

## CHAPTER 5

# EARLY CROWN POLICY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15. Orange, p 3

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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26. Williams, pp 258–259

27. Ward, pp 85–91

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

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

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28. Ibid, p 86

