

The Taranaki Report - Kaupapa Tuatahi

CHAPTER 5

CONFISCATION

When I look at a map of Taranaki and trace the confiscation line, it is an arrow piercing the heart of my people.

Peter Moeahu to the Waitangi Tribunal, 1990

On the 13th June 1869 I was taken prisoner and removed to Wellington, where I remained three months before being tried. When my trial came on I waited to see what would be done about the land . . . I was told 'Taurua, you and your people have done wrong in rebelling against the Queen.' I answered 'I have not done wrong, I have not carried arms against the Queen, but against you, and now you say it is done against the Queen.'

Taurua of Pakakohi to the West Coast Commission, 1880

5.1 ISSUES

During 1865, some 1,199,622 acres of Taranaki were confiscated (see fig 9). The Government later claimed to have returned part of the land, but for reasons given later in this report, we do not regard any of it as having been properly returned.

This chapter considers whether the confiscations were consistent with the principles of the Treaty of Waitangi, and if they were not, whether the Treaty could be set aside on account of extraordinary circumstances, whether such circumstances existed, and, if so, whether confiscation was necessary and appropriate.

This chapter also considers whether the confiscations were unlawful; either because they were contrary to constitutional norms or fundamental principles of law or because they failed to satisfy the terms or purposes of the New Zealand Settlements Act 1863.

We review the basis for the legislation, the historical background, the legislation itself, and the confiscatory steps taken, before returning to the questions stated above. We conclude that the confiscations were unlawful, contrary to the Treaty of Waitangi, and prejudicial, because most hapu were deprived of their means of subsistence.

5.2 THE BASIS FOR CONFISCATION

The legal basis for the confiscation of Maori land needs to be established at the outset. This is important; first, because it is doubtful that the purpose in the governing Act

was the true or only purpose and, secondly, because the amount of land taken exceeded that which the Act appears to have contemplated or allowed, which further suggests another purpose was intended.

The Act was the New Zealand Settlements Act 1863, which on its face was not for the confiscation of Maori land but for the maintenance of law, order, and peace. The New Zealand Settlements Act was directed to national security, and the rationale was stated in the statute itself: its purpose was to achieve law and order by establishing 'a sufficient number of settlers able to protect themselves and to preserve the peace'. The taking of land was so coincidental that words like 'confiscation' did not rate a mention. Still, it was apparent on a closer reading that the expropriation of Maori land was involved, that it was being taken for rebellion, and that in most cases there would be no compensation. Accordingly, because the Act was punitive, it was to be strictly construed. To be lawful, a confiscation had to be referable to the Act's purpose of keeping the peace and could not have been more than that which was necessary to keep the peace.

The lawfulness of the confiscations in terms of the Act is to be decided on narrower evidence than that now to be reviewed. A broad examination of the background follows, however, because we must consider not only the legislation but the policies and practices that existed in fact, even if not admitted, where these are relevant to Treaty obligations.

5.3 BACKGROUND

The contemporary debate illustrates how, in the Ministers' minds, the purpose behind the confiscation of land was not limited to that given in the New Zealand Settlements Act. Indeed, had the Act's objectives been upper-most in their minds, the confiscations could only have been more constrained. The debate suggests that Ministers saw the main purpose as the acceleration and financing of colonisation, and during the debate, the confiscation of land was rationalised on several grounds. We will examine the proposals made before the Act was introduced, the debate in the General Assembly, the public debate, the Imperial Government's response, and the subsequent local reaction.

5.3.1 Initial confiscation proposals

The confiscation of land to advance settlement and defray costs was mooted even before the second Taranaki war began in 1863. Governors Browne and Grey both proposed it in 1861. Grey had just returned after a term as Governor of Cape Colony, South Africa, where the military settlement of Xhosa land had been undertaken. In New Zealand, confiscation was soon demanded by the colonial press and pursued by Ministers with what one historian has called 'a greedy enthusiasm'.

On 2 May 1863, even before the Oakura ambush, the Taranaki superintendent wrote: 'It would be rightful to confiscate from the tribes which should fight against us, territories of sufficient value to cover fully all the cost of the war.'

Three days later, the minutes of the agreement between the Governor and his Ministers for the return of Waitara formally proposed that the land between Omata and Tataraimaka be confiscated. At the same time, Te Atiawa were warned that Waitara would be confiscated as well unless they distanced themselves from those responsible for the Oakura attack.

The Domett Ministry gradually expanded the confiscation plans in a series of memoranda later in 1863, all before the Act was introduced. By 24 June, even before the invasion of Waikato, the Ministry was planning a line of defence posts from the Hauraki Gulf along the Waikato River to Ngaruawahia, clearing 'all hostile natives' north of the line, and proposing:

to confiscate the lands of the hostile natives, part of which lands would be given away and settled on military terms to provide for the future security of the districts nearer Auckland, and the remainder sold to defray the expenses of the War.

In a proclamation of 11 July 1863, land confiscation was further threatened if Maori in Waikato resisted the establishment of military posts on their land. In both Taranaki and Waikato, resistance to military invasion was regarded as sufficient cause for confiscating land, and the threat of confiscation was made after military invasions or occupations had begun. Land was also confiscated on the ground in both places before its taking was made legal. Thus, notice of the terms for granting land between Omata and Tataraimaka to military settlers was published on 6 July 1863, and settlement followed soon after, but the land had not been legally confiscated because no enabling legislation was then in place. Similar notices on 3 August offered land in Waikato for additional military settlements.

By the end of August, the Governor and his Ministers had a comprehensive scheme for confiscation and military settlement, which proposed 5000 military settlers on the Waikato and Taranaki frontiers, each holding a 50-acre farm on military tenure. The plan had no legal sanction but there was confidence that the General Assembly would pass the necessary laws.

Then, when Parliament met in October, the Colonial Secretary proposed much more. He submitted a 'Memorandum on Roads and Military Settlements in the Northern Island of New Zealand', which, with its accompanying map, recommended a massive expansion of the confiscation and military settlement schemes. This grandiose plan proposed that the number of military settlers be increased from 5000 to 20,000, to be located in settlements in Taranaki, Waikato, and other parts of the island. These settlements would be linked by 1000 miles of roads, which the settlers would help to construct. The scheme was to be funded initially by a £4 million Imperial loan, which would be repaid by the sale of surplus confiscated land. In Taranaki, there would be 8000 military settlers in about 40 settlements stretching across 200,000 acres from Waitara to Waitotara. Accordingly, when the New Zealand Settlements Bill reached the House, it was well established in members' minds that the purpose and proposals were extremely large - larger, we think, than the Bill provided for. Of course, for lawyers, what counts is what is in the Act, not what is in the mind.

5.3.2 The parliamentary debate

The confiscation legislation, which vitally affected Maori, was enacted by a parliament without Maori parliamentarians, even though Maori comprised about one-third of the population. Article 3 of the Treaty of Waitangi guaranteed to Maori the rights and privileges of British subjects. As such, Maori, or, more particularly at that time, Maori men of property, were entitled to voting rights but were in fact disenfranchised.

When the New Zealand Settlements Bill was introduced into the House of Representatives on 5 November 1863, it attracted little debate. Only two voted against it in the Lower House and two in the Legislative Council. In fact, this major measure passed through both Houses and committees and received the royal assent in under one month. This outcome was predictable, however, for confiscation had already happened. Allotments had already been marked out and allocated to military settlers, and so the Bill was needed partly to validate past actions and contracts already let.

The Bill was introduced to the House by the Native Minister. In his view, its purpose was primarily to suppress the 'present rebellion'; a goal that could be achieved only by establishing a large body of military settlers on the frontiers of the confiscated lands. The Minister admitted that the proclamation of confiscation over a district would have a blanket effect so that the lands of 'Natives [who] have not been in rebellion' could also be confiscated, but he stressed they would be entitled to compensation through a Compensation Court. He made no reference to the Treaty of Waitangi.

Only two other members spoke: J E FitzGerald, who delivered a lengthy attack on the Bill, and G Brodie, who gave a brief speech supporting it. FitzGerald argued that the Bill was:

a repeal . . . of every engagement of every kind whatsoever which has been made by the British Crown with the Natives from the first day when this was a colony of the Crown . . . [and that it was] contrary to the Treaty of Waitangi, which has distinctly guaranteed and pledged the faith of the Crown that the lands of the Natives shall not be taken from them except by the ordinary process of law - that is, taken within the meaning of the Treaty.

FitzGerald thought that taking the land of loyals as well was repugnant to the law of England and that the Bill, if passed, would 'drive every [Maori] . . . into a state of hopeless rebellion . . . be they friends or be they foes'. He reviewed the Waitara purchase and the events leading to the renewal of the war and criticised the occupation of Tataraimaka before agreeing to return Waitara. Finally, he called for a greater understanding of Maori by the Crown and lamented the absence of Maori parliamentarians for the purposes of debate. (There were no Maori representatives in Parliament until 1868.)

As he himself had been a critic of the Waitara purchase, the Native Minister replied in a conciliatory manner, but he claimed that the Government had since been faced with a widespread armed rebellion that had to be suppressed. He offered to amend the Bill to take account of the criticisms if a better way could be devised to separate the land of loyals from that of rebels.

On reporting back from the committee of the House, the Native Minister indicated that, following discussions with FitzGerald, he had introduced amendments to distinguish more clearly between loyalists and rebels. On FitzGerald's suggestion, a new clause was added, 'closely analogous to what was done in the case of the Scottish rebellion', allowing rebels who surrendered by a certain date to submit to trial and thus become eligible for compensation (this clause became section 6). The Bill was passed without further comment or amendment in the Lower House.

There was a fuller discussion in the Legislative Council when the Attorney-General moved the second reading there. He contended that Maori were British subjects and were therefore in rebellion, adding that, when one party violated a treaty, the other side 'was discharged from all obligation; and the Natives had most certainly violated the Treaty of Waitangi'.

The main opposition came from former Attorney-General William Swainson. Swainson, like FitzGerald, was opposed to the measure in principle, not in so far as it was designed to suppress a rebellion but because 'it authorised the Government to take the land of Her Majesty's Native subjects who were not in rebellion'. He appealed to the authority of both the Treaty of Waitangi and the New Zealand Constitution Act 1852 (UK). As to the Treaty, he quoted from article 2 of the English text, adding both that 'the Crown itself, in the face of this treaty, could not, consistently with honour and good faith, seize the land of peaceable Maori subjects without their consent' and that 'it was impossible for anyone to deny that the Bill . . . was inconsistent with the Treaty of Waitangi'. He then contended that the Bill was inconsistent with the New Zealand Constitution Act, which did not give the General Assembly the power 'to make laws for seizing, occupying, and disposing of lands guaranteed to the natives, under treaty, by the Crown'.

Swainson then quoted from the latest dispatch of the Secretary of State for the Colonies. Although the secretary had not opposed the principle of confiscating rebel land, merely urging restraint, he was quoted as saying:

policy, not less than justice, requires that the course of the Government should be regulated with a view to the expectations which the Maoris have been allowed to base on the Treaty of Waitangi, and the apprehensions which they have been led to entertain respecting the observation of that treaty.

Dr Pollen, the other main speaker, accepted the Bill in principle, in so far as it was necessary to confiscate sufficient land for military settlements, but argued that the Government should take 'not one acre more'. In his view, however, the Bill was 'in fact a Bill for the confiscation of the Native lands of the province, that object being veiled by a specious form of words'. Pollen then referred to the Treaty of Waitangi and, noting that he had been present when it was signed at Waitangi on 6 February 1840, claimed that:

He heard Her Majesty's representative arguing, explaining, and promising to the Natives; pledging the faith of the Queen and of the British people to the due observance of it; giving upon the honour of an English gentleman the broadest interpretation of the words in which the treaty was couched . . . The ink was scarcely dry on the treaty before the suspicions . . . were awakened with redoubled force; and .

. . . from that time to this every action of ours affecting the Natives had presented itself to their eyes, and had been capable of that interpretation, as showing that our object and business in this colony was to obtain possession of the lands of the Natives *recti si possimus; si non, quocunque modo* [legally, if possible; if not, by whatever means]. Before we talked of the duties of the Natives to us in this Colony, we ought to be able to show that some of the duties which the Crown undertook to discharge to the Native people had been discharged . . . And now the Assembly were about to legislate in respect to Native lands, to give power to take these lands by force, and to abrogate, as it will appear to them, the Treaty of 1840.

He questioned the profit motive:

The soundness of the financial policy of confiscation might be tested by a very simple calculation, the elements were at hand. We could determine, approximately at least, the cost of the work of extermination: We might be said to have been at war for three years; we had spent - including the Imperial charges - perhaps £5,000,000 during that period; we had killed a hundred and fifty or two hundred Natives. How much, at that rate, would it cost to kill ten thousand? This policy of confiscation was immoral, and could not be made profitable financially.

Pollen predicted that confiscation and military settlement would lead to a war of extermination. R Stokes, another critic of the Bill, agreed.

The Attorney-General replied that three-quarters of the Maori land in the country was held by conquest, which was accepted in Maori custom. When there was a division over the Bill, however, Pollen and Stokes voted for it and only Swainson and Henry Sewell (who had not spoken) voted against it.

5.3.3 The public debate

Outside the General Assembly, the prospect of cheap land and the repayment of war loans from Maori land had much appeal. Confiscation was promoted by the press and the populace; especially those with pecuniary interests through their legal, real estate, or financial businesses.

None the less, there were others outside the Assembly who were opposed to confiscation. In particular, retired chief justice Sir William Martin wrote vigorously on the topic. He noted, prophetically:

The example of Ireland may satisfy us how little is to be effected towards the quieting of a country by the confiscation of private land; how the claim of the dispossessed owner is remembered from generation to generation, and how the brooding sense of wrong breaks out from time to time in fresh disturbance and crime.

From Britain, the Aborigines Protection Society protested:

We can conceive of no surer means of adding fuel to the flame of War; of extending the area of disaffection; and of making the Natives fight with the madness of despair, than a policy of confiscation. It could not fail to produce in New Zealand the same bitter fruits of which it has yielded so plentiful a harvest in other countries, where the

strife of races has perpetuated through successive generations; and that, too with a relentlessness and a cruelty which have made mankind blush for their species.

5.3.4 Aspects of the debate

Other aspects of the debate describe the attitudes of the day. It was a strongly held view, for example, that Maori should be relieved of the burden of their lands that they might adjust to 'civilisation' and learn to labour for a living. It was said:

Ministers believe that nothing has been or can be more pernicious to the native race than the possession of large territories under tribal titles which they neither use, know how to use, nor can be induced to use . . . [The possession of such land] has, in the opinion of the Ministers, been the principal cause of the slow progress and in some respects (particularly in their physical condition) of the actual retrogression and decay of the race.

Related to this popular view was the belief that the civilising advantages to be gained by relieving Maori of their land could be enforced by war, if need be. In his memorandum on roads and military settlements, which was referred to earlier (see sec 5.3.1), the Colonial Secretary demanded:

Power first - as the only thing that commands the respect of these undisciplined men; after it the humanising institutions; after it, every wise and mild contrivance to elevate and improve them. This is the natural order of things. Until you get rid of the rank growths of savagery, how can you rear the plants of civilization? The axe and the fire are wanted before the plough and the seed-corn. Cut down the towering notions of savage independence so long nurtured by Maoris . . . root up their ill-concealed passion for lawless self-indulgence. Then you will have clear space and a free soil for the culture of the gentle and more useful products of the heart and the intellect.

Although a right to the land by conquest was not generally advocated because the Bill was presented as the harbinger of peace, the opinion was still propagated that confiscation following conquest was usual in Maori law. It was said:

In their wars a conquered tribe not only forfeited its lands, but the vanquished survivors were reduced to a tributary position, and large numbers to personal slavery. The Government of New Zealand has always recognised such a title as valid.

The colonial image of a lawless Maori society where only might was right was maintained by the Native Land Court; but in our view the image was wrong. The Maori saying that land was kept by the strength of one's arm did not mean that might alone applied. Maori law, no less than that of others, required good cause, or tikanga - a proper line of action - to support war. Exceptional cases, as happened in all societies, did not disprove this rule.

Punishment for offences was not, however, claimed as a ground for confiscation. This was possibly because the first wrong, at Waitara, had been committed by the Governor, as the Government had acknowledged. It may also have been because trials and proof of wrongdoing would have been required and would not have enabled large

and rapid acquisitions. It would also have raised the need to punish the person, not take the land.

In contrast, Taranaki Maori saw the confiscation purely in punitive terms as a *murū*, or punishment for wrong, even though no wrongdoing was admitted. Taurua later stated the position in those terms. Following his release from prison in Dunedin, he found his lands had also been taken. With regard to his trial, he said, 'the blame was put onto me and not on the land . . . My body was punished for my offences.'

5.3.5 The Colonial Office position

The Governor's power to give the royal assent to a Bill was conferred by section 56 of the New Zealand Constitution Act 1852, which also gave the alternative of reserving the Bill for the signification of the Queen's pleasure - in effect, for the approval of the United Kingdom Government. Despite some claims in the New Zealand debate that the Bill was repugnant to the laws of England, the Governor assented to the Bill on 3 December 1863. The Queen was still empowered to disallow the Act, however, provided this was done within two years from the date on which the Secretary of State for the Colonies received an official copy.

The Governor sent a copy of the Act to the Secretary of State, the Duke of Newcastle, on 6 January 1864, claiming he had agreed reluctantly with the principle. It was, however, unlikely that the secretary would disallow the measure. Britain had borne most of the cost of the war and the Bill would shift the burden to 'rebel' Maori. In addition, approval in principle had previously been given on receipt of the Governor's advice as to the number of hostile Maori in arms and his undertaking that, 'acting upon the principle of the great wisdom of showing a large generosity towards defeated rebel subjects, I would not carry the system too far'.

The Governor's dispatch was eventually answered by Edward Cardwell, who succeeded the Duke of Newcastle as Secretary of State. He was alarmed that the scheme exhibited 'a rapid expansion of the principles in which the Duke of Newcastle acquiesced with so much reserve' and noted the settlers and affected land had quadrupled since notice of confiscation was first given in August 1863. He observed the difficulty of applying 'the maxims of English law' to Maori, who occupied, in his view:

an anomalous position . . . as having acknowledged the Queen's sovereignty, and thus become liable to the obligations and entitled to the rights of British subjects, and on the other hand as having been allowed to retain their tribal organisation and native usages, and thus occupying in a great measure, the position of independent communities. Viewed in the former capacity, they have, by levying war against the Queen, rendered themselves punishable by death and confiscation of property. These penalties, however, can only be inflicted according to the rules and under the protection of the criminal law. Viewed in the latter capacity, they would be at the mercy of their conquerors.

He listed several objections: the Act was a permanent measure; it could be applied to Maori in any part of the island; it allowed unlimited confiscation; some could be dispossessed without having been engaged in rebellion; decisions could be made in

secret without argument or appeal; the provision for compensation was 'as rigidly confined as the provision for punishment [was] flexible and unlimited'; and, generally, the powers, being permanently embodied in the law, formed 'a standing qualification of the Treaty of Waitangi'.

In the end, however, the secretary concluded 'the rights of the Maori insurgents must be dealt with by methods not described in any law book, but arising out of exceptional circumstances of a most anomalous case'. Like his predecessor, Cardwell accepted the necessity of confiscation and cautioned against harsh and excessive application, but he recognised:

the necessity of inflicting a salutary penalty upon the authors of a war which was commenced by a treacherous and sanguinary outrage, and attended by so many circumstances justly entailing upon the guilty portion of the Natives measures of condign punishment.

Thus, obviously influenced by the Governor's description of events, the Secretary of State was prepared to leave the responsibility for implementing the Act with the Governor and his local advisers:

Considering that the defence of the Colony is at present effected by an Imperial force, I should perhaps have been justified in recommending the disallowance of an Act couched in such sweeping terms, capable therefore of great abuse, unless its practical operation were restrained by a strong and resolute hand, and calculated, if abused, to frustrate its own objects, and to prolong, instead of terminate war. But not having received from you any expression of your disapproval, and being most unwilling to take any course of action which would weaken your hands in the moment of your military success, Her Majesty's Government have decided that the Act shall for the present remain in operation.

None the less, the secretary proposed modifications. He asked that the Governor seek a cession of land from defeated tribes as a condition of clemency, that he apply the Act only if that failed, and that the Act be limited to 'perhaps' two years:

a period long enough to allow the necessary inquiries respecting the extent, situation, and justice of the forfeiture, yet short enough to relieve the conquered party from any protracted suspense, and to assure those who have adhered to us there is no intention of suspending in their case the ordinary principles of the law.

The secretary recommended the establishment of an independent commission to determine what lands might be forfeited, and he cautioned that the Governor's concurrence in any confiscation should not be 'a mere ministerial act' and should be withheld unless he, personally, was satisfied that it was 'just and moderate'. He added:

And here I must observe that if in the settlement of the forfeited districts all land which is capable of remunerative cultivation should be assigned to Colonists, and the original power, the Maori, be driven back to the forest and morass, the sense of injustice, combined with the pressure of want, would convert the native population into a desperate banditti, taking refuge in the solitudes of the interior from the pursuit of the police or military, and descending, when opportunity might occur, into the

cultivated plain to destroy the peaceful fruits of industry. I rely on your wisdom and justice to avert a danger so serious in its bearing on the interests of the European not less than of the Native race.

He finally noted that, because the power to pass such a measure had been questioned in New Zealand, the Act, along with the Suppression of Rebellion Act 1863, had been submitted to the law officers of the Crown, whose reply had still to be received. Their advice, given subsequently, was to the effect that the legislation was within the power of the New Zealand General Assembly to pass and was not repugnant to the laws of England.

5.3.6 The Governor's response

More than a year elapsed between the enactment of the New Zealand Settlements Act and its implementation. The Governor, at odds with his Ministers, declined to issue the necessary confiscatory proclamations. The problem appears to have been related both to the enthusiasm of certain Ministers to expand the confiscations as much as possible (some had businesses likely to profit from augmented real estate activity) and to the Governor's anxiety to maintain control. The issue was complicated by plans to pardon those who surrendered. In September 1864, the Governor offered his Ministers a draft proclamation promising a pardon to rebels who swore allegiance and ceded such territory as the Governor (but not the Ministers) required. The Ministers refused to agree unless they could dictate the terms and, in particular, the amount of land to be given up. At the end of September, the Ministers resigned.

Subsequent action suggests the Governor's aim had been to assert power over his Ministers, not limit the confiscations. Following the resignations, and working with a new Ministry, the Governor was to confiscate all that the previous Ministers had sought.

5.3.7 Confiscation on the ground

The delay in implementing the Act need not have concerned the Governor, for with or without legal sanction, the land was in fact being taken.

As mentioned earlier, Oakura was occupied even before the Act was passed. In other places, not only were lands occupied before they were formally taken but the hapu concerned were not actually at war. This was the case at Tikorangi, north of Waitara, where a blockade and settlement were made on Ngati Rahiri land, even though Ngati Rahiri had been the Government's allies in arms. Encouraged to move elsewhere, Ngati Rahiri returned to find their lands swamped with settler homes and farms. Despite repeated protests, their lands were never returned to them.

The Pukearuhe redoubt and settlement were laid out at a strategic extremity some 30 kilometres to the north to guard against a possible Waikato invasion. At no stage, however, had the war ever extended that far, and there was (and still is) no evidence that the local Ngati Tama had been involved in any part of the war.

As General Cameron's campaign proceeded north from Whanganui to clear the southern district, settlers were offered land there. Again, the settlement offers date from a time before a formal confiscation was made.

5.4 CONFISCATION LAW

As discussed, the primary instrument for the confiscation of Taranaki land was the New Zealand Settlements Act 1863 and its amendments, which were passed annually from 1864 to 1867 (collectively called 'the Act'). (The New Zealand Settlements Act is reproduced in appendix II.) Beguiling for the innocence of its name, in its terms the Act dealt with national security, not confiscation, the word 'confiscation' nowhere appearing in it. The Act's primary purpose was to protect persons, prevent rebellion, and maintain law and order by placing on the land a sufficient number of settlers, generally on military contracts, who were able to protect themselves and keep the peace. The land would be taken from Maori, but those affected who had not been involved in the war would be able to claim compensation.

The state of affairs, as the Legislature saw it, and the objectives of achieving law, order, and peace through settler occupation were set out in the preamble as follows:

Whereas the Northern Island of the Colony of New Zealand has from time to time been subject to insurrections amongst the evil-disposed persons of the Native race to the great injury alarm and intimidation of Her Majesty's peaceable subjects of both races and involving great losses of life and expenditure of money in their suppression And Whereas many outrages upon lives and property have recently been committed and such outrages are still threatened and of almost daily occurrence And Whereas a large number of the Inhabitants of several districts of the Colony have entered into combinations and taken up arms with the object of attempting the extermination or expulsion of the European settlers and are now engaged in open rebellion against Her Majesty's authority And Whereas it is necessary that some adequate provision should be made for the permanent protection and security of the well-disposed Inhabitants of both races for the prevention of future insurrection or rebellion and for the establishment and maintenance of Her Majesty's authority and of Law and Order throughout the Colony And Whereas the best and most effectual means of attaining those ends would be by the introduction of a sufficient number of settlers able to protect themselves and to preserve the peace of the Country:

Be it therefore enacted by the General Assembly of New Zealand . . .

The Act's main features are given below.

- (a) The Act declared the existence of insurrection and rebellion. Accordingly, rebellion was not judicially determined to exist but legislatively declared so that it came to exist in law, irrespective of the position in fact.
- (b) The Act referred to retrospective acts of rebellion, but these dated only from 1 January 1863. That Maori were not responsible for the first war was thus acknowledged.
- (c) The Act gave its purpose as the placing of settlers on the land for the maintenance of peace. Accordingly, by law, the motive was 'peace', not 'land

grab' or profit, notwithstanding any true intentions. The corollary, however, was that confiscation was required to be limited to only that necessary for the maintenance of peace.

- (d) The Act provided for a four-stage process:
 - (i) To declare, before 4 December 1867, districts where land could be taken on account of rebellions. The declaration was to be effected by executive discretion without the need for an independent inquiry. More particularly, the Governor, once satisfied that 'any Native Tribe or Section of a Tribe or any considerable number thereof' had been 'engaged in rebellion against Her Majesty's authority' since 1 January 1863, could declare their land a district under the Act.
 - (ii) To set apart 'eligible sites for settlement' within those districts and to lay out town and farm allotments thereon; first, to offset military contracts and, secondly, to sell the remainder profitably.
 - (iii) To reserve or take any land within such districts for the purposes of those settlements.
 - (iv) To compensate, with cash or land awards, those whose lands had been taken and who were entitled to compensation on account of their loyalty, such compensation to be determined by the Compensation Court.

More particularly, compensation was not to be given to those who, inter alia, had taken up arms against the Crown; assisted, comforted, or counselled those in arms; or declined to deliver up arms or submit to trial when so required by proclamation. Effectively, those who had taken up arms and the like were rebels.

It was later added that persons so excluded from compensation remained excluded, despite a proclamation of 2 September 1865 that declared that those who surrendered would become entitled to a piece of land.

The Confiscated Lands Act 1867 provided some relief, enabling the Governor at his discretion:

- (a) to award lands to those omitted from compensation awards or to increase such awards as had been made;
- (b) to award reserves to friendly Maori (which included Maori from elsewhere fighting alongside the Governor); and
- (c) to make reserves for rebels who surrendered.

At this point, we will explain our use of terms. We use 'loyal' as a diminutive for 'loyalist', which was more usually deployed at the time, in order to keep part of the contemporary language but without accepting that 'faithful in allegiance to the sovereign' was necessarily implied. 'Loyal' encompassed both those who did not take up arms and those who fought with the Crown, but care must be taken with the term. It appears many of the Governor's Maori allies were loyal, true, or faithful, not to the Governor but to themselves, seeking to settle old scores or, simply, to protect their own lands. Maori used the word 'kupapa', which to the Governor meant 'friendly' or 'ally' but to Maori meant 'neutral' - those concerned to avoid the debate of others and simply look after themselves.

It has next to be observed that the Act was but one of several relevant to the wars and confiscations (see app II). These others affirm, qualify, or expand on the New Zealand Settlements Act or indicate the Government's mind-set at the time:

- (a) The Militia Act 1858 enabled the Governor to raise an army and define militia districts for the control of rebellion. It predicated that rebellion existed or was likely.
- (b) The Native Lands Act 1862, to individualise Maori titles, was enacted during the Waitara truce. While it was promoted as an Act to settle the question of who owned land before it was bought, it was still provocative at the time because it also predetermined an issue on the Waitara sale that was meant to be investigated in terms of the truce. The Act made two large assumptions, both crucial issues in the war: namely, that the Government could decide all matters relating to rights in Maori land and that the tribal basis for managing land should disappear. The Act was replaced by the Native Lands Act 1865, which strengthened the land reform provisions.
- (c) The Suppression of Rebellion Act 1863 assumed a state of rebellion existed and envisaged the suspension of habeus corpus and the introduction of martial law. This enabled military courts to hold trials and pass death sentences and sentences of penal servitude.
- (d) The New Zealand Loan Act 1863 facilitated a £3 million loan to pay for colonisation costs and the war. The intention that the loan be redeemed from the sale of confiscated land, and the use of the loan for colonisation costs, made it likely, as proved to be the case, that Maori land would be confiscated for financial purposes, not merely to keep the peace.
- (e) The New Zealand Loan Appropriation Act 1863 apportioned the loan to competing provinces to pay local development costs. Again, the provinces understood the loan would be repaid by the sale of confiscated land.
- (f) The Public Works Act 1864 was the first Act to allow Maori land to be taken for public works. When it was passed, Ministers had most in mind the construction of a road from Whanganui to New Plymouth. Compensation was not to be given to 'rebels'.
- (g) The Native Rights Act 1865 made it clear that Maori and their property were subject to the ordinary jurisdiction of the courts. This Act did not confer rights but ensured that Maori matters would be determined by the courts. It took from Maori the right to determine certain domestic matters themselves.
- (h) The Native Lands Act 1865 reformed the Native Lands Act 1862 and aimed to individualise native titles through the Native Land Court. It effected a major confiscation of tribal rights and facilitated the acquisition of Maori land.
- (i) The Outlying Districts Police Act 1865 enabled more land to be forfeited when chiefs failed to surrender fugitives. A proposal to use this Act to take a further 200,000 acres at Taranaki does not appear to have eventuated.
- (j) The Friendly Natives Confirmation Act 1866 validated land awards of uncertain legality arising from out-of-court settlements of compensation claims and indicated that failure to adhere to the New Zealand Settlements Act process would not be fatal.

Each of these Acts was either wholly or partly inconsistent with the principles of the Treaty of Waitangi because it promoted land confiscation or abrogated tribal or civil rights. They indicate as well the contemporary mind-set. It should especially be noted that, though the New Zealand Settlements Act provided that confiscation was to be used only for the purpose of keeping the peace, the Loan Act and Loan Appropriation Act assumed confiscation would also be used to pay for the costs of colonisation.

5.5 CONFISCATORY STEPS

It is necessary to note the steps taken to confiscate Taranaki land, because those steps did not follow the Act. The result of this was that more land was taken than the law allowed. The steps were:

- (a) By proclamation on 26 October 1864, made pursuant to section 6 of the New Zealand Settlements Act (by which the Governor could call on Maori to lay down their arms or be excluded from compensation), the Governor notified an intention to pardon all who 'came in' before 10 December 1864, took the oath of allegiance, and ceded such territory as he might require. This gave effect to the recommendation of the Secretary of State, but given the circumstances of the Taranaki war at that time, a surrender was most unlikely anywhere in the area.
- (b) By proclamation on 17 December 1864, soon after the pardon period, the intention was notified:
 - (i) to assume and retain such lands of rebels as the Governor might decide.
 - (ii) to make roads over Maori land (compensation would be paid to those who consented and those who obstructed would suffer 'forcible repression'); and
 - (iii) to assure 'the full benefit of their lands' to those who 'continued' in 'peace and friendship with the Governor'.
 - Like the previous proclamation, this seems to have been a case of play-acting. It did not purport to do anything and was at best a notice of intention.
- (c) By proclamation on 30 January 1865, the Governor declared the middle Taranaki district to be a district where Maori were or had been in rebellion since 1 January 1863 and within which eligible sites for settlement might be taken. This district, from the Waitara River in the north to the Waimate Stream in the south, is depicted in figure 9. It included parts of central Taranaki that were well outside the theatre of the war, and as a result, the proclamation was questionable.
- (d) Two other proclamations on 30 January 1865 then set aside the lands designated as Oakura and Waitara South as eligible sites, being discrete areas within the middle Taranaki confiscation district (see fig 10).
- (e) By notice on 5 April 1865, the Colonial Secretary required those seeking compensation in the middle Taranaki district to file claims with him within three months (the forms were to be obtained from the Native Land Court in Auckland or from any resident magistrate or native assessor).
- (f) Then, and this is the main 'offending' action, by proclamation on 2 September 1865, the Governor:

- (i) Expanded the confiscation area enormously, prescribing the Ngati Awa and Ngati Ruanui districts, as shown in figure 9, and including huge areas that had little or nothing to do with the war, making all but the Taranaki hinterland liable for confiscation.
- (ii) Set aside the lands then designated as Ngati Awa Coast and Ngati Ruanui Coast as eligible sites (see fig 10), this being the whole of the land then remaining inside the total confiscation boundary from Parininihi in the north to Whanganui in the south and to beyond Taranaki mountain in the interior. Then, in the grossest act of confiscation of which complaint is made, the proclamation purported to take all that land for settlement.
- (iii) Declared no land of any loyal inhabitant would be taken, except where it was absolutely necessary for security purposes, in which case compensation would be paid. This was a contradiction of the immediately preceding clause, by which all the land had been taken.

Map 9: Confiscation districts

- (iv) Declared that rebels who, within a reasonable time, came in and made submission to the Queen would receive a sufficient quantity of land within the said districts under grant from the Crown, although there was no legislative authority to say so at the time.
- (g) On the same day as the previous proclamation was made, 2 September 1865, a 'peace proclamation' declared 'the War which commenced at Oakura is at an end' (even though the war was still being fought). It added that 'sufficient punishment' had been inflicted and no more land would be confiscated 'on account of the present war'. This was unsurprising, because all that could have been acquired had already been taken.
- The proclamation stated that past offences were forgiven and the Government would 'at once restore considerable quantities' of land, but that those people who did not 'come in at once' had to expect to be excluded.
- (h) Following an amendment to the Act in 1865, a proclamation on 25 January 1867 abandoned the confiscated land south of the Waitotara River (see fig 9). Apparently, the land was abandoned because the district was claimed by Whanganui hapu who were fighting as allies of the Crown. In addition, the Government claimed to have purchased the Waitotara block, which comprised the greater part of that area to the Okehu River.

In effect, the Governor declared all but the interior of the Taranaki province (and beyond) a confiscation district, within which lands might be taken from out of prescribed settlement sites, then declared the whole district an eligible settlement site and confiscated it all.

5.6 THE LAWFULNESS OF THE CONFISCATIONS

5.6.1 Jurisdiction

The lawfulness of the confiscations has long been an outstanding concern, previous attempts to put the matter to courts or commissions of inquiry having failed. Court

proceedings were constrained; first, because Parliament validated any confiscations invalid as to form and, secondly, because the courts considered land confiscation to be an unreviewable act of State. The latter view, which treated Maori as foreign to the domestic regime, is unlikely to be followed today but was a deterrent to the progressing of matters before the courts at the time.

Lawyers' attempts to raise the legality of land confiscations before the 1880 Royal Commission on the West Coast and the 1927 Royal Commission on Confiscated Land also failed, the commissions holding the issue to be outside their terms of reference. The 1880 commission reported that it:

Map 10: Lands confiscated as eligible settlement sites

refused to hear counsel who wished to question the validity of the confiscation, and we told the natives at the very outset that we were not there to discuss such questions with them.

The grievance thus grew among Maori that their case had never been properly heard. Their frustration was rekindled in 1981, following the dissemination of a legal opinion to the Secretary of Maori Affairs. This considered that the confiscation legislation was *ultra vires* the New Zealand Constitution Act 1852.

On a related claim, Crown counsel contended that the Waitangi Tribunal could not consider the question either, for reasons including that the Tribunal cannot determine questions of law. In that case, the Tribunal concluded it could, and should, address the matter and that is the course we propose to adopt here. While the Tribunal cannot conclusively determine questions of law, the lawfulness of the statutes, actions, or policies complained of is relevant to the honesty and integrity of the Crown's actions as a Treaty partner. It also seems important to address the issue in this case. The matter has long been outstanding, court proceedings are now statute barred, lasting settlements may depend on full inquiries, and it would defeat the purpose of the Treaty of Waitangi Act 1975 - to promote a remedy for historical grievances - if relevant matters could not be reviewed.

Because we are not a court, however, and because the matter was not fully argued before us and may be raised further, our views are preliminary and brief. They draw upon the more elaborate reasons of Emeritus Professor F M Brookfield, a constitutional lawyer whose opinion we commissioned.

5.6.2 Fundamental principles and the constitution

We concur with Professor Brookfield's opinion that the New Zealand Settlements Act 1863 and associated legislation were within the authority of the New Zealand General Assembly to enact. In other words, the Act itself is not unlawful. This opinion is significant in the light of earlier claims that, by section 53 of the New Zealand Constitution Act 1852, the General Assembly was empowered only 'to make laws for the peace, order and good government of New Zealand', and then 'provided no such laws [should] be repugnant to the law of England'. From that, it was argued that the confiscation legislation was not for peace, order, and good government but for ulterior and discriminatory motives and was in any event repugnant to fundamental principles

of English law. The legal opinion on which we rely states that it is for the Government, not the courts, to determine that which is for peace, order, and good government; and secondly, the reference to 'the law of England' is a reference to the statute laws of the United Kingdom, not to fundamental principles of English law. In any event, the laws of England have long recognised the necessity of exceptional legislation to suppress insurrection threatening the existence of the State, and confiscatory statutes have been applied in the United Kingdom before, especially in Scotland and Ireland.

This same view, that the Act was not *ultra vires* the New Zealand Parliament, was taken at the time by the law officers advising the Secretary of State.

The opinion given to the Secretary of Maori Affairs in 1981 was that the New Zealand Settlements Act could not have been passed without the express amendment or repeal of section 73 of the New Zealand Constitution Act 1852. We are advised, and agree, that this opinion is untenable. Section 73 did not prevent land confiscation. In addition, by the New Zealand Provincial Government Act 1862 (UK), it was not necessary for legislation in New Zealand to have been consistent with that section.

Because the matter had been raised, we were advised for the sake of completeness that the 'conditions' proposed by the Secretary of State for the Colonies, when he declined to exercise the power to disallow the New Zealand Settlements Act, were not and could not have been binding upon the Governor in New Zealand (the conditions were not fulfilled). They were directory only, and thus their non-observance could not affect the validity of the confiscatory action.

5.6.3 Compliance with statute

On the other hand, however, for the reasons below and those given by Professor Brookfield, it appears the confiscations were unlawful because they did not comply with the statute's terms. We think there were many respects in which the statute was not followed, but we refer to those that went more to substance than to form:

- (a) Section 4 of the New Zealand Settlements Act required the Governor to be satisfied on certain matters before land was taken. In the north and the far south and at Oakura, however, settlements were established before the legislation was passed in 1863 or before the land was taken in 1865, as earlier seen, and thus the Governor could not have been so satisfied. In addition, one of the matters on which he had to be satisfied was that there were tribes in rebellion in the area. In our view, that could not have been said at the time in respect of the lands that were informally occupied, save for Oakura.
- (b) The same difficulty confronted the formal acts of confiscation. By section 2, the Governor was to be satisfied that the tribes of an area or a considerable number of them were in rebellion before their land was included in a confiscation district. We would expect some evidence of the information the Governor had before him and on which he relied in order to apply his mind to the facts. We can find no evidence that he ever had such information. It appears that any inquiry was fleeting and that the Governor was not aware of the true position. The lands of several northern hapu were included - Ngati Tama, Ngati Mutunga, and various hapu of Te Atiawa, for example - but the

war had not reached their areas. Similarly, there were so few Maori in the northern part of Taranaki at that time, owing to the absence of most Ngati Mutunga and Ngati Tama, that there could not have been a realistic threat to peace, as the Act required. In the east, Ngati Maru land was taken when they were not then involved in the war, and though there is no record of fighting at the time by several of the hapu of the centre or the south, their lands were also included in the confiscation district. Even the lands of the Whanganui hapu were within the confiscation district, and their alliance with the Government was well known.

- The evidence suggests that the Governor simply defined an area, being all the land for several miles inland from the whole coast, with the northern boundary fixed purely to accommodate a stockade at one frontier, the eastern boundary running as parallel to the coast as convenient trigonometrical lines might allow, and the southern boundary being simply the most southerly point possible. The centre was taken for no greater reason, it seems, than that it fell within those northern and southern extremities. In brief, the confiscation districts bore no relationship to the theatre of the second war or to tribal aggregations according to appropriate geographic divisions.
- It is telling that the confiscation names, Ngati Awa Coast and Ngati Ruanui Coast, attracted resentment when they were discussed by the claimants during our hearings. Ngati Awa and Ngati Ruanui are but two of several significant hapu aggregations, each in relatively distinct geographical zones but all enclosed by the confiscation districts of those names. These other hapu also lost their lands, but adding insult to injury, they lost them under another hapu's name. The names were there, it seems, because in the colonists' eyes Ngati Awa and Ngati Ruanui were troublemakers. To understand the situation, it might help to imagine that the United Kingdom was colonised from the other side of the world, the English caused trouble, and the Scots, Welsh, and Irish were then called English and held to blame because, to the coloniser's mind, they all looked the same. In this case, it was as though either the other hapu were to blame for the 'sins' of the two named or the Governor was not concerned to distinguish one hapu from another. To us, it merely shows that the districts were too large and that no consideration could possibly have been given to the rebelliousness of particular hapu.
- (c) In our view, the third error is even more serious. By section 4 of the Act, the Governor could do no more than take specific lands for particular settlements within prescribed districts. Instead, the Governor defined an enormous part of Taranaki province (and beyond) as a confiscation district in three parts then, in one proclamation, declared the whole area to be eligible settlement sites and took the lot.
- The Act required a three-stage process. By section 2, the Governor was obliged to declare districts where tribes or a significant number of tribes were in rebellion. By section 3, he was then to set apart 'eligible sites for settlement', being prescribed and suitable areas within such districts. By section 4, he was finally to take such lands within those areas as might be necessary. The statutory prescription, which was essential for the survival of the hapu in this case, was not followed. The Governor declared extremely large districts then purported to take the lot on the basis that the whole was an eligible site. This was done without an inquiry, which he was obliged to make, into such matters as which lands were suitable for settlement and how settlement could be

arranged and without first laying out the settlements by survey in order to define the parts to be taken.

- The effect was to alter fundamentally the Act's objective of taking land in discrete areas for such numbers of settlers as might be sufficient to keep the peace in the district as a whole. An entirely different regime was substituted whereby, except for the remote interior, the whole of the province was taken.
- An inquiry as to eligibility was needed, along with some discretion and selection. Instead, there was a global taking of mountain, hill, and vale, and some places taken have never been divided into town or farm allotments to this day. The whole of Taranaki mountain was confiscated, despite it being patently obvious that most of it was unsuitable for settlement. We consider the whole confiscation to have been unlawful.
- (d) A fourth error is described later (in chapter 8) because it flows from events that happened later. The confiscation of central Taranaki appears to have been unlawful because the purpose of the Act had become redundant when, a decade later, it was implemented as though it could still apply.

The consequences of these unlawful operations outside the statute's terms were extremely serious for the hapu. Every hapu in Taranaki, rebel or other, save only for those few with cultivations in the deep interior, lost the whole of the lands on which they relied to survive. They were thrown entirely upon the Governor's mercy for anything they might receive. There were three main results. The first was that, because settlements were so rapidly and extensively laid out over the cultivatable lands in the north, little or no land was left to return, as was promised, even to loyals. The second was the measure of desperation that was brought to the Maori resistance, as some of the critics of confiscation had predicted, which was probably the reason why the war lasted longer in Taranaki than elsewhere. The third was the desperation that was to last well after the war, in the form of protest and obstructions, and that led, 15 years later, to the military invasion of Parihaka. This desperation has not yet dissipated.

5.6.4 Statutory compliance and rebellion

There is a further question as to what constitutes rebellion. Although the Act declared rebellion to exist whether or not it existed in fact, the Governor had still to be satisfied there was rebellion in any area before land could be confiscated there. But what was rebellion? It was not rebellion, for example, to resist an unlawful attack and so to defend oneself and one's home, as Professor Brookfield has explained. Resistance became rebellion only when it extended to some act of counter-aggression. This rule of the common law applied, despite the inference in section 5 that anyone who carried arms against Her Majesty's forces was in rebellion.

Much therefore depends on the interpretation of the facts. By way of example, Professor Brookfield considers that in 1860 Wiremu Kingi was unlawfully attacked, an interpretation with which we agree. He added that certain Crown officers were criminally and civilly liable as a result, though of course no suit was taken against them. Unsurprisingly, the New Zealand Settlements Act excluded the first war, for which the Governor accepted blame, and referred only to acts of rebellion from 1 January 1863 on.

On the record that survives, however, there was no rebellion throughout the greater part of northern, central, and southern Taranaki from 1 January 1863 through to the land takings in 1865. There was evidence of rebellion at Oakura, in the sense that the ambush was an attack, and also at Sentry Hill, but there it is difficult to attach anything to any hapu, for the attack was committed by persons from several places, whose sole commonality was that they belonged to one faith. Elsewhere, Maori appear to have acted only in self-defence.

In so far as the Governor does not appear to have possessed, and the Government has not maintained, sufficient documentation on the perceived state of affairs when the confiscation districts were declared, and because it is clear that large areas were included where the hapu were either loyal or neutral or where the district was outside the theatre of the war, the confiscations in our view were again unlawful, owing to the lack of evidence of rebellion.

5.6.5 Statutory purpose

Further to this, it is our view that the confiscations as effected by the Governor were inconsistent with the objects and purposes of the governing statute and again, for that reason, were unlawful. Although this point is covered but not developed by Professor Brookfield, we think it important to pursue it. As earlier described, the purpose of the New Zealand Settlements Act, as stated in the preamble, was to achieve law and order by establishing a sufficient number of settlers on the land who could protect themselves and preserve the peace. It is axiomatic that the Governor did not consider the numbers necessary or the land needed for that purpose, because he simply took all the land that was capable of settlement (and a great deal that was not). In effect, an Act that was passed for the maintenance of peace was converted into an Act for the furtherance of colonisation. The ostensible objective of the Governor was to settle sufficient numbers to keep the peace; his actual purpose was simply to take the land.

As the Act was confiscatory of rights, it was to be strictly construed. Any confiscation had to be referable to the Act's purpose and should not have exceeded the minimum necessary for that objective. The confiscation was clearly more than was necessary, and for breach of statutory purpose, it was again illegal.

5.6.6 Validation

Subsequently, section 6 of the New Zealand Settlements Acts Amendment Act 1866 provided:

All orders proclamations and regulations and all grants awards and other proceedings of the Governor or of any Court of Compensation or any Judge thereof heretofore made done or taken under authority of the said [New Zealand Settlements Act] . . . are hereby declared to have been and to be absolutely valid and none of them shall be called in question by reason of any omission or defect of or in any of the forms or things provided in the said [New Zealand Settlements Act].

It is arguable, and it seems to us, that this did no more than validate illegalities arising from want of proper process and form and, more particularly, that it did not make lawful those actions of the Governor that were fundamentally outside the authority of

the statutory scheme. We need not, however, reach a conclusion on the point. The question of whether the confiscations were subsequently validated by this section is of academic interest only. Proceedings are statute barred and properties have changed hands. Our concern is whether the confiscations were unlawful at the time, not whether they were made lawful later, and, if they were unlawful at the time, how that informs the Government's fulfilment of its Treaty obligations.

5.7 CONFISCATIONS AND THE TREATY OF WAITANGI

The New Zealand Settlements Act 1863 and the confiscation of land in Taranaki were obviously prejudicial to claimants and inconsistent with the principles of the Treaty of Waitangi. The Treaty guarantee to Maori of their lands and estates for as long as they wished to keep them was an unequivocal undertaking, with which the Act and policies were in direct conflict.

No one has seriously contended otherwise. Crown counsel, though without elaboration, admitted the Taranaki confiscation was an injustice and a breach of Treaty principles. The real issues are whether the Treaty could be set aside on account of extraordinary circumstances, whether such circumstances existed, and, if so, whether confiscation was appropriate to the situation. The first question can be disposed of briefly. The specific terms of treaties, the rule of law, and civil rights may all be suspended in an emergency to the extent that is absolutely necessary. Article 4 of the International Covenant on Civil and Political Rights illustrates this position. The last two questions, and the various arguments of the time, reduce to one question: whether, in all the circumstances, confiscation could be justified.

In illustration, it was claimed that the Oakura ambush was a rebellion against the Queen, for which the Queen's promises could be set aside. This claim made several assumptions, including: was the ambush in fact a rebellion or a response to provocation?; could all Maori be held responsible for those who did the deed?; did the punishment fit the 'crime'?; and so on. The Native Minister argued that, by article 3 of the Treaty, Maori were British subjects, they were in rebellion, and, as British subjects in rebellion by English law, their property could be forfeited. The questions we have raised apply here. There is also the question of whether, as British subjects, Maori were first entitled to a fair trial and whether the property guarantee was more important than article 3 on this occasion. Both arguments showed the need to look widely at the circumstances rather than reach a conclusion on some narrow ground.

While the specific terms of the Treaty may be suspended in an emergency, the general principles enure to the extent that they provide criteria for assessing the circumstances. The Treaty furnishes a superior set of standards for measuring the propriety of the State's laws, policies, and practices. This shifts the debate from the legal paradigm where the rules must protect the Government's authority to one where Government and Maori authorities are equal. For reasons given in section 2.1, the test to be applied, in terms of the Treaty, is whether Maori and the Government have acted reasonably and in good faith towards each other.

In light of the record, as described in chapter 3, it cannot be said that the Governor acted in good faith. Wiremu Kingi was unjustly attacked; Waitara was unlawfully seized; Omata and Tataraimaka were taken during a truce; the presence of troops at Oakura was provocative; Waitotara was not properly purchased; and, in the second war, most of Taranaki was invested by the army without prior Maori aggression.

Nor could it be said that the settlement of military settlers on confiscated land was actually needed for peace. Land grabs and profit-making were thinly disguised as a security measure and the confiscations were more likely to add to the war. Peace really required both an assurance to Maori that their lands would be protected and that the Government treat openly with them for agreed colonisation terms. In our view, a peace on that basis was feasible at all times. Both before and during the war, Maori sought a peaceable arrangement, even before any question of confiscation had been raised.

Indicative of the Government's performance in this area was its disregard of the statute's terms, as earlier described - the pursuit of profit before peace, the taking of more land than the Act authorised, and the like. The disregarding of Imperial advice that an independent commission should determine the lands to be taken was further indicative of the Government's lack of concern to avoid conflicts of interests.

Thus, while motives and intention are irrelevant to whether or not there was a rebellion, these things are important when determining good faith. It becomes pertinent to ask whether a charge of rebellion against the Queen's authority can be fairly levelled when the Queen's authority was not established, in fact, upon the ground. It is further relevant that Maori may have seen themselves not as opposing the Queen but, more prosaically, as opposing their treatment. As we understand the Maori view of things, through much of history, and even today, Maori have viewed the monarch not as the Government, as most people do, but as the fount of justice, separate from the Government, which the monarch might even admonish. The monarch was thus an ariki, as distinct from a rangatira. After his release from Dunedin gaol, Taurua, a leader of Pakakohi and Nga Rauru, deposed to the West Coast Commission in 1880:

On the 13th June 1869 I was taken prisoner and removed to Wellington, where I remained three months before being tried. When my trial came on I waited to see what would be done about the land . . . I was told 'Taurua, you and your people have done wrong in rebelling against the Queen.' I answered 'I have not done wrong, I have not carried arms against the Queen, but against you, and now you say it is done against the Queen.'

(So sincerely have older Maori impressed upon us that the Crown and the Government are distinct and that their claims should be against the Government, not the Crown, that in this report we generally refer to 'the Government' where 'the Crown' would otherwise be used.)

Similarly, past examples of forfeiture for rebellion, as referred to by the Ministers of the day, cannot honestly be seen as strategies for peace, no matter what words were used, but can be seen as models for conquest. The popular justification for the confiscations had relied on the opinion that forfeiture for rebellion was old law. So

strong had this contention been that we commissioned research on the jurisprudential record.

From that report, we understand that forfeiture for rebellion has a history dating from Roman, Saxon, and Norman feudal times. It was applied in Scotland after the rebellions of 1745 and 1750. Ireland, the first of England's 'colonies', experienced bouts of land confiscation and military settlement from the Anglo-Norman conquests of the twelfth to the early eighteenth century. These instances were known to New Zealand legislators of the 1860s and the confiscation of Maori land was drawn from Irish precedents. The New Zealand Settlements Act 1863 was similar in title and terms to Cromwell's Act of Settlement 1652; and the Suppression of Rebellion Act 1863 was copied, with virtually no changes, from the Irish Act of that name of 1799. The New Zealand Loan Act 1863, which looked to the profitable sale of confiscated land to pay the costs of colonisation, followed the Irish Adventurers Act 1642. Absent from the New Zealand statutes, however, was any specific provision for pardons. If forfeiture was old law, so too was clemency, which had a pedigree dating from at least the reign of Elizabeth I. (Nor was there anything in New Zealand comparable to the large land returns carried out in Scotland once the wars ended there.) Land confiscation also prevailed in British colonies in North America (through treaty renegotiation), South Africa, and Ceylon.

The question, however, was not whether models existed but whether they worked. Peace was the ostensible object of the New Zealand Settlements Act and the taking of land may be justified in war if peace will result from that taking. The antecedents, however, were not proof of that result. It seems to us the Roman and Norman strategies, and those of Scotland and Ireland, had little to do with peace. They were thoroughly concerned with conquest. Indeed, if peace was the goal, then the example of Ireland showed, as Sir William Martin maintained, how little was to be achieved by confiscating land.

5.8 CONCLUSIONS

Our conclusions are summarised as follows. The confiscation laws were within the authority of the New Zealand General Assembly to enact. The statutes as such were not unlawful, but the confiscations themselves were. They were unlawful on several grounds: they did not comply with the New Zealand Settlements Act's terms and they were carried out without sufficient evidence of rebellion and without proper regard for the statutory purpose of achieving peace. The result was that more land was taken than the Act provided for - so much more, in fact, that nearly all hapu were left without the means to subsist, driving them, of necessity, to fight with unprecedented desperation.

In their terms, the New Zealand Settlements Act and the confiscations were inconsistent with the principles of the Treaty of Waitangi and with the guarantee that land would not be taken without consent. Good grounds did not exist for suspending that guarantee. While extraordinary measures may be necessary to secure peace and Treaty guarantees may be set aside in an emergency, confiscation was not a means of securing peace in this instance. Peace terms were practicable without confiscation, but peace was not the Government's apparent purpose.

The primary test is whether the Government and Maori acted reasonably and in good faith towards each other. The contemporary debate; the proposals for confiscation, made even during the truce; the New Zealand Loan Act 1863, which allowed colonisation costs to be met from the proceeds of the sale of confiscated Maori land; and the taking of far more land than was needed to keep the peace all showed that the Government's true purpose was other than that which honesty, integrity, and good faith towards Maori required.

5.9 IMPACTS AND REMEDIES

Justifiably, the claimants saw the confiscations as so blatantly wrong that their submissions were directed to its impact on their hapu. Hapu losses are not considered in the present report. Here, we are concerned with the approach required for relief.

In that context, it needs to be noted that more than land was taken. Expropriated with it were the right of community and the social order through which centuries of affairs had been managed. Accordingly, the loss cannot be quantified simply by measuring the land. The principles applicable to persons do not necessarily fit peoples. Those who lose land for a necessary public work have the benefit of knowing that their loss was, ostensibly at least, for the greater good of the society of which they are a part. People who lose their lands to an alien culture bear the additional risk of identity loss and social and cultural impairment. This could not have been more apparent than in the confiscation of Maori land, where the effect was not only to acquire land but to take control of the people and to effect a social reordering. Loss must therefore be assessed not only in terms of individual deprivation and personal suffering but in terms of the impairment of the group's social and economic capacity, the generational distortion of its physical and spiritual wellbeing, and the flow-on effects on subsequent standards of living. The lack of established criteria for assessing losses of that kind need not deter a search for the proper approach. To consider the measures necessary to re-establish the hapu as a people, or iwi, and to secure their place in the future would have the benefit of focusing reparation on the most significant loss sustained - the society of the people. Hapu are the lifeblood of the Maori civil order. It may be noted that the numerous hapu that existed during the war are now down to a few score and cultural survival is now at risk.

That which is necessary to remove the sense of grievance is a related consideration. It cannot be assumed that grievance dissipates with time. Witness after witness described the numerous respects in which they, in their view, have been marginalised as a people and how the burden of the war is still with them and their dispossession has preoccupied their thinking. When a grievance of this magnitude is left unaddressed, it compounds over time and expands, as do generations, in geometric progression.

The measures necessary to re-establish Maori units as viable, self-governing authorities must also form part of the considerations. After all, it was the autonomy of the people that was most in issue in the war and it was the traditional authority that was most destroyed in the social reordering that followed the war. The opportunity to develop representational institutions over time was foreclosed on. It appears to us that the current uncertainties concerning representation for the hapu today are a direct

result of the destruction of traditional institutions that accompanied the confiscation of the land.