

CHAPTER 6

THE ORIGINS OF AUTHORITY FOR PUBLIC WORKS TAKINGS – THE 1860s

By the late 1850s it had become obvious that the Crown's policy of extensive land purchasing ahead of settlement was failing. Maori were becoming very concerned about the loss of their land and very suspicious of Government and settler intentions. Land sales slowed and the last large-scale purchase of the time took place in the late 1850s in the Wairarapa. Maori owners themselves now preferred alternatives, such as renting, that allowed them to derive an income but still retain ownership of the land. This was anathema to the New Zealand Company and to the Crown, both relying on profits to be made by cheap purchasing and resale at a higher price. In the Wairarapa sale the Crown used the Native Land Purchase Ordinance 1846 to force Maori owners to give up renting and part with their land. This Act was designed to protect Maori but was instead used against them. The Government also promised that 5 percent of the sales profit from this block would go to public provision for Maori, including schools, hospitals, and flour mills. However, after the sale these promises went largely unfulfilled.

Voluntary land sales by Maori virtually ceased after this. Land-hungry immigrants were still being encouraged into the colony however, and a move to pastoralism required even more land to be made available. Although by now Maori had sold almost half their land, most had been sold in the South Island. There was still prime land for farming in districts such as Taranaki, Waikato, and the Bay of Plenty, but by now Maori owners were refusing to sell. Increasingly concerned about loss of land and shut out from settler government activities, many Maori turned to the King movement and began to support a general anti-land selling policy. The King movement was designed to help achieve the Treaty goal of equal partnership between the Crown and Maori but it provoked the fury of settlers, who saw a threat to the success of continued colonisation in the anti-land selling 'combinations'.

At the same time settlers were becoming more assertive in their demands for domination of the colony and for more Maori land. By this time settlers had also begun to outnumber Maori. The European population increased sevenfold between 1843 and 1860, from about 11,000 to about 79,000.¹ Settlers in general also found the idea of Maori landlords intolerable. It had always been apparent that settlers preferred not to have to make any sort of accommodation with Maori. Even while

1. George Asher and David Naulls, *Maori Land*, New Zealand Planning Council, Planning Paper no 29, March 1987, p 14

Crown officials assured Maori of Treaty guarantees, it was clear that settler politicians were concerned with assimilation on their terms rather than accommodation. Even the early ordinances that appeared to offer some concessions to Maori were given little practical effect but clearly revealed the assimilationist hopes of settlers. The Native Exemption Ordinance 1844, for example, expressed the hope that natives would be brought to ‘yield a ready obedience to the laws and customs of England’ and the Native Trust Ordinance 1844 preamble looked for assimilation as speedily as possible to the habits and usages of the European population. As Peter Adams has noted, assimilation was to be on settler terms, and ‘perfect equality’ would be accorded the Maoris ‘when they raised themselves to British standards’.²

As Adams has shown, British colonial policy, rather than attempting to accommodate Maori and settler interests, was aimed mainly at subverting land guarantees in the Treaty through the use of Crown pre-emption. The overriding concern was to acquire vast areas of Maori land as cheaply, quickly, and quietly as possible in order to facilitate extensive European colonisation. Adams gives examples of the belief at the time of the Protector of Aborigines and other officials that the Colonial Office was trying to neutralise the Treaty of Waitangi and many Acts of the Colonial Government were directly opposed to the spirit of the Treaty.³

One of the protections Maori might have gained from British sovereignty – controlled, limited, and orderly colonisation – was denied to them. Instead, even when land sales slowed right down, colonists were still encouraged to immigrate. At the same time, settlers became more confident of their strength and ability to use force to achieve their ends. Most regarded the full imposition of English law as an essential ingredient in their dominance of the colony, and justified it by the ‘civilising’ influence it would invariably have on Maori. The Treaty, which was originally supposed to protect Maori, was increasingly used by settlers, when it was referred to, as a justification for imposing English law on Maori. In settler eyes the ‘rights and privileges’ of British citizens bestowed on Maori by the Treaty had invariably become duties and obligations.

With the Constitution Act 1852, the settler Government was given increasing control over colonial affairs, and debate over the practical implementation of the Treaty moved to the colonial Parliament. While the British Colonial Office still retained some management of native affairs, effective control rapidly diminished in the face of settler pressure, until by the early 1860s the Colonial Office abandoned attempts to manage native affairs altogether.

The full imposition of English law obviously included compulsory provisions such as public works takings. As well as being essential to the civilisation of Maori however, it is clear that public works projects would also become an important part of war policy. Just as the British Government previously had found the growth of transport helped reduce civil unrest by allowing the speedy provision of law enforcement throughout that country,⁴ the provision of public works such as roads

2. Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830–1847*, Auckland University Press, pp 226–227

3. Ibid, pp 238–245

4. Harold Perkin, *The Age of the Railway*, David & Charles, 1970, p 118

and telegraph lines throughout the North Island were an essential part of successful warfare and the ‘pacification’ of troublesome districts.

By the 1860s, it was clear that Grey and most settler politicians were in no mood for diplomacy and were determined to engage in warfare if it was required to ensure the success of colonisation and to crush Maori resistance to it. A disputed purchase sparked war in Taranaki in 1860, and by 1863 Government troops had invaded the Waikato. The construction of works aimed to facilitate war, such as military roads, were clearly an important part of war policy.

In 1860 settler politicians were still not free to determine native policy without the consent of the Colonial Office although by a variety of means, including their power over finances, they were asserting increasing power in this area. As late as 1861 the Government refused a request to introduce measures giving it the power to make roads through Maori land. The request was put as though it was a benefit to Maori, as Maori would be paid for the land and there were districts where they were anxious for roads through their land. In addition, however, ‘the importance of such works in a military point of view could not be overestimated’. The Government agreed about the importance of roads but ‘under present circumstances’ it was not considering any general measure, ‘nor did they believe a special measure necessary’.⁵

Military roads continued to be an important part of war policy, however. Governor Grey decided to build a military road from Auckland to the Waikato, ostensibly to protect Auckland from attack, and by 1862 he was reporting satisfactory progress on its construction.⁶ In practice, however, the road was used to enable troops to invade the Waikato in 1863.

By this time settler politicians clearly felt they had the right to take land for works over Crown-granted Maori land. This was apparently based on the view that this land, as it was held by Crown grant, was therefore subject to British law, including public works takings. Wartime needs were now a catalyst in deciding politicians to reopen the question of whether the Crown had a legal right to take customary Maori land for roading. This was a direct result of the situation in Taranaki, where Te Atiawa were asserting their rights of landownership and refusing Europeans access over their land. The land in question lay between two European-owned blocks of land and had been used as a road between them. Te Atiawa refused access in an attempt to force the Government to release the findings of an investigation into the legality of the purchase of the Waitara block. Disputes over this purchase had already led to war in Taranaki and the road in question was part of the much longer road between Wellington, Wanganui, and New Plymouth. Parts of this road were on Maori-owned land and had been used with Maori consent since the 1840s. In Taranaki some soldiers attempting to use the Maori-owned part of the road, in defiance of Maori wishes, had also been killed.

Provoked by this, settler politicians sought a legal opinion from the Attorney-General, Henry Sewell, and sent this to the Colonial Office for further advice.

5. 12 June 1861, NZPD, 1861, p 26

6. For example, dispatch from Grey to Newcastle, 20 May 1862, concerning the progress of the military road, BPP, vol 13, p 138

Sewell was asked what legal right the Government had to make roads through lands over which native title had not been extinguished, whether the Government had the complete legal right to take possession of land required for the road and what legal right the Government had to take similar land for permanent military positions, or other purposes of defence.

Sewell's opinion was that the question could not be answered by reference to ordinary rules of law. It was clear that customary Maori land could not legally be treated in the same way as wastelands of the Crown or other private lands for public purposes. Under the Constitution Act 1852, the General Assembly had no power over Maori land until it had been ceded to the Crown. However, Sewell believed that the right of passage through a country and the right of constructing works incidental to this, such as roads and bridges, were 'essential condition[s]' of sovereignty. Regardless of whether it was considered that Maori only had occupation rights to what were all properly Crown lands, or whether it was believed that Maori had some form of recognised private property rights, the Crown was sovereign. As a result of this it had rights of making roads through lands as part of its function of sovereignty. The Government intended to build roads on uncultivated land, but in the unlikely event there was damage to private property, it would be a matter for compensation. Sewell felt the same principle applied to land required for military or defence purposes.⁷

Assistant Law Officer Francis Fenton provided a further opinion because he felt Sewell was wrong at law. Fenton described the previous history of Crown policy towards customary Maori land. He described how originally it had been assumed that all those lands except those in actual use by Maori could be considered demesne or wastelands of the Crown. This view was reflected in the 1846 royal instructions for example; but it was objected to by the natives, and was never carried into practice, 'and in fact could not have been, in a peaceful manner'. A gradual change took place between the years 1846 and 1851, and the Constitution Act 1852 clearly provided for the exclusion of land in which the native interest was unextinguished from the category of 'waste' lands. Thus aboriginal land was admitted to be their distinct and admitted property, but inalienable to anyone other than the Crown. The Treaty guaranteed Maori territorial rights and admitted them as having equal rights and privileges as British subjects. These rights and privileges were summarised by Blackstone as rights of personal security, personal liberty, and private property. They could only be interfered with by sovereign power and as the Crown had limited its inherent power most importantly by the Constitution Act 1852, then it required parliamentary action to create a power of compulsory taking:

The principal of English law is clear, that a subject may not be disseized of his land . . . except by operation of the law, or under the authority of an Act of Parliament specially made.

Fenton found that the rule was clear, authority to compulsorily take land required for a public work had to emanate from the supreme legislature. The exercise of

7. Opinion of H Sewell, 22 November 1862, AJHR, 1863, E-3, sec 1, p 6

taking lands required for public necessity from Maori as a prerogative power of the Crown would be ‘in derogation of the honor of the Crown and in contravention of its own promises, contained in the Treaty’. Moreover, if such a prerogative power existed it would not reside in the Governor of the colony, who only had such powers as were expressly given him by lawful authority. The General Assembly would have to take legislative action before the executive could ‘legally take compulsory possession of any person’s land’.⁸

Yet another opinion was added by Frederick Whitaker, who succeeded Henry Sewell. Whitaker was a land speculator and settler politician and represented the more common settler view that still relied on the early theories of colonisation. Whitaker felt that there was no doubt that native lands were part of the demesne lands of the Crown, subject to the rightful use and occupation of the natives. The Crown therefore had a right to take land for public purposes as long as there was no interference with the ‘rightful and necessary occupation and use thereof by the Aborigines’. Whitaker did not think this was contrary to the Treaty of Waitangi but in any case ‘a positive enactment of the legislature would prevail over the terms of the treaty if there was any conflict’ and:

without discussing the precise meaning of the second article . . . under the first article all the rights and powers of sovereignty . . . were ceded to Her Majesty; and it appears to me that a right of road through those territories . . . as well as a right of constructing works necessary for military defence, are essential and necessary incidents to . . . Sovereignty.⁹

All three opinions were sent to the British Colonial Office for legal advice. In the meantime the Colonial Office had decided to relinquish most of its authority over the management of native affairs. In early 1863, in a dispute over financing the wars, the Colonial Office ‘resigned’ control over the management of native affairs claiming that constant jealousy and encroachment by the Colonial Government had made its position impossible anyway. Even though the colony was on the verge of war the Colonial Office expressed a somewhat pious hope that the Colonial Government policy towards Maori would be ‘just, prudent and liberal’.¹⁰

From this time on the Colonial Office increasingly accepted New Zealand legislation, even while expressing concern about the effect it might have on Maori. For example, in 1863 Newcastle expressed some concerns about a proposed Land Bill, but it was clear the Colonial Government had no real intention of allowing the Home government, through the Governor, to dictate their course in respect of one of the most important branches of native policy. Therefore he would allow the Bill to go forward for the royal assent.¹¹

In reply to Sewell’s opinion, which was received first, the Secretary of State, Newcastle, wrote that he understood that ministers wanted to make a road through lands belonging to natives without the consent of the native owners. The Attorney-

8. Opinion of F Fenton, 28 November 1862, AJHR, 1863, E-3, sec 1, pp 13–16

9. Opinion of F Whitaker, 21 February 1863, AJHR, 1863, E-3, sec 1, p 16

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

11. Dispatch from Newcastle to Grey, 24 March 1863, BPP, vol 13, p 282

General had advised them that although the local legislature was powerless to authorise such a proceeding, the land could be appropriated by authority of the Crown. Although by now the Home Government had absolved itself of major responsibility for the management of native affairs, Newcastle was moved to offer an opinion on the matter. As a ‘matter of strict law’ he was doubtful that Her Majesty had the power ‘without any Legislative sanction, of appropriating for any purpose the acknowledged property of any of her subjects’. But even if it were true, as a matter of policy he thought that ‘application of this arbitrary principle’ was unwise at the present time in New Zealand. He said that:

With a large proportion of the Native Population either already in arms or prepared to take them up in defence of their supposed rights, and most especially of rights to land, policy not less than justice, requires that the course of the Government should be regulated with a view to the expectations the Maories have been allowed to base on the Treaty of Waitangi, and the apprehensions which they have been led to entertain respecting the observance of that Treaty.

Newcastle was convinced that the proposed appropriation would be considered a violation of native rights, would be resisted, and would provoke resentment and general distrust of British good faith. It would also be likely to cause renewed warfare. He did not want Imperial troops employed in such a war, and unless colonists were willing to pay for this war themselves they would have to be content to remain imperfectly provided with means of communication ‘until they can persuade their neighbours by peaceable means to submit to what is for the common good’. Newcastle ended by saying that he viewed ‘with more than regret’ the adoption of the course that appeared indicated in the documents sent to him. His response to the other opinions was to refer again to the above reply.¹²

Colonial politicians were not about to tolerate any attempts by the Colonial Office to provide policy guidance. They stiffly informed the Governor that the reason they had sought a legal opinion was to obtain the precise legal position regarding the right of the Government to take native lands for roads. They had sent this to Britain to have the legal opinion confirmed, revised, or reversed, not to be advised about policy. They claimed they agreed with Newcastle that wherever possible it was desirable to obtain concessions of rights of land from natives by peaceful means, even where these were ‘most necessary for the occupation by the settlers of their own lands’. However, in the present case the part of the road on native land was the only access road between the settlement of New Plymouth and the Tataraimaka block, and had ‘always’ been used by both settlers and natives since the block was purchased in 1847. It was also part of the only road between Wellington, Wanganui, and New Plymouth. In addition, it was the road on which murders had taken place which were justified by the prohibition on its use by Europeans. While ministers were aware of the necessity for obtaining the ‘real or pretended right’ of natives by peaceful means, the acknowledgement of such rights:

12. Dispatch from Newcastle to Grey, 22 March 1863, AJHR, 1863, I, sec 2, pp 71–72

exercised so arbitrarily, and enforced with such barbarity, would . . . be equivalent to the abandonment of lands long ago bought and settled by Europeans, and to the recognition of a Maori sovereignty over these latter, of the most tyrannous, galling, and ruinous a character.¹³

The Ministers conveniently disregarded the fact that the whole dispute arose at a time of warfare when killings had taken place on both sides. The implication of their message was clear however. Settler interests equated with the ‘public good’ and Maori interests would not be allowed to interfere with these.

The 1863 General Assembly passed a series of legislative measures designed to provide authority and financing for the wars. These included a number of Loan Acts designed to help finance the wars and subsequent settlement on confiscated land; a Suppression of Rebellion Act designed to crush Maori resistance; and a New Zealand Settlements Act to provide for extensive confiscations of Maori land that in the end coincided neatly with the fertile districts coveted by settlers and speculators alike. The Settlements Act was also designed to help prevent further Maori resistance by ‘planting’ large numbers of settlers in the disaffected districts.

Public works projects such as road and electric telegraph networks were essential instruments of war policy and the confiscated lands required further public works such as roading to make them available and attractive for settlement. Settler politicians were therefore keen to update public works legislation. This included the clarification of land-taking powers and their extension where necessary, including to provincial governments. The same 1863 General Assembly therefore also passed a series of legislation concerned with public works.

The Provincial Councils Powers Extension Act 1863 sought to extend the powers of provincial councils to enable them to make laws affecting public roads and waterways on Crown land. This was in spite of restrictions on local authority powers contained in the Constitution Act 1852. It was explained in the House that the intention was not to contravene that Act but to provide councils with full powers over such roads and waterways.¹⁴

The procedures for taking land were updated by the passing of a New Zealand version of the English Lands Clauses Consolidation Act 1845. The Lands Clauses Consolidation Act 1863 was also intended to provide consistent procedures for land takings much as the Imperial Act 1845 had done and in fact the New Zealand version relied heavily on the English Act, incorporating the same wording for many of the same provisions and protections. The Act assumed, for example, that special Acts containing specific taking authorities would still need to be passed by Parliament and that they would incorporate the relevant provisions of the Consolidation Act within them. The New Zealand Act also contained very similar machinery for protecting the rights of landowners, resolving disputes, and determining compensation. Like the English Act, it allowed for both purchase by agreement and compulsory purchase, required records to be kept of land taken and compensation paid, specified an expiry period for the taking authority in special

13. A Domett to Grey, 30 June 1863, AJHR, 1863, E-3, sec 1, pp 56–57

14. 12 November 1863, NZPD, 1863

Acts (three years if not otherwise provided for), and provided for surplus land to be offered back to original owners or adjoining owners in the first instance.

The 1863 General Assembly also sought to provide legislation to remove any legal quibbles about the right of settler Governments to build roads through Maori customary land. The Provincial Compulsory Land Taking Act authorised the provincial councils to take any land for public works and validated any earlier provincial Acts and Ordinances which had authorised the taking of land. Section 3 of the Act allowed the ‘compulsory purchase of any land for any work or undertaking of a public nature’, subject to payment of compensation as provided by the Lands Clauses Consolidation Act 1863.

In moving the second reading of this Bill, Whitaker said it was intended to authorise provincial councils under certain circumstances to take land for public works. He was in no doubt that provincial councils already had that power but doubts had been raised and it was considered desirable to pass a law to enable them to take land.¹⁵ In later debate, supporters of the Bill referred to the necessity of local authorities such as Highways Boards having power to take native as well as other lands in their districts to make roads, and felt it was a ‘benefit’ of the rebellion that natives and their lands would be subject to English law in future. However, Fitzgerald reminded members that it was contrary at the time ‘to the whole spirit of the law of England for any Act to pass for the general taking of private land’. Instead, with due notice, Acts could be passed that took particular land if this was desirable, and therefore the Act ‘was repugnant to the spirit of English law’. Fox, in reply, took issue with this. He believed that there were a large class of Acts in England, ‘for drainage and other purposes’, dealing with lands generally and not specifying particular lands. He had no doubt of the legality of the present Act and he felt that the Lands Clauses Consolidation Act provided proper safeguards.¹⁶

However, even the Colonial Office in its retreat from the management of native affairs could not tolerate these measures. The Provincial Compulsory Land Taking Act was disallowed because it applied to native land over which customary title had not been extinguished. The Colonial Office, although relinquishing general management of Maori affairs, still insisted that taking powers over Maori land should be restricted to the General Assembly, and not be extended to local governments. Cardwell wrote to Grey that the Act was open to grave policy objection. The Home Government still felt it had the right under the present circumstances to require that laws ‘so seriously’ affecting the relationship between the races should be enacted on the responsibility and authority not of a local council, who can only represent local interests, but of the General Assembly, whose decisions are adopted with reference to the interests of the whole colony and were brought under the cognizance of the Home Government. However, if native lands were excluded from the Act it would not be considered objectionable.¹⁷

By this time, provincial councils were beginning to make use of the right to take roads through Crown-granted Maori land, even if they were still excluded from

15. 12 November 1863, NZPD, 1863

16. 18 November 1863, NZPD, 1863, p 897

17. Dispatch from Cardwell to Grey, 26 May 1864, BPP, vol 13, p 560

authority over customary land. In 1863 the Taranaki provincial Omata Road Ordinance empowered the superintendent to construct the Omata Road and provided for compensation. The schedule attached to the Act described the road crossing through Native Reserve no 1. The Canterbury Great Northern Railway Act 1864 also listed in the schedule of lands the superintendent was empowered to take and construct a railway upon, the Kaiapoi Native Reserve. The General Assembly also acted on the apparent willingness of the Colonial Office to agree to the General Assembly having taking powers over customary land so long as these had legislative authority. In 1864 the Public Works Lands Act was passed. This Act provided the first specific legislative authority for central government to take Maori land, whether customary or Crown granted, for public works purposes. Section 2 named the ‘public works’ considered necessary for pacification – ‘roads bridges and ferries’. This section also stated that the term ‘lands’ in the Act included all lands whether held ‘by Native or other owners’ and by any form of title. Ostensibly the wording of the Act referred to all land, not just Maori land. However, the Lands Clauses Consolidation Act 1863 and special Acts already covered non-Maori land takings. It seems clear that the 1864 Act was really aimed at Maori, as part of the Government’s wartime measures, and ministers were quite open about this.

The preamble to the Act clearly revealed the motives behind it. The taking authority was necessary for ‘the civilization of certain parts of the Colony’. It was clear that public works takings were to be a central part of the policy of ‘civilization’. It was also clear what was ‘civilized’ and what was not. Compensation for those having land taken where title was derived from Crown grant were to have compensation determined under the provisions of the Lands Clauses Consolidation Act 1863, with all its protections. For those holding lands where native title had not been extinguished, for example customary Maori land, compensation was to be determined under the provisions of the wartime confiscatory legislation, the New Zealand Settlements Act 1863. Those deemed ‘rebel’ under that Act would therefore be ineligible for any compensation at all. As a result, for Maori customary land there was very little difference in practice between punitive confiscations and compulsory taking for public works. This was especially true as ‘public works’ at this time were of a military nature, such as military roads and telegraph lines, obviously intended to help crush Maori resistance.

In addition, the Act contained very few protections for land takings that might have been expected in an Act supposedly based on English public works principles. Section 3 said that the Governor could simply define a public work by Order in Council, and after such publication could ‘compulsorily take and permanently hold’ all such lands as may be necessary for the construction of the work, and could enter upon lands, occupy them, and, in section 4, temporarily use them ‘without giving any notice or making any application to any person owning such lands’. This applied to all Maori lands whether customary or held by Crown grant. Section 6 stated that all public works and the land under them became Crown lands. There were no protections for lands in use or occupation, or for wahi tapu, and there was no pre-emption right for the return of surplus lands. Specific projects did not need parliamentary approval, in fact Maori had no voice in Parliament at all even though

the Act was clearly aimed at their land. There was also none of the other protections such as a time limit on takings. Virtually all the standard protections of the time were excluded, even of compensation, given the nature of the land the ministers obviously intended to take. Significantly, there was also no provision for purchase by agreement, already a traditional provision in general public works legislation such as the Lands Clauses Consolidation Acts.

The debates in the House clearly revealed the motives of ministers.¹⁸ Weld, in sponsoring the Bill, described it as a necessary means of establishing civilization:

history and experience showed that the civilization of a barbarous country mainly depended on road making, and that was the first means by which they could penetrate into the wildest country, and open it up to the influences of civilization. The Government ought to have the right to take roads through the country by buying the land . . . from friends, whether European or Natives; and . . . if they should be opposed, they should now use force to repel force.

There was also severe criticism of the Bill however, particularly because it flew so much in the face of established legal principles, let alone the guarantees in the Treaty. In debate, critics claimed the Bill was repugnant to the law of England because it gave taking powers over private property without giving individuals an opportunity to appear before Parliament to state their objections to the confiscation of their property. It was also claimed that as the Act was essentially an ‘emergency Act’ it should have similar time limits to the New Zealand Settlements Act. Mr G Graham opposed the Bill because it would infringe the Treaty of Waitangi. He also reminded members that Maori had wahi tapu sites such as graveyards and it would be ‘manifestly unjust’ to make roads through this type of land.

Majority opinion, however, supported the Bill. It was claimed that any such rights were of little importance compared to ‘great public works’. Mr Jollie urged that when the necessities of state required, they had to dispense with those ‘nice formalities’ which might be requisite in dealing with a ‘more civilized nation than they had at present to deal with’. Weld also rejected concerns about the Treaty or wahi tapu. The Treaty gave sovereign rights to take land and ‘even of taking a road through a graveyard’. He claimed this was even done in England, ‘although certainly objectionable when it could be avoided’.

In their memo describing the Act for the Governor, ministers declared that it involved an important matter of principle. It had been questioned whether the Government had the right to carry roads through native lands, or to take such lands for public purposes. The Act established this principle. The same practical rule was to apply to native lands as to those of Europeans, namely, that land may be taken for such purposes, the owners receiving compensation. The court established under the New Zealand Settlements Act (which for the purposes of this Act would be continued in operation notwithstanding the Act itself might expire) would give the ‘most convenient tribunal’ for assessing compensation. In the case of land taken from rebels, no compensation would be paid. The recent Native Lands Act 1862 had placed native ownership rights on a footing established by law, and the native owner

18. NZPD, 1864–1866, p 154

would now be able ‘to sell and dispose of his land’ like an ordinary proprietor. That being so, ‘it is just and necessary that he should be placed in other respects on the footing of ordinary proprietors’ and that his land should be subject to the ‘ordinary legal liabilities’; a primary one being ‘that the State may take what land it requires for roads, or other like purposes of a public nature, making compensation to the owners’. The ministers seemed unconcerned however that Maori were not being given the balancing protections of ‘ordinary proprietors’. This was passed off with the excuse that from the ‘intermixed state of Native titles, it would be impossible to apply the ordinary rules of notices etc’.¹⁹ The ministers also seemed unconcerned that the same difficulties in providing notice might also have applied in paying compensation, assuming any owners qualified for this.

In 1865 the Electric Telegraph Act provided further powers of compulsory entry and taking of land as required for the purposes of establishing an electric telegraph network, another vital part of the war effort. Compensation was to be in terms of the Lands Clauses Consolidation Act 1863. The mid-1860s also saw the establishment of the Native Land Court under the Native Lands Act 1865. While this was designed to facilitate the purchase of Maori land, the history of the court and its legislative provisions are often closely linked to public taking provisions concerning Maori land. This will be explained further in later chapters, but for the present it is enough to note the verdict of historians that the court began a process of alienation of Maori land that was in the end far more effective and far reaching than the punitive confiscations following the wars. For example, Alan Ward has described the court as establishing a system that exposed Maori to a predatory horde of storekeepers, grog sellers, surveyors, lawyers, land agents, and money lenders. The laws of succession established by the court resulted in enormous problems for Maori in the land they managed to retain, particularly in the fragmentation of ownership into vast numbers of tiny uneconomic shares, that made any economic use of the land almost impossible. This process was also to have considerable impact on the way future procedures for the taking of Maori land for public purposes developed.

The final major legislative push of the 1860s concerning land taking for public purposes was the continued attempts by the General Assembly to enable provincial governments to pass their own laws to take land. Attempts were made to pass similar Provincial Compulsory Land Taking Acts in 1864 and 1865, but this time native lands were exempt, to satisfy the Colonial Office. In debate in 1864 Whitaker declared that he still believed provincial councils should have the same powers of taking lands as the General Assembly. Even apart from Maori land, however, reservations were still expressed about the Bill and whether provincial councils subject to local pressures should be entrusted with taking powers for any private land.²⁰ The legislation was revived again in 1866. Native lands were still exempt, much to the displeasure of members and it was suggested that by then as they were sending away Imperial troops they would have more independence in legislation.²¹

19. Memo by Ministers on Public Works Land, AJHR, 1865, A-2, p 1, Act 1864

20. NZPD, 1864, pp 62–65

21. NZPD, 1866, p 780

However, Imperial troops were to stay for much longer and the Provincial Compulsory Land Taking Act passed in 1866 still exempted customary Maori land. Section 2 of this Act allowed provincial governments to pass laws or ordinances authorising the compulsory taking of land for public works as long as they conformed with the provisions of the Lands Clauses Consolidation Act 1863. However, native land over which title was unextinguished was exempt under section 6. Maori land held by Crown grant and Maori reserves were, however, covered by the Act.

An example of provincial legislation passed subsequently was the Wellington Province District Highways Act 1867. Following the lead of the General Assembly, this too, under section 17, continued to exempt land set apart for aboriginal natives unoccupied or in their occupation.

In summary, by the mid-1860s, central government had the legislative power to take all Maori land for public works purposes, whether customary or where title was derived from Crown grant. The power was contained in wartime legislation, the Public Works Lands Act 1864, that contained few of the protections that might have been expected in traditional public works legislation, and that were in fact available at the same time for non-Maori land.

The land-taking provisions for all Maori land were clearly discriminatory when compared with the protections for taking other land in general legislation, such as the Land Clauses Consolidation Act. The reasons given, that the ‘intermixed’ state of native titles made giving the protections too difficult, is a particularly poor one. Past experience had shown that it was possible to negotiate successfully with Maori leaders. It was the settler insistence on dealing at an individual level that caused the difficulties. Ministers were also admitting that administrative convenience was being put before Treaty and ordinary legal rights. It is also difficult to believe that the heat of war and the belief in the inherent superiority of British title had nothing to do with this. Ministers also seemed unconcerned that the same difficulties in giving notice might stand in the way of giving proper compensation. It was clear however that if traditional protections were ‘too difficult’ to apply, the answer was they would be dropped; there would be no attempt to make modifications that might meet Maori interests. The ‘state of Native title’ was to become a perennial excuse for failing to provide adequate protections for Maori land well into the next century. In terms of compensation, Crown-granted Maori land was to be treated the same as other land. However, customary Maori land was brought under the harsh compensation provisions of the confiscatory New Zealand Settlements Act.

By the 1860s, the power of provincial governments to take Crown-granted Maori land for public purposes was confirmed and provincial governments had begun to use this power. However, in spite of the efforts of colonial politicians, provincial governments still did not have legislative authority over customary Maori land.

It is clear that politicians regarded public works as an essential part of war strategy as a means to civilise and pacify Maori. Public works were clearly to be used for settler interests, regardless of Maori rights and concerns. Even administrative convenience was sufficient reason to deny Maori even ordinary legal, let alone Treaty, rights. It was also clear by this time that Maori were regarded as a ‘barbarous’ race, clearly inferior to Europeans, and therefore undeserving of

civilised ‘niceties’. In the area of public works land takings, Treaty guarantees of equality, respect for rangatiratanga, and protections for land, had been replaced by discriminatory legislative provisions that punished rather than protected Maori land, especially that held by customary traditional title.

Although settler politicians frequently spoke of the superiority of English justice and the benefits of English legal traditions, they showed these could be disregarded or perverted to suit their own interests. It was an essential principle of English law concerning public works land takings that takings had to be subject to parliamentary scrutiny. In English terms this meant that land takings were scrutinised by a forum of landowners. This was especially hollow in New Zealand, where Maori were still excluded from Parliament when important legislation was enacted concerning the taking of Maori land. It was not until 1867 that four Maori seats were eventually established. However, as Ward has pointed out, this was done largely to balance out increased West Coast mining representation and was not expected to be a really democratic exercise. On a population basis, even then Maori should have been given more seats, as they made up almost 50 percent of population. According to Ward, Maori members were sometimes appointed to the Executive or Legislative Council when their political support was required by ministries with precarious majorities, but they were only expected to advise when called upon. It was considered ‘absurd that they should enter into a Cabinet and take part in the administration of the ordinary affairs of the Colony’.²²

In pursuit of the wars, settler politicians also showed themselves willing to rely on measures such as wartime proclamations rather than legislative authority; and when legislation was passed it was often to give extraordinary powers well in excess of ordinary English legal principles. For example, the preamble to the Suppression of Rebellion Act declared that ‘the ordinary course of the law is wholly inadequate for the suppression of the said rebellion’, and the Act itself went on to remove or suspend basic rights such as habeas corpus. Ward described the 1864 legislation in the following manner, ‘As was often the case, the great argument used to justify British imperialism – that it introduced the rule of law – was brought into disrepute by the prostitution of that law to the interests of the colonising race’.²³

The lack of respect for established legal traditions appalled even some settler politicians, as well as those traditionally more sympathetic to Maori. Even allowing for some of the histrionics expected of opposition members, criticism on these grounds was especially trenchant. For example, Henry Sewell, who had supported the Crown right to take Maori land for public purposes, was appalled by the provisions of the Suppression of Rebellion Bill, which he described as ‘an eternal disgrace to the colony’. The proposed law was a subversion of all law – ‘it was intended to legalize beforehand whatever might be done, no matter how barbarous or atrocious . . .’, and he accused the Minister of digging precedent for the measure out of the ‘charnel-house of Irish history’.²⁴

22. Alan Ward, *A Show of Justice: Racial Amalgamation in Nineteenth Century New Zealand*, Auckland, Oxford University Press, 1973, pp 209, 270

23. *Ibid*, p 169

24. NZPD, 1863, pp 859–861

The New Zealand Settlements Bill was similarly criticised for authorising the taking of land from Maori who were not in rebellion but who were living quietly and in peace, and of confiscating more land than was necessary for military settlements, in order to profit from its sale. Dr Pollen criticised the Bill as being ‘politically immoral’ and financially ‘utterly delusive and unsound’. He also declared that the measure was an abrogation of the Treaty of Waitangi and of the good faith of the Government. Another member warned that the only way to achieve lasting peace was to secure the confidence of the natives and not to enforce their submission by such stringent measures.²⁵

However, the various measures prevailed and were summed up by Fox in his defence of confiscation. Simply put, the needs of settlers outweighed the rights of Maori. In 1864 he wrote that the ministers believed ‘that nothing has been or can be more pernicious to the native race than the possession of large territories under tribal title, which they neither use, know how to use, or can be induced to use’.²⁶ In a further memo he wrote:

if we are to hold the Northern Island of New Zealand as a British possession, if its colonization is to go on, if the Maori race itself is not to be gradually exterminated by repeated conflicts with a superior power, the proposal of the Government to take the lands of the rebels as an indemnity for the past, and a material guarantee for the future, must be adopted.

He went on to claim that there was nothing in the proposal contrary to the first principles of justice, or unusual in the history of national conflicts the world over, and it was strictly in conformity with the customs of the Maoris themselves:

Mere technical difficulties (. . . such as . . . the necessity of conferring political franchise, which is alleged to be a condition precedent to the right to enforce submission to the law) however interesting as abstract questions for discussion, cannot be entertained by a government on which the responsibility rests of saving to the British Crown a dependence in imminent peril, and preventing for the future the renewal of a similar crisis.²⁷

The New Zealand colonial experience added another dimension to the English experience of public works takings. However, it was not one of accommodating the rights and concerns of Maori landowners in a colonial version of public takings principles. In England, public works land-taking principles had developed reflecting the balance of power between the Crown and a relatively small group of wealthy politically powerful landowners. There was a sense of neutrality in takings in that the only motive was to create further wealth through the development of public works by which incidentally the whole community received some benefit. The procedures surrounding the taking and payment of compensation were carefully developed to protect the interests of landowners. The result by 1840 at

25. NZPD, 1863, pp 869–873

26. Fox to Governor, 5 May 1864, BPP, vol 13, p 597

27. AJHR, 1864, E-2, p 18

least was a minimal sense of injustice among landowners. In New Zealand, however, public works takings of Maori land originated largely in a war of domination where Maori landowning interests were subordinated to those of settlers. Public works land-taking principles were an instrument of this policy and the ‘public good’ that justified these takings was increasingly seen in terms of settler interests, regardless of Maori concerns and rights.

The history of the extension of compulsory taking principles to Maori land began with warfare and as a result, for Maori, public takings are inextricably linked with the legacy of bitterness and betrayal brought about by war and wartime measures such as land confiscations and imprisonment without trial. As described by Asher and Naulls:

The land confiscations are the single greatest injustice in our history and the worst possible precedent for future government acquisition of Maori land, whether for public works or other activities in the ‘national interest’.²⁸

The result has been that instead of being drawn into a system of cooperating in land taking for the community good, Maori leaders were faced with public takings as an alien imposition begun as part of a confiscatory wartime policy. Principles of law designed to balance private land rights with the common public good were imposed on Maori as an instrument of furthering settler interests. The rejection of any process of consultation and negotiation either through Parliament or direct with Maori leaders further undermined any possibility of drawing Maori leaders into the community and cooperating over public needs. This possibility was rejected in favour of a process of compulsory land taking that paid little heed to Maori needs or interests and too often seemed designed to serve the interests of settlers alone. This began a legacy that has continued to embitter the process of public works takings of Maori land to this day.

28. Asher and Naulls, p 28

