CHAPTER 5

CONFISCATION, COURTS, AND COMMISSIONS

The Native Land Acts were drafted with alienation in mind, but they could only operate successfully in districts where there were at least some owners willing to take their land before the Native Land Court. In the fertile and very desirable areas where the King held sway and Maori had ceased to sell land, some other means had to be devised to pry lands out of Maori hands. The problem was not beyond the wit of the legislature.

5.1 Confiscation

In mid-1863, with war a distinct possibility, an elaborate plan to confiscate 'rebel' land on which to establish European settlements was drawn up by the Premier, Alfred Domett, an aggressive Wakefieldian.[1] His ideas of what should have happened to Ngati Toa's leaders after the Wairau affray of 1843, and his criticism of the Government's 'humanitarian' policy toward Maori, shaped his views and attitudes as Premier at a crucial stage of New Zealand's history. When Parliament met in October 1863, Domett laid before the General Assembly a 12-page memo which clearly expressed his views. It would be 'only just and reasonable', he said, to take all the Waikato and Taranaki lands best suited to English settlement, and banish the rebellious tribes to 'the valleys and plains further up in the interior'.[2] He would put military settlers on some of the confiscated lands, and sell the rest to defray the cost of the war – a war which did not begin until imperial troops invaded the Waikato a few weeks after Domett had begun to draft his proposals.[3]

Prospective military settlers had already signed Government contracts specifying the terms on which they would be granted land, several months before the New Zealand Settlements Act 1863 was passed.[4] A retrospective clause had to be written into the Act to validate the contracts and legalise the confiscation of land that had

1. Domett memo, 23 May, 1863, AJHR, 1863, e-7A, pp 7–8; Domett memo, 24 June 1863, AJHR, 1863, e-7, p 8
2. AJHR, 1863, A-8A, p 7
3. On confiscation in general and its application in Taranaki in particular, see Hazel Riseborough, 'Background Papers for the Taranaki Raupatu Claim', report to the Waitangi Tribunal, claim Wai 143 record of documents, doc A2, 1989
4. The first was dated 6 July 1863; AJHR, 1866, A-13, pp 7–8

already been 'given away' to military settlers. According to ministerial reasoning, it was the paucity of the European population and the lack of respect on the part of Maori for settler and Government power that had led them to rebel, and the solution would be to introduce a sufficient European population to overawe them and secure peace.[5]

The Government had its eyes on the fertile lands of Taranaki and Waikato from the start; the Tauranga and Bay of Plenty lands were later swept into the net. It just happened that these were the most fertile and desirable lands in the country – lands the Maori owners would not part with. T M Haultain, Minister of Defence from 1865 to 1869, reported in 1871 that Maori had 'always been loth to part with their fertile land' and it was chiefly by confiscation that Government had 'obtained any large tracts of really good land'.[6]

The Whitaker–Fox ministry succeeded the Domett ministry in October 1863 and adopted unchanged the elaborate confiscation scheme; two months later they passed the New Zealand Settlements Act 1863 into law. The ostensible aim of the Act was to establish settlements for colonisation in the North Island; in practice it authorised the confiscation of the land of those tribes deemed to have been 'engaged in rebellion against Her Majesty's authority'. The ministry was dominated by Auckland capitalists, notably Whitaker and Russell. They claimed that taking land from rebellious tribes was not punishment for the past, but a guarantee for the future – a deterrent to rebellion.[7] Domett had proposed raising a loan of £4 million, £1 million of it to fight the war which would justify taking the land, to be repaid by the sale of the land.[8] Reader Wood, treasurer in the Whitaker–Fox ministry, reckoned on making £3 million from the sale of the land. Fox was careful to point out that the Government proposed 'to confiscate (that is, to take without compensation) no lands except those of which the owners have been engaged in open rebellion'. The Act would not empower the Government to confiscate other lands, but only to take other lands on payment of full compensation.[9] Only the land of those in rebellion would be confiscated; the land of 'really loyal natives' would just be taken. The problem of distinguishing the one from the other was passed over very lightly, but it was a problem that was to bedevil successive governments for years to come.

Under the New Zealand Settlements Act 1863, the land of any tribe or section of a tribe 'or any considerable number thereof' deemed to have been in rebellion since 1 January 1863 could be declared a 'district' within the provisions of the Act. Land in that district could then be set apart as 'eligible sites for settlements for colonization', and such sites would become 'Crown land freed and discharged from all Title Interest or Claim of any person whomsoever'. Compensation would be paid to those with title interest or claim to such lands, provided they had not themselves

5. AJHR, 1863, A-8, pp 2–4
6. AJHR, 1871, A-2A, p 8
7. NZPD, 1861–63, p 783
8. AJHR, 1863, A-8A, p 7
9. AJHR, 1864, appendix to E-2, p 18

been in rebellion or aided, assisted, or comforted those who had; and to those who, having been in rebellion, should come in within a specified time, deliver up their arms, and submit to trial.

Since the Act required the Governor in Council to proclaim the districts and set apart the sites for settlement, no land could actually be confiscated until the Governor and his responsible advisers were agreed on the procedure. They were agreed on the necessity for confiscation; what they could not agree on was the extent to which it should be carried. The Governor, acting on instructions from the Colonial Office, had confiscation for punishment in mind. The ministers were intent on confiscation for profit. While Grey and his ministers bickered all through 1864, no land was confiscated. The ministry tried repeatedly to pin Grey down and have him proclaim districts under the New Zealand Settlements Act 1863, and he as often managed to procrastinate. It was the last straw for the ministry when Reader Wood returned from London with the news that he had failed to negotiate the loan on which the ministry was relying to suppress the rebellion, settle immigrants on the confiscated land, and undertake public works. He had found there was considerable disquiet at the Colonial Office over the Government's intentions with regard to confiscation. With no loan and no confiscated land as 'an important source of revenue', their financial policy was in tatters, and they formally tendered their resignations.[10] Whitaker expressed the opinion of the ministers and, they believed, 'a large majority of both Houses of Assembly and of the public in general', when he said that 'Responsible Government in New Zealand can never be satisfactorily worked under His Excellency Sir George Grey'.[11]

Grey had so far successfully thwarted his ministers' intentions to confiscate huge quantities of land, but he was obliged to accept the conditions specified by Weld if he was to form a new ministry – and one of them was that proclamations of confiscation under the 1863 Act be issued without delay.[12] The first appeared on 17 December 1864; it declared that the Governor would 'retain and hold as land of the Crown' all the land in military occupation in the Waikato and as much rebel land in Taranaki and as far south as Wanganui as the Governor should think fit.[13] Much more extensive confiscations were proclaimed in both areas the following year,[14] and in addition the whole of the Tauranga–Moana block, supposedly of 214,000 acres but nearer to 290,000 acres, was declared to be a district under the 1863 Act.[15]

Once a district was declared under the Act, the Colonial Government could 'at any time thereafter confiscate within that district such lands as they may from time to time consider requisite for the purposes of settlement'.[16] The native title to the

10. AJHR, 1864, e-2, pp 110–111
11. Ibid, p 100
12. Weld memo, 22 November 1864, AJHR, 1864, A-2
13. *New Zealand Gazette*, 17 December 1864, p 461
14. *New Zealand Gazette*, 31 January 1865, pp 15–17; *New Zealand Gazette*, 7 June 1865, pp 170–171; *New Zealand Gazette*, 5 September 1865, pp 265–267
15. *New Zealand Gazette*, 27 June 1865, p 187
16. Cardwell dispatch, 26 April 1864, AJHR, 1864, appendix to e-2, p 20

land was thereby extinguished and the land became Crown land. Clearly only the land designated as a site for settlement should have become confiscated land; the rest should have been returned to those who had taken no part in the rebellion. The Attorney-General, James Prendergast, gave his opinion on this point in 1866.

> The operation of the New Zealand Settlements Acts appears to me to be that as to such land within the declared districts as is not set apart for Settlement, that part may be given back to the Natives as abandoned by the Crown or be disposed of in compensating those Natives who establish their claims without any grant; but that as to such land as is reserved for settlement that becomes Crown Land and would require a grant to dispose of it.[17]

In other words, land within a district not designated as a site for settlement retained its native title. But this is not what the Government intended. One of the aims of confiscation was to extinguish native title over vast areas, and in most cases the Government got around the problem by declaring whole districts to be sites for settlement. Mount Taranaki, the Poukai Ranges, the eastern side of the Kaimai Range, and the Waikato swamps, all became part of the legal fiction that they were eligible sites for settlement for colonisation. Lest there be any doubt about the status of land within a district under the New Zealand Settlements Act 1863, the Confiscated Lands Act 1867 resolved the question. Any land taken under the 1863 Act and its amendments and declared to be a district, whether or not set apart as a site for settlement was to be deemed to be 'Waste Lands of the Crown'. The intention of a succession of ministries was crystal clear.

5.2 The Compensation Court

Proclamations of confiscation issued in accordance with the New Zealand Settlements Act 1863 and its amendments applied to huge areas of land: in Taranaki 1,275,000 acres; in Waikato 1,202,172 acres; in Tauranga 290,000 acres; in Opotiki 448,000 acres.[18]

The question was how to distinguish the lands of 'loyal' and 'rebel' Maori and compensate loyal Maori and surrendered rebels in accordance with section 5 of the New Zealand Settlements Act 1863. An order in council of 2 September 1865 promised that no land of any loyal inhabitant would be taken except as necessary for the security of the country, and then only against payment of compensation; and that all rebel inhabitants who came in within a reasonable time and submitted to the Queen's authority would receive 'sufficient' land under a Crown grant. The peace proclamation of the same date repeated the promise to restore land 'at once' to well-disposed natives, and it promised that commissioners would be sent 'forthwith' to the Waikato and Taranaki to settle the people on the land and to mark out the boundaries of the blocks they were to occupy.[19]

17. Prendergast to Native Minister, 16 January 1866, RDB, vol 125, pp 47911–47912
18. Royal Commission on Confiscated Lands (Sim commission), AJHR, 1928, g-7, pp 6–22

The 1863 Act had provided for the establishment of Compensation Courts to determine claims for compensation, but no court sat until May 1865 when one was convened in Auckland to hear claims relating to the Waikato confiscations. Hearings around Auckland (at Mangere and Orakei) and in the Waikato (Port Waikato and Ngaruawahia) continued sporadically until July 1868. In Taranaki, the first hearings were at New Plymouth between June and October 1866, followed by Wanganui in December 1866 and January 1867, and again in February 1874. In Bay of Plenty there were hearings at various centres throughout most of 1867.[20]

The Compensation Court was no more conveniently organised than the Native Land Court. Fenton ran them both, styling himself senior judge of the Compensation Court. Claimants had six months in which to submit their claim in writing to the Colonial Secretary, and it was up to him to refer the claims to the judge of a court competent to hear them; and up to the judge to determine the right of each claimant and the amount of compensation to which he was entitled. Claimants had to travel long distances to attend the court; notifications of hearings, adjournments, or delays were often inadequate; and until June 1866, when the first rules and regulations for the conduct of the court were gazetted,[21] each judge had power under section 12 of the 1863 Act to make his own rules for the conduct of the business of his court. Claimants who did not attend the court were excluded from compensation.

In Taranaki the Compensation Court made 518 awards covering nearly 80,000 acres.[22] The task of reconciling the various Acts and proclamations of confiscation was not an easy one. Decisions had to be made on the order of priority of claims; on just how much land was 'absolutely necessary for the security of the country'; on whether or not Parliament had meant that loyal natives should be ousted to make way for military settlers; on what share of the tribal estate constituted 'the land of any loyal inhabitant'; on whether loyal natives who were dispossessed should be compensated in land, and if so, in what land. Under the 1865 amendment to the Act, the court was supposed to 'determine the extent of land' to be given as compensation, and awards of the court were to be accompanied by such plans and particulars as would be decided from time to time by regulation. The problem was that the regulations of June 1866 and September 1867[23] were 'mutually exclusive' in that not until an award was made could the claimant select his piece of land, yet the land awarded was to have been already selected and surveyed. As the 1880 West Coast commissioners said:

> The Court was called upon to do an impossibility, and naturally did not do it. Awards for more than 60,000 acres were not signed for 3 years after the judgements,

19. *New Zealand Gazette*, 5 September 1865, pp 265–267
20. RDB, vol 100, pp v–vii
21. *New Zealand Gazette*, 20 June 1866. The New Zealand Settlements Amendment and Continuance Act 1865 provided that the Governor in Council could make regulations for the practice and procedures of the Compensation Court.
22. AJHR, 1880, g-2, and appendix b, pp 17–24, 51–56, 80; AJHR, 1883, g-3, pp 12
23. *New Zealand Gazette*, 20 June 1866, p 250; *New Zealand Gazette*, 16 September 1867, pp 346–347

> and when they were signed, the words which . . . were inserted in the printed form to describe the land, were struck out. In point of formal validity . . . there is no doubt that the awards of the Court were not made in accordance with the law, and that they are thereby reduced from the rank of a statutory 'determination' to that of mere promises or engagements binding in good faith upon the Crown.[24]

Several of the rules under which the Compensation Court and later the Native Land Court operated were laid down at the first sitting of the Compensation Court in Taranaki when Judges Fenton, Rogan, and Monro heard claims to the Oakura block, part of the Middle Taranaki district proclaimed on 30 January 1865. Fenton found the titles in the Oakura block 'extremely simple' – but it is difficult to see how he could reach such a conclusion, when he found the main problem in arriving at the truth was the loss of traditions and genealogies due to the long absence and dispersion of the owners of the land.[25] He obviously ignored evidence that complicated the formula he had established for awarding compensation: the court excluded the claims of absentees, even though they were 'generally admitted' by the resident owners.

> We do not think that it can reasonably be maintained that the British Government came to this Colony to improve Maori titles or to reinstate persons in possessions from which they had been expelled before 1840, or which they had voluntarily abandoned previously to that time. Having found it absolutely necessary to fix some point of time at which the titles as far as this Court is concerned must be regarded as settled, we have decided that that point of time must be the establishment of the British Government in 1840,[26] and all persons who are proved to have been the actual owners or possessors of land at that time must be regarded as the owners or possessors of those lands now, except in cases where changes of ownership or possession have subsequently taken place with the consent, expressed or tacit, of the Government, or without its actual interference to prevent these changes.[27]

The 1840 rule, which was applied in both the Compensation Court and the Native Land Court, was particularly prejudicial to Moriori of the Chathams; to South Island tribes displaced by Ngati Toa; and to those Taranaki tribespeople who had migrated from Taranaki in the 1820s and 1830s, and who had not returned to occupy any part of their ancestral land. 'In this way 908 loyal claimants were shut out for non-possession or insufficient occupation' of the Oakura block.[28]

Another rule the court laid down for its guidance concerned the status of the resident owners. The court inquired into what parts of the block each resident owned and which of them 'had joined the rebellion or done some Act which brought them within the fifth clause of the Act of 1863'. For 'brevity's sake' Fenton

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24. AJHR, 1880, g-2, pp xxxvi, 59
25. AJHR, 1866, A-13, p 3
26. 14 January 1840 – 'the date of proclaiming the Queen's sovereignty'; second report of West Coast Commission, 14 July 1880, AJHR, 1880, g-2, p xxxv
27. AJHR, 1866, A-13, p 4
28. AJHR, 1880, g-2, p xxxv. It should be noted that Te Atiawa themselves had displaced earlier tribes in the Horowhenua district and Whanganui-a-Tara.

called 'this class of persons' rebels. His criteria for so judging them were not explained. Then, having found it impossible to 'appraise' the value of chiefs on the loyal or rebel side, the court deemed each man, loyal or rebel, to be of the same value and to have an equal estate.[29] It was convenient reasoning. There were fewer loyal men than there were rebels; only 10,927 acres of the 27,500-acre block could be said to belong to them; and because some of that was mountainous they were really entitled to only 7400 acres of 'available' land (meaning available for cultivation).[30] Rebels were found to be valuable men when it came to calculating how much land could be taken from them without payment of compensation.

Under the 1863 Act, 'loyal natives' could be deprived of their land, but they would be paid monetary compensation for it; under the 1865 amendment compensation could be given wholly or partly in land in lieu of money – not because the Government was anxious to return land to Maori, but because the Treasury was short of funds. If compensation was paid in land, it should have been their own land that was returned to loyal owners. A proclamation of 17 December 1864 had promised to those who had remained and should continue in peace and friendship 'the full benefit and enjoyment of their lands', and that surely meant 'not lands of equal value somewhere else, but their own ancestral territory'. But much of the Oakura block had already been granted to military settlers. The court could not find 7400 acres of good land there for the loyal owners; only 2500 acres remained.[31] The court's dilemma was evidenced by Ropata Ngarongomate, of Ngamahanga hapu, who addressed the court. He said:

> I demand that our compensation shall be within the block; the blood of my relatives is on my land. You must remember my services during the war. My cattle, my sheep, my pigs, and all my property went in the war; my wheat, my cultivations, and I never received anything for them, though the pakehas have all been compensated. What I did was without remuneration, I was never paid, and now let the Government fulfil its promises.[32]

If justice was to be done and the promises of the Crown fulfilled, then 'compensation in land to be ordered to the Oakura claimants' had to come out of the Oakura block.[33] Since this was an impossibility, the court referred the problem to the Crown. Section 9 of the New Zealand Settlements Amendment and Continuance Act 1865 authorised the Colonial Secretary to agree to an out-of-court settlement by which any claimant might be given 'money or land or both to withdraw his claim'.[34] In the case of the Oakaura block, A H Russell, then Native Minister, 'effected an arrangement with the claimants', and ultimately all the claimants except one withdrew his claims to the court's satisfaction. But what the terms of the arrangement were 'the Court did not think it their duty to inquire'.[35]

29. AJHR, 1866, A-13, p 5
30. Ibid
31. Ibid, pp 6, 10–11
32. Ibid, p 5
33. Ibid, p 11
34. Ibid, p 10

The arrangement was in fact effected by W S Atkinson as Crown agent, and Robert Parris as native agent. Atkinson:

> applied for and obtained a suspension of judgement for two days, in the hope that the matter might be arranged out of Court, by offering the Native claimants the whole of the remaining land in the Oakura block in full compensation for their claims.

The offer was accepted by Parris 'on behalf of the natives'.[36] Whether 'the natives' had any real say in the matter, or whether it was simply a convenient arrangement between two Government-appointed officials, is not clear.

This was not the only out-of-court settlement – far from it; it was an arrangement used almost anywhere the court sat. When claims in the Waitara South block were being investigated, 'the Crown Agent announced that negotiations were being undertaken, and the Court adjourned to give the parties time and opportunity to agree'. This they eventually did, and all the claims were withdrawn – but again the court:

> did not think it its duty to inquire what were the terms of the agreement, but it appeared . . . that the rights of the Maoris (inter se) were to be settled by the Native Land Court at some future time.[37]

The Legislative Council was less easily satisfied about these out-of-court settlements than the Compensation Court had been, and Parris was required to provide a full explanation. Several hundred claims in the Oakura block had been submitted; only 76 were admitted (two-fifths of the claims of those found to be in rebellion). All the rest were rejected on various grounds, such as non-residence or non-appearance in court. The successful claimants were offered 'over 10,000 acres', which obviously included the 8000 acres of 'worthless' land the court had excluded in its first calculations. This small point was not elaborated on for the benefit of the Legislative Council.[38]

The investigations of claims into the Waitara South block had not proceeded as far as they had in the Oakura block when the court case was halted, but again Parris agreed 'on behalf of the Natives to accept in full compensation of their claims' what land was left in the block (something over 10,000 acres) after 14,000 acres of the best land had been awarded to military settlers.[39]

Reports on the Oakura and Waitara South blocks were laid on the table of the House and printed in the *Appendices to the Journal of the House of Representatives*, but when the Ngatiawa and northern Ngatiruanui Coast blocks came before the court in September and October 1866 this was not done. Increasingly sketchy

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35. Ibid, p 12
36. W S Atkinson to R Parris, 29 June 1866, AJHR, 1866, a-13, p 17
37. Ibid, p 16
38. Parris memo, 8 August 1866, AJHR, 1866, a-13, p 19
39. Parris to W S Atkinson, 10 July 1866 and Parris memo, 8 August 1866, AJHR, 1866, A-13, pp 17, 19. See also Janine Ford, 'The Decisions and Awards of the Compensation Court in Taranaki, 1866–1874', report to the Waitangi Tribunal, claim Wai 143 record of documents, doc e6, 1991, pp 32–47

records of the court's proceedings exist in Department of Survey and Land Information (DOSLI) files. Again, claims to the Ngatiawa Coast block, and possibly the northern Ngatiruanui Coast block, were settled out of court.[40] Claims to the southern portion of the Ngatiruanui Coast block were heard in Wanganui beginning in December 1866. The judgment in these claims was both gazetted and published.[41] Sixty-eight claims concerning 630 people had been submitted to the court; the claims of only 265 were heard, and of them only 119 were admitted. They were awarded a total of 17,264 acres; '40 claimants were awarded 400 acres each, and 79 claimants received 16 acres each'.[42] Many claims were not heard because of the non-appearance of the claimants in court; some were rejected on the grounds that the claimants were unsurrendered rebels.[43] At the Wanganui sittings, the rule of exclusion of absentees was reversed, 'but absentees were only let in on a fantastic scheme'. The court in its wisdom decided that 'the interest of a loyal absentee was to bear the same proportion to the interest of a loyal resident as the number of loyal residents bore to the number of resident rebels'. The effect of 'this queer equation was that as there were only 40 loyal residents to 957 rebels, the loyal resident got 400 acres, while the absentee got 16'.[44]

Absentees whose claims had been rejected at earlier hearings petitioned the General Assembly, and a number of them gathered at the Native Office in Wellington in July 1867 to press their case. The New Zealand Settlements Act Amendment Act 1864 enabled the Governor to give compensation where none had been awarded by the court, and the Government now 'advised His Excellency, without reversing the decision of the court, to extend his kindness to these men'. Thus another 12,200 acres, almost all bush land, were awarded to 755 Ngati Tama, Ngati Mutunga, Te Ati Awa, Puketapu, and Taranaki absentees, each of whom was to get 16 acres.[45] A further 200 acres were awarded to Te Puni, and 100 acres each to Wi Tako, Mohi Ngaponga, and Hemi Parai, who for various reasons deserved the special consideration of the Government. The recipients were not happy with their measly grants; Mohi Ngaponga declined his 'so that the Government might be ashamed of their kindness'.[46] In any case, 14 years later none of these chiefs had yet been allocated 'the paltry dole of land which had been promised to them in recognition of loyal service'.[47]

Some months before the court sat in Taranaki the provincial authorities were complaining about Parris endeavouring to adjust the claims of Taranaki Maori to confiscated lands 'in such a manner that their final adjudication by the Compensation Court may be a matter of form only'. They wanted the claims settled 'in open

40. Ford, pp 48–64
41. *New Zealand Gazette*, 20 April 1867, pp 189–191; F D Fenton, *Important Judgements Delivered in the Compensation Court and Native Land Court, 1866–1870*, Auckland, 1879
42. AJHR, 1880, g-2, p 79
43. AJHR, 1872, c-4, p 19; Ford, pp 67–68
44. Second report of West Coast Commission, AJHR, 1880, g-2, p xxxv
45. Ibid, p xxxviii
46. Ibid, appendix c, pp 1–3
47. Ibid, p xxxviii

Court . . . with the sanction of law', both because the settlers were uneasy and distrustful of the 'private nature' of Parris' negotiations, and because the natives were 'perplexed and exceedingly discontented' with the way their claims were being handled – or ignored.[48]

Parris had been 'invested', confidentially, by the previous Government with 'full and uncontrolled discretion' in negotiating with all the rebels in his district to persuade them to 'come in at once', accept defined blocks under Crown grants, and 'promise to live peaceably under the law'. He was to use his discretion 'in dealing liberally in the disposition of the land' in order to 'win their final acquiescence' in the settlement of the whole district. The Weld government wanted the matter settled with 'the utmost expedition'.[49] Arranging for the Compensation Court to sit in Taranaki did not appear to be part of their plan.

The Stafford ministry was just as anxious to get the confiscated lands colonised, but it spent several months arguing with the provincial government over how the scheme was to be financed, before it asked Fenton to call a sitting of the court.[50] Although Parris held a commission as judge in the Compensation Court, the Government meant to continue to employ him on the ground. Just before the September 1866 sittings in New Plymouth to hear claims in the Ngatiawa and northern Ngatiruanui Coast blocks, J C Richmond, head of the Native Department in the Stafford government, issued Parris with new instructions. He was to induce absentee owners of these blocks to abandon all their claims (there were about 216 of them) in return for reserves of about 5000 acres and payment of £1500.[51] These were claims which, if taken to court, would be excluded from payment of compensation. The Government did not want these absentees returning to Taranaki for Compensation Court hearings; but neither apparently did they want to cross Fenton by obliging him, by legislation if necessary, to provide for absentees in his court awards. Fenton was already a law unto himself.

Parris was also to 'arrange' the claims of residents so that the court would only have to give 'formal sanction to adjustments previously assented to by the claimants'; and claimants were to understand that the whole district would be passed through the court and their claims 'entirely disposed of, and no further claim afterwards allowed'.[52]

The Government meant to get Maori claims out of the way so that they could put military settlers on the land long promised to them. Actually settling Maori on their land was much less of a priority. North of the Waingongoro River, compensation was awarded and scrip issued for a specified quantity of land, but only a small portion was actually allocated under arrangements made by Parris. Most awardees got nothing but land scrip and promises for the next 15 or 20 years, until Fox as sole

48. H R Richmond to Stafford, 8 February 1866, AJHR, 1866, A-2A, pp 7–8
49. FitzGerald to Parris, 30 August 1865, AJHR, 1879, A-8, p 3
50. See AJHR, 1866, A-2A, pp 1–9
51. J C Richmond to Parris, 10 September 1866, AJHR, 1879, A-8, p 4
52. Ibid

west coast commissioner awarded their reserves in the 1880s.[53] South of the Waingongoro, awards were allocated to:

> specific sections of land, after which the allottees were considered by the Government to have a valid and transferable title even before the Crown grants were issued; and it was not long before the owners sold or leased (chiefly the former) nearly the whole of it, the Government being itself the principal purchaser.[54]

Far from ensuring that confiscated land was returned to loyal Maori or returned rebels, the system operated to deprive Maori of their land.

Of the 17,264 acres awarded by the court at the Wanganui sitting, Parris allotted only 9864 acres to 56 claimants.[55] None of the other claims were allotted for another six years, and by that time only 6304 of the original 17,264 acres were still in Maori hands.[56] By 1880, despite the inalienation clause supposedly required in all Crown grants, practically the whole of the awards had 'passed into the hands of Europeans, either by sale or lease', and the Crown grants were 'only required in order to perfect the titles' of the European purchasers who had acquired the interests.[57]

Clearly the Government did not mean Maori, loyal or rebel, to continue to hold lands on the west coast. In 1865, when the confiscations were first promulgated by proclamation, Whitaker's partner, Thomas Russell, Minister for Defence when the New Zealand Settlements Act 1863 was passed, expressed the mood of the House when he said he wanted all natives, loyal or rebel, moved off confiscated land and concentrated on reserves 'to prevent their rambling over the entire extent of the Waikato and picking out the best portions, thus interfering with the future settlement in blocks by Europeans'.[58] And by as early as December 1865, Julius Vogel had drawn up a detailed scheme for disposing of the 'magnificent lands acquired from the Natives'.[59] In the event, he had to wait until the 1870s to put his scheme into practice – but only because Parliament was not yet ready to sanction the borrowing of 'large sums' for the purpose.[60]

As far back as 1859, T H Smith, Assistant Native Secretary, had suggested a scheme that was echoed in the New Zealand Settlements Act 1863. Gore Browne had asked him for his views on 'the question of making further provision for the extinguishment of the native title over the unacquired waste lands of this country, with a view to the extension of European settlement'. Smith's idea was that:

> districts should from time to time be defined, each district to be . . . comprised within natural boundaries, and to include an eligible site for a township, and other requisites

53. See, for example, AJHR, 1882, g-5c; AJHR, 1883, g-3; AJHR, 1884, sess i, a-5a
54. AJHR, 1882, g-5c, p 1
55. AJHR, 1880, g-2, p 79
56. AJHR, 1872, c-4, p 21
57. AJHR, 1880, g-2, p 80
58. NZPD, 1864–66, p 715
59. Vogel to Stafford, 14 December 1865, AJHR, 1866, a-2b, pp 1–3
60. Ibid, p 1

> for the formation of a complete settlement. The native title should be extinguished over the whole of any such district before any portion of it is settled.[61]

When it came to granting compensation in land in the confiscated blocks, C D Whitcombe, commissioner for Crown lands in Taranaki, was unhappy with Fenton's requirement that all Crown grants of confiscated land were to contain an inalienation clause. That might do for those lands that had been 'individualized', but he 'hoped it was not going to apply to large blocks of confiscated land to be returned, otherwise it would have a bad effect on settlement'. When he took over his position as commissioner, he found in his office 'Native grant forms' containing the inalienation clause, but the clause in most cases had been struck out. All the grants for the large Waitara east and west blocks had been executed without the clause, with the result that almost the whole area had 'fallen into the hands of settlers'.[62]

In the 1870s, when Vogel's long-delayed immigration and public works scheme was put in place, Parris was issued with yet more instructions with regard to the settlement of the confiscated lands. South of the Waingongoro the awards of the Compensation Court had still not been defined on the ground, and McLean wanted Parris to buy out, at £1 per acre, all the awards of those who were willing to sell.[63] George Worgan, an interpreter and land purchase officer, was entrusted with the job of surveying and subdividing awards, and purchasing all he could of them. He was pleased to report that he had been 'enabled to acquire a considerable estate for the Government'.[64] He forgot to say he had also acquired a considerable estate for himself and his friends. Instead of confining himself to his official duties, he also negotiated purchases for private individuals, and in so doing allocated choice blocks to awardees who were willing to sell. Instead of paying £1 per acre as authorised by the Government, he would offer lesser chiefs 10 shillings per acre, and split the other 10 shillings between himself and the principal chief. He would induce awardees to leave the allocation of their claims to him, then he would group them together in one block – which made them very attractive to European purchasers.[65] Ngarauru owners particularly were severely disadvantaged by Worgan's handling of compensation awards. By threats, cajolery, and trickery, awardees were persuaded to relinquish their claims, in some cases without ever receiving full payment for them.[66]

Of all the nefarious deals done over the confiscated lands, Worgan's were some of the most reprehensible, but nowhere on the west coast were the promises of the Acts and proclamations of confiscation fulfilled. The non-fulfilment of those promises by ministry after ministry, and the implementation of the confiscation policy in settler, not Maori interests, were at the heart of the troubles which plagued the west

61. T H Smith to Gore Browne, 20 September 1859, BPP, vol 11, pp 100–101
62. AJHR, 1880, g-2, p 59
63. McLean to Parris, 20 January 1872, AJHR, 1872, c-4, pp 26–27
64. Worgan report, 2 August 1872, AJHR, 1872, c-4, pp 20
65. AJHR, 1873, h-29, p 11
66. AJHR, 1880, g-2, pp lix, 41, 43

coast and the colony for years to come. The grievances of those who never were in rebellion, or who actually took up arms on behalf of the Queen yet still lost their land by confiscation and were then cheated of their compensation, are a poignant and lasting legacy of the intolerance, arrogance, and racism brought to New Zealand by its European settlers in the nineteenth century.

5.3 Tauranga Moana

A block of land estimated at 214,000 acres was confiscated around Tauranga by an order in council dated 18 May 1865, issued under the New Zealand Settlements Act 1863.[67] The confiscation of the whole block came after one-quarter of it had already been 'ceded' to the Government, and half of it 'purchased'; and after the Tauranga Moana people had been solemnly promised by Governor Grey that the rights of friendly natives would be scrupulously respected and that not more than one-quarter part of the lands of surrendered rebels would be taken.[68] Had either the cession or the sale been voluntary agreements, carried out by those who had the right to alienate the land, there would have been no need to confiscate it. As it was, the legislation was necessary simply to overcome local opposition and circumvent the need to deal with grievances.[69]

The confusion and contention over the Tauranga lands grew out of fundamental differences of opinion between Grey and his ministers, which made the effective management of native affairs impossible. When the Whitaker–Fox ministry came to power in October 1863, William Fox dispensed with the position of Native Minister and simply assumed the functions under the rubric of the Colonial Secretary's portfolio.[70] He and Whitaker (and Thomas Russell operating in the wings) were anxious to impose the confiscations provided for in the New Zealand Settlements Act 1863; the Tauranga lands were an attractive target. However, Grey would not countenance confiscation until he had tried, and failed, to obtain cessions of land from 'defeated rebels', as required by the Colonial Office.[71]

In August 1864 Grey, followed by his ministers, went to Tauranga to accept the submission of 'Ngaiterangi' – by which they meant the Tauranga Moana people in general, not the Ngaiterangi tribe in particular. The ministers wanted to see the submitted rebels settled in 'a permanent place of residence . . . not inconsistent with the location of the military settlers'. They had advised Grey that the land allotted should be held under Crown grants 'and not in common but in severalty'.[72] The location of military settlers had first priority as far as ministers were concerned.

67. *New Zealand Gazette*, 27 June 1865, p 187
68. AJHR, 1867, a-20, p 6
69. For more detail on this section see Hazel Riseborough, 'The Crown and Tauranga Moana, 1864–1868', report for Crown Forestry Rental Trust, October 1994
70. NZPD, 1861–63, pp 780–782
71. Grey memo, 10 October 1864, AJHR, 1864, e-2A, p 9; Cardwell dispatch, 26 April 1864, AJHR, 1864, appendix to e-2, p 22
72. Whitaker memo, 28 July 1864, AJHR, 1864, e-2, p 79

They would not specify the extent and location of land that would be left to Maori. What they had in mind was to establish a frontier line from Raglan or Kawhia to Tauranga, to confiscate 'all the land belonging to Rebel Natives within that line', and return 'in convenient locations, estates varying from 10 to 2,000 acres' to each of the former inhabitants who wished to return and reside in the district.[73] But Grey would not entertain such a proposal. He had already promised Ngaiterangi 'generous terms',[74] and at the pacification hui, when he accepted the 'absolute and unconditional submission' to the Queen's authority of all those present, Grey assured them they would be dealt with generously and 'cared for in all respects as other subjects of the Queen'.[75] When the ministers failed to convince Grey to confiscate widely, they tried instead to convince the surrendered rebels to cede 'some specific block of land'. They failed in that too, as the Tauranga Moana people had given up 'the mana of the land' to the Governor. They would 'leave the entire settlement of their lands' to him and 'receive back from him so much as His Excellency might think proper to restore'.[76] Grey took it that 'Ngaiterangi' had relinquished 'the whole of their lands as forfeited'.[77] Ngaiterangi believed they had relinquished only the shadow of the land. They had left the precise details of the arrangement to the Governor, on the understanding that they were to make only a 'nominal or temporary' forfeiture.[78]

The 'one-fourth part of the whole lands' the Governor meant to take as punishment for rebellion was later defined as 50,000 acres of choice agricultural land between the Waimapu and Wairoa Rivers (south and west of present-day Tauranga).[79] The land the Government proposed to keep was Ngatiranginui land; most of that which they proposed to return was Ngaiterangi land, and nowhere in official papers was Ngatiranginui considered as a separate entity. They were simply subsumed under the title 'Ngaiterangi'. When there were objections to the arrangement, the people were told other land (mainly sandy islands in the harbour) would be reserved for them, that their claims would be individualised and they would receive inalienable grants for them.[80]

Ministers were not satisfied with their meagre remuneration. When Grey left Tauranga they stayed on, and by the end of the week they had gained almost another 90,000 acres; they had managed to purchase from a few compliant chiefs the Te Puna–Katikati block. There appears to be no record of the deal struck in that week. It was always said publicly that the 'Tauranga natives wished their land to be purchased by the Government', but the bulk of the people certainly had no knowledge of and no part in the sale process, and the deal was finalised in Auckland by a group of about 18 chiefs who accompanied Fox and Whitaker on their return.[81]

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73. Whitaker memo, 25 June 1864, AJHR, 1864, e-2, p 5
74. *New Zealander*, 31 May 1864, p 5
75. AJHR, 1867, a-20, p 5
76. Clarke to Fox, 7 August 1864, AJHR, 1867, a-20, p 7
77. Grey dispatch, 6 August 1864, BPP, vol 14, p 114
78. AJHR, 1869, a-18, p 9
79. AJHR, 1867, a-20, p 12
80. Ibid

No sooner had the sale become known than the right to sell was disputed by other claimants. Fox was soon tired of the endless stream of petitions and letters, and wrote icily to the Governor about this 'early and very clear proof of the inconvenience and impolicy of the cession principle as opposed to that of confiscation'. All these complaints and claims over what was 'after all a forced acquisition of Native Lands under colour of a voluntary sale' would never have been heard of if only Grey had taken his ministers' advice and confiscated the entire block.[82] Native title would have been extinguished, the whole block declared Crown land, and the Government would no longer be burdened with the need to deal with local opposition and grievances.

When the Weld ministry succeeded to office two months later, they did so with certain stipulations, including 'the right of determining the question as to what land should be confiscated and subject to what conditions'.[83] Their determination in the case of the Tauranga lands was expressed the following May by order in council, declaring all the lands of 'the tribe Ngaiterangi' to be a district 'set apart and reserved as sites for settlement and colonization'.[84]

Meanwhile, Weld had appointed James Mackay, a senior Native Department officer, and H T Clarke, formerly resident magistrate at Tauranga, to inquire into the claims of the Marutuahu (Thames) tribes to the Katikati lands. They spent four days in December 1864 investigating the claims of the Tawera or Ngatipukenga people. They found the evidence 'very lengthy and conflicting', and their report was not presented to the Native Minister for another six months.[85] They concluded that Tawera had an ancestral claim to the land, and Ngaiterangi a claim by conquest, about 70 years earlier. About 1857, after a dispute between Ngaiterangi and Ngatihe over an eel pa, Tawera were invited by Ngatihe to return to the district and were reinstated on a small portion of their original claims. In the judgement of Mackay and Clarke, Tawera could 'fairly claim' only that land of which they had retained possession, or which had been 'returned to them by their former conquerors'[86] – which ignored the fact that the major 'conquering tribe', Ngaiterangi, had not invited Tawera to repossess the land. It is also hard to see how the investigators could uphold a claim to land lost by conquest about 1795, and 'returned' only seven years before the investigation in 1864.

Mackay and Clarke were also appointed not just to investigate, but to arbitrate in the dispute between Ngaiterangi and Te Moananui and his people of Ngatitamatera – as though it were already acknowledged that Te Moananui's claim was good. Clarke arbitrated on behalf of Ngaiterangi, and Mackay on behalf of Ngatitamatera.[87] This investigation was also held in Auckland at the end of December. It lasted five days, but was apparently more easily decided than the Tawera claim. Again it

81. *New Zealander*, 16 August 1864, p 3
82. 'Native Claim to Katikati', Fox to Grey, 24 September 1864, g-17/3, no 15, NA Wellington
83. Weld memo, 22 November 1864, AJHR, 1864, a-2; Weld memo, 11 August 1865, AJHR, 1865, a-1, p 26
84. *New Zealand Gazette*, 27 June 1865, p 187
85. Mackay to Mantell, 10 January 1865, AJHR, 1867, a-20, p 7
86. Mackay and Clarke report, 22 June 1865, AJHR, 1867, a-20, p 11
87. Mackay and Clarke report, 10 January 1865, AJHR, 1867, a-20, p 7

was clear that Ngaiterangi had a claim by conquest, while Ngatitamatera had an ancestral claim. But despite the fact that Ngaiterangi had exercised their rights to a greater extent than Ngatitamatera, the decision of the arbitrators was that the purchase money for the land should be equally divided between the two claimant groups. The purchase price was to be two or three shillings per acre, the actual rate to be decided once the area was surveyed and valued. The arbitrators' decision on the claim was confirmed by Walter Mantell, Native Minister in the Weld government.[88]

Nothing was then done to settle the claims the Government had investigated – no surveys, no payments, no one settled on the land with Crown grants. In October 1865 there was yet another change of ministry, and a new round of inquiries began. The Defence Minister, T M Haultain, was sent to Tauranga in February 1866 to 'settle' the land question by getting the local people to help in the carrying out of the peace terms. But Maori and British understanding of the peace terms were far apart. According to Haultain the peace agreement required the local people to give up 50,000 acres, one-quarter of the 200,000-acre block; but they maintained the Governor had said he would take one-quarter of the whole of the rebels' land, not of the whole block.[89]

Haultain left them 'to think it over', and a month later the Governor and Whitaker returned to Tauranga to settle the boundaries of the block to be retained by the Crown. No direct report of this vital meeting was published at the time, and the question of just what happened there became a very contentious issue. Grey apparently confirmed his intention to take a 50,000-acre block, but 'the definite boundary of the land to be taken by the Governor for the sin of the Ngaiterangi' was to be decided later – by Clarke.[90] And Clarke thought 'these natives . . . must see that they are great gainers by having their land taken from them', since so little of it was cultivated and so much 'lying waste'.[91] The local people understood the western boundary would be fixed at the Wairoa. When they were told it might extend much further towards Te Puna they became 'rather excited' and refused their consent until threatened with the force of arms.[92]

In the event, the block did extend to Te Puna. The surveyors had crossed the Wairoa because nothing like an adequate quantity of 'good agricultural land' could be obtained within the limits of the 'confiscated' block.[93] The Government was not taking land for the punishment of Ngaiterangi's hara, but for the enrichment of Whitaker's province of Auckland. The survey was deliberately provocative, encroaching on Pirirakau villages at the edge of the bush. Clarke ignored all warnings and requests that the survey be stopped. In his view it would be:

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88. Mackay report, 26 June 1867, le1/1867/114, RDB, vol 7, p 2320
89. AJHR, 1867, a-20, p 19–20
90. Ibid, pp 62–64
91. Clarke to T H Smith, 18 April 1866, Smith ms (qms 1839), ATL
92. W G Mair to Rolleston, 20 March 1867, AJHR, 1867, a-20, p 53
93. 29 May 1866, 'District Surveyor Tauranga Letterbook' (cited in Evelyn Stokes, 'Te Raupatu o Tauranga Moana: The Confiscation of Tauranga Lands', report to the Waitangi Tribunal, 1990, p 102)

> a manifest injustice to the other Tauranga Natives that the Pirirakau – the most implicated in the rebellion, many of whom have never surrendered, and who are now the most troublesome in the district – should be allowed to escape without the forfeiture of a single acre of land.[94]

Pirirakau had protested continually over Ngaiterangi's sale of the Te Puna–Katikati block, but they were simply labelled 'a turbulent and obstinate people'[95] and the Government refused to address their complaints. They referred to Pirirakau as a hapu of 'Ngaiterangi'; according to Clarke they were 'of the inferior hapus of Ngaiterangi . . . always kept in a state of vassalage'.[96] The existence of Ngati-ranginui, and the status of Pirirakau as one of its hapu, were simply not acknowledged. When Pirirakau interrupted the survey for the second time at the beginning of 1867, tensions boiled over; the Tauranga bush campaign had begun.

The next three months were characterised by brief exchanges of fire and massive destruction of rebel villages, crops, and plantations on the edge of the bush outside the boundaries of the 'ceded' block or just within them.[97] The wanton devastation resulting from this military action of early 1867 was graphically described in a biography of the Mair family:

> Apparently the Government of the time could conceive of no other way of dealing with this poor remnant of the defeated tribes than harrying them into the bush and, by the destruction of their homes and food plantations, rendering them homeless and foodless and, later, by the confiscation of the land itself, landless. The extent of their cultivations and the attractiveness of their villages showed them to be industrious and orderly. No doubt conquering and dispersing them seemed the simpler way of dealing with them, but it left an aftermath of bitterness which never died.[98]

Meanwhile, Whitaker had instructed Mackay and Clarke to meet all the claimants of the Te Puna–Katikati block – not to discuss the purchase, but to settle who was to receive the purchase money.[99] The hui lasted three weeks, and was attended by Ngaiterangi and eight other tribal groups, all of whom contested Ngaiterangi's right to sell the land. According to Mackay's report, written a year later,[100] he rejected one claim, persuaded one group to accept a few hundred acres, and five other groups to accept cash payments of a few hundred pounds. Ngaiterangi could not be persuaded at that hui to agree to terms, and Pirirakau would not accept Mackay's terms at all, so they were dismissed as Hauhau and excluded from the agreement. In fact, Mackay thought of Pirirakau that 'it would be only just to confiscate all their lands, reserving about 2500 acres for their use and occupation', and giving some of the rest to 'those friendly Natives' who had lost land in the block retained by the Crown.[101]

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94. Clarke to J C Richmond, 20 September 1866, AJHR, 1867, a-20, p 21
95. *New Zealander*, 15 January 1865
96. Clarke to Richmond, 25 September 1866, AJHR, 1867, a-20, p 23
97. Ibid, pp 43–44
98. J C Andersen and G C Petersen, *The Mair Family*, Wellington, 1956, p 157
99. AJHR, 1867, a-20, p 64
100. Mackay report, 26 June 1867, le/1867/114, RDB, vol 7, pp 2329–2334

Mackay's instructions – that he was not to discuss the purchase, but simply decide how to distribute the purchase money – made it clear that his decisions were a matter of expediency, designed to quiet potential opposition, not dispense justice. The wording of his report suggested a sort of contest for compensation, with purchase money paid out on the strength of a tribe's bargaining power rather than on the strength of their claim. He reported that 'the claims of the Thames natives are nearly all inferior to those of Ngaiterangi, the latter having exercised more of the rights of ownership than the former'.[102] He had previously found that 'Ngaiterangi proper have no claims by right of inheritance to lands in the district of Tauranga, but have their claims on right of conquest only'.[103] Anywhere else in New Zealand at the time, especially in Fenton's courts, right of conquest would have taken precedence over any other right – but the Tauranga people were denied the opportunity to have their titles ascertained in either the Compensation Court or the Native Land Court. The Government had acquired land by cession or purchase from 'Ngaiterangi', their catch-all name for the several tribes of the district. They would compensate Ngaiterangi 'proper', but they continually acted as though the one were the other. They wanted everyone to admit to being Ngaiterangi 'really' so the problems would be solved, but in fact the confusion between 'Ngaiterangi' and Ngaiterangi 'proper' bedevilled the whole issue in Tauranga.

If the claims to the Tauranga lands were to be finally and justly settled, competent courts would have to hear the claims and settle the ownership. Clarke had presumed in 1865 that the Native Land Court would investigate all claims in the area, and he warned that the rebels would probably be found to be 'very small claimants' and that the major claimants would be found to have taken 'no active part in the war'.[104] But the Government had no intention of allowing the Native Land Court to sit at Tauranga; one of the reasons for declaring the whole district a site for settlement, and therefore Crown land, was to extinguish native title and prevent long, complicated court hearings and the recital of traditional claims to the land. The Compensation Court could have dealt with the land, but Fenton claimed that the Colonial Secretary had not referred any cases to the court, as required by the New Zealand Settlements Act 1863. According to Richmond, all the claims that had come forward had been extinguished out of court.[105]

Fenton was determined that the Native Land Court should sit in Tauranga, so he advertised a sitting for 28 and 29 December 1865, and sent five applications for investigation of title to the Colonial Secretary.[106] Whitaker (then agent for the general government) said that the Tauranga land, having been confiscated, was Crown land and the Native Land Court therefore had no jurisdiction over it.[107] But

101. Mackay to Rolleston, 25 September 1866, AJHR, 1867, a-20, p 22
102. le/1867/114, RDB, vol 7, p 2339
103. AJHR, 1867, a-20, p 7
104. Clarke to Mantell, 23 June 1865, AJHR, 1867, a-20, p 12
105. NZPD, 1867, vol 1, pt 1, p 29; NZPD, 1867, vol 1, pt 2, p 978; Fenton to Richmond, 29 July 1867, AJHR, 1867, a-13, p 1
106. Fenton to Colonial Secretary, 1 November 1865, ia 1/1865/13015
107. Whitaker to Fenton, 14 December 1865, Fenton correspondence, RDB, vol 125, pp 47,893–47,894

Fenton pointed out that as 'no block of land' had been confiscated in Tauranga, but 'merely the land of a certain Tribe in a defined Territory', without a court sitting it could not even be determined whether or not the land to be investigated was part of the confiscated block.[108] Moreover, once a hearing was advertised, claimants had a right to be heard:

> I cannot imagine that the Crown can step in and demand the closing of a Court in any case in which the involvement of its own interests places it in the position of a quasi defendant.[109]

The issue was apparently resolved when all the claims set down for the hearing were withdrawn by the claimants concerned – for what reason, or under what coercion, is not clear.[110] What is clear is that in a clash of the giants the Government would win. They had already decided to amend the law, and added section 18 to the Native Lands Act 1866 to empower the Government to define districts within which the provisions of the 1865 Act could be suspended from time to time. This was supposedly to enable the Government to fulfil its obligations to both loyal and rebel Maori in a more 'convenient manner' than through the operations of the Compensation Court.[111] It looked more like a case of the Government protecting its own interests than those of its Maori subjects, loyal or rebel.

In the following year the Government introduced the Tauranga District Lands Bill to validate the order in council of 18 May 1865, which had confiscated the land of the 'tribe Ngaiterangi', and 'to prevent future litigation'. Richmond assured the House that:

> It was by the very strong desire of the tribe that the land was formally taken by the Government, as there were so many tribal disputes that they were unable to deal with their own claims and they asked the Government to take the matter in hand and deal with it.[112]

The Act may have prevented any legal appeal on the part of all and any owners of the confiscated block against the Government's actions, but it did not prevent future expression of grievance. The Act provided for commissioners, authorised by the Governor, to make 'grants, awards, contracts or agreements', and it declared them, and those already made in accordance with the order in council, to be 'absolutely valid'. But the Act had to be amended the following year when it was found that the schedule to the order in council of 1865, and to the Act of 1867, did not include the whole of the lands of the Ngaiterangi tribe. Once more Government action was justified by claiming that Ngaiterangi earnestly desired to have their land confiscated – this time lest the Arawa 'dispossess them' of part of it.[113] Petitions heard by

108. Fenton to Native Minister, 22 January 1866, Fenton correspondence, RDB, vol 125, pp 47,905–47,907
109. Fenton to Whitaker, 18 December 1865, Fenton correspondence, RDB, vol 125, pp 47,895–47,897
110. Fenton to Whitaker, 23 December 1865, Fenton correspondence, RDB, vol 125, pp 47,900
111. Stafford to Whitaker, 7 January 1867, AJLC, 1867, p 40
112. NZPD, 1867, vol 1, pt 2, pp 978, 979
113. NZPD, 1868, vol 3, p 404

the Native Affairs Committee in later years noted that the commissioners appointed under the Act to settle the question of titles and awards operated in a most informal manner, with 'no public advertisement' and 'no formal records such as are kept in the Native Land Court'.[114]

It may have been more convenient for the Government to 'fulfil its obligations' in this way, but by ensuring that the Compensation Court never sat in Tauranga, and that the Native Land Court never sat there to determine native title, the Tauranga Moana people were strongly disadvantaged. There were few means of redress available to them against the ruling of the commissioners acting under the Tauranga District Lands Act 1867.

5.4 The East Coast

The true intent of the Government's confiscation policies were never so clearly revealed as on the East Coast, where the Government showed its determination to confiscate for profit, regardless of who owned the land they coveted or what part the owners had played in the war. The East Coast was one of the most rugged and isolated parts of the North Island, an overwhelmingly Maori district, with only a small European population. East Coast Maori were independent and not easily to be drawn into swearing allegiance to either the King or the Queen, but ready to oppose whoever threatened their independence or their land-holding. The Government presence on the coast was negligible and McLean's efforts to buy land in the district in the 1850s had ended in failure. The Crown found the fierce independence of the local people a challenge, and the rich alluvial river flats of the region an enticement. They had the excuse they needed to intervene in the district when Pai Marire emissaries arrived from the Bay of Plenty in 1865; and an urgent need to do so when oil springs were discovered in early 1866.

These many factors complicated relations between iwi and Crown in the next decade, and while the Crown was as intent on extinguishing native tenure here as in every other district, the means they used to do it differed markedly.[115] During the war in the Waikato, and especially in the Tauranga region, some Ngati Porou had taken up the King's cause and some the Queen's, but around Tauranga the iwi for the most part had remained aloof from the struggle. However, in 1865 Pai Marire became a much more divisive issue that the earlier fighting had been. The result was virtual civil war on the coast through much of that year, with the anti-Hauhau party automatically labelled 'friendly', 'loyal', 'Queenites'. The Government's response to this new 'rebellion', as to earlier ones, was to demand that the rebels pay a penalty in land. They could have exacted this under the New Zealand Settlements Amendment and Continuance Act 1865, which made the 1863 Act perpetual but provided that no districts could be proclaimed, or land taken for

114. See, for example, AJHR, 1879, sess i, i-4, p 4

115. This section draws extensively on a detailed study by Vincent O'Malley, 'Report for the Crown Forestry Rental Trust on the East Coast Confiscation Legislation and its Implementation', February 1994

settlement after 3 December 1867. But the New Zealand Settlements Act 1863 was falling out of favour with the New Zealand Parliament. The 1863 Act, and especially the 1865 amendment, had been strongly criticised – although not disallowed – by the Imperial Parliament; and as was often said in the House over the following years, the confiscated lands were more trouble than they were worth. With the lesson of Tauranga so recently learned, the Government was ready to find other means of gaining the land – 'a more convenient and better fashion of confiscation' which would save 'the expense and complication' of taking land through the Compensation Court;[116] a means of inflicting 'some sort of punishment upon those . . . Ngatikahungunu and Ngatiporou, who had been in rebellion', and rewarding those who had done the Crown good service.[117]

According to official reports they found willing allies in both 'friendly and hostile Natives' of the coast, who were suddenly anxious to divest themselves of all their land and leave the Government to return to them so much as they saw fit.[118] It was the same argument the Government had put up in Tauranga; it is not clear who they hoped would believe it. In any case, they needed a new law that would enable them to take the land 'without causing discontent' and they meant to put it in operation while the worst of the 'rebels' were out of the way in imprisonment without trial in the Chatham Islands. The law they devised was the East Coast Land Titles Investigation Act 1866, which was introduced and passed into law in four or five days with minimal debate. According to Stafford, the object of the Act was, 'after a careful and judicial investigation before the most competent existing tribunal . . . to secure their land to the loyal Natives individually under Crown Grant'.[119] It was intended to give the Native Land Court full power and jurisdiction to inquire into and determine title to all land in a specified district – whether or not the owners requested it. The court would issue certificates of title to those who it found were entitled to land and who, in the opinion of the court, were not rebels as defined in section 5 of the New Zealand Settlements Act 1863. The Government would then issue Crown grants to loyal Maori for their land, or for their 'just portion' of land held jointly with rebels. The rest of the land, from the date the certificates were issued, would be deemed to be Crown land, some of which would be reserved for the benefit of those who had been engaged in rebellion.

The Native Land Court was thus to be given the dual powers of ascertaining title, and of deciding who was and who was not a 'rebel'. Fenton had managed to combine the Native Land Court and the Compensation Court into one. It was he who had 'first recommended' the Act 'to avoid the most vexatious part of the New Zealand Settlements Act'; Whitaker then helped the Government to 'devise' it. Under this Act there would be 'no possibility . . . of taking the land of any man who had been friendly to the Government'.[120] It was not 'a general confiscation with

116. NZPD, 1867, vol 1, pt 2, p 868
117. NZPD, 1868, vol 3, p 145
118. NZPD, 1867, vol 1, pt 2, p 868
119. Stafford to Whitaker, 7 January 1867, AJLC, 1867, p 40
120. NZPD, 1867, vol 1, pt 2, p 693; NZPD, 1868, vol 3, p 155

subsequent restoration, but merely permitted certain lands to be taken through the operation of the Court'.[121] Those certain lands were meant to be those desired by the Government regardless of ownership, and taking them through the operation of the court would forcibly extinguish the native title to kupapa land, regardless of the owners' wishes.

But, in any case, the Act was unworkable. It had to be amended in 1867 to correct errors in the wording of section 2 (where 'include' should have read 'exclude') and of the schedule (which listed non-existent points of reference). Then it depended on East Coast Maori providing the information the court needed – that is testifying against close relatives – and as Richmond later told the House:

> there are a large number of so-called friendly Natives who were on the verge of hostility and who were not at all willing to give any assistance in ascertaining the title.[122]

And, most importantly, the Crown would have ended up with scattered, and maybe inferior, blocks of rebel land – not what they intended at all. For all their protestations, the aim was not simply to punish rebels. It was to extinguish native title, and gain fertile land in as large blocks as possible so they could quickly settle the 150 men for whom 'The Colony was bound to find a settlement'.[123] The Government would then sell the rest to pay compensation and the costs of military settlement and of putting down the rebellion.

Land confiscations had been widely expected on the East Coast, and soon after the fighting ended speculators were moving to buy up land before it was lost to the Crown. Then the discovery of oil brought new pressures to the district. Under the Native Lands Act 1865 private dealings in Maori lands were void, so there was pressure from several quarters for a sitting of the Native Land Court, and one was advertised for 12 September 1866 at Turanganui. But there was pressure in other quarters to prevent the court from sitting. McLean thought it would be 'both inexpedient and impolitic', and J C Richmond requested a postponement lest a sitting 'give rise to embarrassment and be injurious to the public service', whatever that might mean.[124] Despite Fenton's opposition, the Government managed to get its way – long enough to pass both the East Coast Land Titles Investigation Act 1866 and the Native Lands Act 1866, by which they could suspend the operations of the court in the district. The Government had achieved its aim of ensuring that East Coast lands would fall to the Crown, not private interests, but it now had to cope with interprovincial rivalry and the determination of both Hawke's Bay and Auckland to win the struggle to obtain the lands. In the event, Whitaker claimed the prize and, he hoped, some very profitable oil springs. He had considerable competition, especially from the Auckland firm of Brown and Campbell, whose lawyer,

121. NZPD, 1867, vol 1, pt 2, p 868
122. NZPD, 1868, vol 3, p 145
123. NZPD, 1867, vol 1, pt 2, p 693
124. McLean memo, 4 September 1866, RDB, vol 131, p 50,431; Richmond to Fenton, 8 September 1866, RDB, vol 131, p 50,411

Thomas Gillies, was owed a favour by Fenton. Hence Fenton's determination that the Native Land Court would sit in the district, and Whitaker's that the Native Lands Act be amended to prevent it.[125] Whitaker won: he succeeded in getting section 13 written into the Act to allow provincial superintendents to make valid contracts for native lands in their province before the court had issued a certificate of title.

Maori interests in all this bickering and manoeuvring were ignored, although pressure on them lessened late in 1867 when the oil springs were shown to be not commercially viable. In the end it simply came down to the question of who would take their lands off them, and how, since in the interests of the colony the East Coast must be opened up to colonisation – and Maori independence and isolation ended. McLean's displeasure over this whole affair and the fetters put on him by the Stafford ministry, was expressed later by his defection from the Stafford government. He joined the Fox opposition, then became Native Minister in the Fox government in June 1869 and retained the post through most of the next seven years.[126]

Although the Government had amended the East Coast Land Titles Investigation Act in 1867 to repair the defects in the 1866 Act, they had already decided that cession of land, voluntary or forced, was a better option than total reliance on the Act. Richmond told the House that:

> it would be much the best to obtain cessions of land to be afterwards confirmed under the Act – to make arrangements with the friendly Natives that certain portions of land should be taken, and the rest should be free from all claim on our part.[127]

Lest the East Coast Land Title Investigation Act 1866 appear too much like a confiscation Act to the Imperial Parliament, the Government would now demand 'voluntary' cessions of land, as required by the Colonial Office when the first New Zealand Settlements Act 1866 was put in place. As in Tauranga, the Government would persuade or coerce friendly Maori to cede land, not necessarily their own, but land which the Government was determined to have. In fact the schedule to the 1866 Act was amended in 1867 not just because of the 'clerical' errors, but because it had failed to include the district 'in which are the petroleum springs together with a considerable portion of the agricultural land'.[128]

Since the war on the coast had been virtually a civil war, with close relatives fighting on either side, there was no way rebel and loyal land could easily be distinguished. When the Government faced this fact they first suspended the operation of the Native Lands Act in the district by order in council of 4 February 1867,[129] then pressed ahead with their plan to gain cessions of land. At Wairoa in

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125. On this whole question, see O'Malley, pp 60–79.
126. Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland, 1973, pp 227–228
127. NZPD, 1868, vol 3, p 145
128. RDB, vol 131, p 50931
129. *New Zealand Gazette*, 11 February 1867, p 72

April 1867, J C Richmond was reported to have told a large gathering from coastal tribes that, as the Government had decided to take the land, 'it might therefore be said that it was gone'.[130] When it was pointed out that the block the Government proposed to take was mainly kupapa land, McLean would have none of it, saying friendly Maori were simply trying to pass themselves off as the owners of rebel land.[131] This was vintage McLean; he would bully and intimidate the owners, then offer them minimal compensation for their claims. In fact the leading claimants, including a Government assessor and an Anglican deacon, sanctioned the cession of the Kauhouroa block, variously estimated to be 71,000 acres or 42,438 acres, in return for a promise that the Government would respect the claims of 'friendly' chiefs.[132] Clearly their claims were not fully respected, with the result that loyal natives whose land had been taken were not compensated with rebel land as promised; and 'rebels' with interests in the Kauhouroa block were not even a party to the agreement and were deprived of their lands without any compensation, supposedly with the freely-given consent of their 'loyal' kin.[133]

The transaction was typically confused and controversial, especially since it involved taking land from an aged and ailing assessor, Kopu Pitiera, who had 'rendered signal service' to the Government during the war – and who died a few days later, supposedly of pleurisy.[134] It was 18 months before the Wairoa deed of cession came before the Native Land Court, and although it was confirmed by the court, this was apparently not done in accordance with section 4 of the East Coast Land Title Investigation Act.[135] It was 1872, more than five years after the cession, before anything further was done about returning land to the friendly chiefs. In August that year a new agreement was negotiated between a Government agent and loyal Maori, but even that was not honoured; and the question was still unresolved in 1927, when it was taken before the Sim commission.[136]

After their success at Wairoa, Richmond and Reginald Biggs, the local military commander and resident magistrate, went on to Turanga to demand further cessions. Richmond took the trouble to warn the tribes that if they did not cooperate with the Government and work under the East Coast Land Title Investigation Act a 'harder' law, the New Zealand Settlements Act 1863, would be brought into operation. The tribes offered about 60,000 acres 'including much of the best agricultural lands to the east of the Waipaoa river'.[137] Biggs, 'a zealot for confiscation', was not satisfied; he wanted nothing less than about 200,000 acres, on both banks of the Waipaoa, a demand which even the local settlers considered excessive.[138] Even Richmond thought Biggs was going too far, but the Stafford government was barely managing to hold onto office, so Richmond's priority was not to dispense justice,

130. *Hawkes Bay Herald*, 23 April 1867 (cited in O'Malley, p 84)
131. *Hawkes Bay Herald*, 27 April 1867 (cited in O'Malley, p 85)
132. See O'Malley, pp 85, 86
133. Ibid, p 87
134. Ward, p 225
135. O'Malley, p 138
136. Ibid, pp 140–142, 172–174
137. Ibid, p 91
138. Ward, p 225

but to avoid being labelled as weak. As was so often the case, Maori rights were sacrificed to political expediency. Richmond could see that he would not win Maori cooperation under the East Coast Land Title Investigation Act, so he advised Cabinet to use the more 'workable' New Zealand Settlements Act 1863 instead; it would give title to the Crown and throw the burden of proving their claims on loyal Maori. He thought that 'a large block around Turanga' should be brought under the Act, lest:

> the so-called loyal natives and the returned rebels with their European advisers . . . triumph over Government which it is most inexpedient to allow them. Land is moreover wanted for the Napier Defence Force. I recommend immediate action.[139]

There could be no clearer explanation than this of the Government's confiscation policy.

The New Zealand Settlements Act 1863 was never brought into operation on the East Coast. It would have been too damaging to the Government's credibility in Britain to use it – and in any case the options under the 1865 amendment were due to run out on 3 December 1867. Thus Government tried for further cessions of land, and met Ngati Porou in May 1867. Considering that Ngati Porou had been such valuable allies of the Government, their offer of almost 40,000 acres of land, some of it 'very rough' and some 'good agricultural land', should have satisfied the Government. But Biggs demanded twice as much, and only succeeded in antagonising Ngati Porou, who were more interested in receiving payment for war service and compensation for losses, than ceding 'rebel' land to the Government. Biggs came away empty handed.[140]

The struggle to ensure the Native Land Court sat, or to prevent it sitting, continued through 1867. When it did sit under Judge Monro in July, it was promptly adjourned 'on the ground that there appeared to be a clerical error' in the East Coast Land Title Investigation Act – and anyway the Crown agent, Biggs, needed more time 'to get up evidence, as the Natives had combined to keep back information'.[141] Loyal Maori were now being blamed for Government inefficiency, and the judge took up their cause and committed the Government to reimbursing their costs, since it was the third time 'they had been brought . . . from great distances to attend the Court'. He was severely reprimanded by Richmond, who told him, among other things, that 'the Courts – Native Lands and Compensation – are alike established by the Legislature to watch over the interests of the innocent', and Judge Monro could pay the promised compensation out of his own pocket.[142]

None of this bickering helped Maori, and 256 'faithful friends of Poverty Bay' petitioned Parliament on 8 July 1867 complaining of their treatment, of how they were wearied at Biggs' constant teasing for land, and intimidated by the Government's words. They had waited patiently 'hoping to get relief by the law, but in vain'. They had handed over a large piece of land to Biggs and kept a smaller piece

139. J C Richmond memo, 23 April 1867, RDB, vol 131, p 50371
140. O'Malley, pp 89–90
141. Monro to Fenton, 25 July 1867, AJHR, 1867, a-10d, p 4
142. Ibid, pp 4–8

for themselves, but he was not satisfied. 'What he wanted was, to get all the level country, and we might perch ourselves on the mountains.' Then he said he would bring the court and for the third time they assembled, hoping this time it would bring them relief: 'Alas! where was the relief?'[143]

Indeed, there was none. The Government, with no workable legislation on their books, continued to try to win cooperation for their policy of cession. It was a losing battle. Maori throughout the district were disillusioned with the shabby treatment meted out to them, and were determined to boycott the Native Land Court as long as it was used as an instrument of confiscation – a 'land-taking court' – under the East Coast Land Title Investigation Act. In early 1868, hundreds signed petitions calling for the repeal of the Act. Later in the year the Stafford ministry's land-taking policy on the East Coast came under close scrutiny in Parliament. Richmond tried to resist the pressure to repeal the Act by arguing that to do so would be to retreat before 'a victorious foe' – not Maori, but 'harpies' and 'land-jobbers' who had supposedly put Maori up to opposing the Act. He reinforced his argument by warning Parliament that if the Act was repealed, they would have to find other means of compensating kupapa for military service and war losses – instead of rewarding them with a gift of rebel land.[144] Stafford supported him by quoting Fenton, that the East Coast Land Title Investigation Act:

> was one of the best Bills ever devised for the settlement of disputes where there had been large sections of the Native race in organised aggression against the supremacy of the Crown.[145]

The weakness of Richmond's arguments – that the Government had never intended to make a profit from East Coast lands, and that the essential principle of the Act was to reward the Crown's allies and punish its enemies – was obvious to all.[146] But Parliament allowed the offending Act to stay in place until the Government could come up with a better one: the East Coast Act 1868. This 'no longer pretended to be a confiscating measure'; it was 'simply to prevent those persons who had been notoriously in rebellion from obtaining a Crown title to their land' – a Crown title being considered the greatest gift the Government could bestow.[147] This new Bill hardly caused a ripple in Parliament, probably because, like so much controversial Maori land legislation, it was introduced in the very last days of the session.

Under the East Coast Act 1868 the Native Land Court could award a certificate of title for the whole of the land under investigation to those customary owners who had not engaged in rebellion; or where land was held jointly between rebel and friendly Maori (as it almost all was) the court could make an 'equitable partition' of the land between the Crown and loyal Maori. It was not much of an advance on the old Act. Depending on the discretion of the judge, loyal Maori might retain all their

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143. AJHR, 1867, g-1, p 10
144. NZPD, 1868, vol 2, pp 518–519
145. Ibid, p 520
146. NZPD, 1868, vol 3, p 146
147. NZPD, 1868, vol 4, p 383

land – but not under native title. Rebel Maori would still lose their land; and the Crown stood to profit as before.

It was little more than a face-saving measure, since the Government still meant to seek 'voluntary' cessions of land. But Te Kooti's escape from the Chathams and his attack on Poverty Bay in November 1868 put a different complexion on things. Once again, and perhaps as never before, the Government was dependent on Ngati Porou kupapa – to the extent that they were finally obliged to give up the idea of confiscating their land. But they thought to make up for that by taking Turanga land – the land of Te Kooti's 'allies', never mind that his people had been held without trial in the Chathams for two years. Maori in fear of Te Kooti were said to be only too anxious to cede their land to the Government in return for protection.[148]

The Government moved swiftly. On 18 December 1868, 279 loyal Turanga Maori signed a deed of cession for about 300,000 acres of the most desirable Poverty Bay land, and accepted that they had but three months in which to lodge their claims to a commission of two judges of the Native Land Court. Claimants with valid claims would receive Crown grants – for rebel land if their own had to be retained by the Crown for 'military settlements'.[149] Maori were no better off than they would have been under the New Zealand Settlements Act 1863 – but the Government was. They had avoided the stigma and complications of that Act and the censure of the Colonial Office, but they still got the land.

Two months later, native title was proclaimed extinguished from the date of the deed of cession, and on 29 June 1869 the Poverty Bay Commission, consisting of judges Rogan and Monro, convened to hear all claims which had been lodged by 18 March.[150] The commissioners had the widest possible discretion to deal with the claims as they saw fit,[151] but the Crown agent, the practiced W S Atkinson, appointed by his brother-in-law, J C Richmond, was to deal with 'exorbitant' demands – and see that the Crown got the land it wanted.[152] He immediately announced that he was in the process of effecting one of his out-of-court settlements, by which part of the ceded block would be given up to the Crown in return for the waiving of its claims to the rest of the land.[153] However, misunderstandings between the Crown and loyal Maori soon emerged. The local tribes – Rongowhakaata, Te Aitanga a Mahaki, and Ngaitahupo – had intended to cede three blocks totalling about 15,000 acres, but the Crown had succeeded in taking about 56,000 acres. The commission seemed to be less concerned than earlier commissions to exclude from awards those who had taken up arms in the Pai Marire cause, but the memory of Te Kooti's activities were still too fresh to be ignored, and those who had voluntarily aided him were among the few excluded,[154] although those who had voluntarily aided the Crown were rather 'ignored than recognized'.[155]

148. O'Malley, pp 113–114
149. Ormond memo, 4 August 1869, RDB, vol 131, pp 50,239–50,240
150. *New Zealand Gazette*, 13 February 1869, p 60
151. RDB, vol 130, p 50,164
152. RDB, vol 131, p 50,297
153. See O'Malley, pp 122–129
154. Ibid, pp 129–131
155. McLean to Ormond, 18 November 1869 (cited in O'Malley, p 134)

As was the case in most other areas, awards on paper and awards on the ground were two different things. The Crown bought out awards where it could[156] and it eventually relinquished most of its claims to Ngati Porou lands in acknowledgement of that tribe's active military assistance; but other awards remained in contention for years. Further Acts of Parliament such as the Poverty Bay Grants Act 1869 and its 1871 amendment were required so that grants could be issued or validated. But this only confounded the issue, since grants were issued not to 'tenants in common' (each with a defined individual entitlement), but to 'joint tenants' (all with equal interests in the land).[157]

The Poverty Bay Commission had to be reconvened in 1873 to try to deal with both settler and Maori discontent. Settlers could not get title to the land they had leased or purchased from Maori whose awards had not been finalised; and Maori with joint tenancy neither received an equitable entitlement nor were able to pass their estate on to their children. Maori first boycotted the commission, then arrived en masse with the Porangahau chief, Henare Matua, a leader of the Repudiation movement.[158] The hearings became so disorderly that the commission achieved little in its August and November sittings, although at the urging of Wi Pere it did return some land in the ceded blocks on a tribal basis. It appears that the Turanga tribes won by default. O'Malley reported that the details of this transaction are not clear; but 'the Government had lost all interest in the return of lands at Poverty Bay, since it had already got the blocks it had sought' and 'all the good land' was already gone.[159]

There was then a further complication: there was no way title to the land returned to the tribes could be ascertained and the land subdivided, as the Native Land Court could not deal with Crown land. Yet another Act had to be passed – the Poverty Bay Lands Titles Act 1874 – to allow the Native Land Court, operating under the Native Lands Act, to investigate and determine titles and subdivide the land 'as effectually to all intents and purposes as if the Native title . . . had not been extinguished'. It seemed that 'humpty dumpty' was at work again.

The whole situation was a shambles. Maori discontent in all parts of the coast ran deep, and with good reason. By one measure or another the Crown had acquired the land it set out to acquire; it had extinguished native title over most of the coast, and it was not too concerned about the mess in which it left its Maori subjects. Appeals and petitions and commissions continued through the rest of the nineteenth and into the twentieth century. It is clear that the East Coast people were never properly compensated, and it was not to the honour of the Crown that they treated so shabbily some of their firmest allies.

156. Ngati Porou agreed to take £5000 for their claim to 10,000 acres in the Turanga lands; Ngati Kahungunu argued with the Government for years over their share and eventually received a few pounds and a few acres. See O'Malley, pp 135–136.
157. AJLC, 1872, no 9, p 3
158. RDB, vol 129, pp 49,541–49,543
159. O'Malley, pp 154–155