KO NGAA TAKE TURE MAORI

Editor's Note

In this year's section of Ko Ngaa Take Ture Maori, three notes from tauira have been published. Regretfully, due to space constraints, these notes cover only a few of the issues that are contained in the larger body of each person's original article. All three notes deal with issues that involve whenua or land. Although able to be read independently of the others, as a body of work, these notes begin to describe a legal picture of the association that Maori have with whenua, and emphasise the importance of whenua in Te Ao Maori.

It is suggested that Williams, *A Dictionary of the Maori Language* (7th ed 1971) be used to explain any Maori terms that are unfamiliar.

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Ngapuhi

The Alienation of Maori Land and Public Works Legislation

A number of claims before the Waitangi Tribunal involve the issue of Maori land taken under public works legislation.[1] These claims are unique in comparison to historical claims, as public works alienations are still remembered by many Maori living today. The impact of these takings is still keenly felt.

This note investigates the processes that were used to take Maori land for public works purposes. In doing so, the discriminatory nature inherent in various Public Works Acts and policies since 1864 is highlighted.

Public works legislation was and remains inconsistent with Article II of the Treaty of Waitangi (Maori text). With the passing of Te Ture Whenua Maori Act 1993 and the Crown's stated policy of the protection of Maori customary and freehold land, the present public works legislation[2] also portrays an inconsistency.

A nominal amount of Maori land remains in Maori possession and there is

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1 For example, the Public Works Act 1924.
2 Public Works Act 1981.

pressure on the Crown to discontinue the practice of alienating Maori land for public works purposes. It is recognised that the degree of Maori culture that survives today may be measured by the extent of land retained in Maori hands.[3] Maori preoccupation with the retention of, and efforts to regain, alienated lands is directly related to this recognition.

Maori land, native title, or customary land, is land which has never been assimilated into the land tenure system.[4] This land is held by Maori in accordance with tikanga Maori.

The status of customary land can be changed by application to the Maori Land Court who will investigate the title and determine the relative interests of the owners of the land. This will then become Maori freehold land.

Statistics show that in 1891, of the approximately 66 million acres (27 million hectares) comprising the total land mass of New Zealand, Maori freehold land was estimated at some 11 million acres in the North Island alone. By 1911 the remaining Maori land had dropped to just under 7 million acres (just under 3 million hectares) or about 11 percent of the total land mass. By 1920 this total was reduced to approximately 4.7 million acres, with nearly three quarters of a million acres leased to Europeans including perpetual leases.[5]

Latest statistics show that in 1996 1.5 million hectares of land was held in both Maori freehold and customary title.[6]

Land Alienation

In 1856 a Board of Inquiry convened by Governor Browne investigated traditional Maori rights of alienation and recognised the communal nature of Maori land tenure.[7]

> Each native has a right in common with the whole tribe over the disposal of the land of the tribe, and has an individual [use] right to ... portions. The individual claim does not amount to a right of disposal to Europeans as a general rule .... Generally, there is no such thing as an individual claim, clear and independent of the tribal right.

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3 Durie, "Maori Custom Law" (1994) unpublished papers, held Davis Law Library University of Auckland.

4 Fiest, *Maori Land: What Every Practitioner Needs to Know* (1997) New Zealand Law Society Seminar 6. Reference is made therein to Te Ture Whenua Maori Act 1993, s 129(2)(a).

5 Marr, *Public Works Takings of Maori Land 1840-1981: Report to the Treaty of Waitangi Policy Unit* (1994) 147.

6 Information given by Janet Carson, Te Puni Kokiri Head Office, Wellington 26 May 1997, referring to the Ministry of Justice statistics 1994 and 1996.

7 Layton, *Alienation Rights in Traditional Maori Society: A Reconsideration* (1984) 93 JPS 423.

In spite of, or perhaps more accurately, in reliance upon such observations, the Crown introduced a system of land tenure which individualised title to land.[8] These Acts were intended to crush the communalism which ran through all Maori institutions and which were viewed as an impediment to the speedy settlement of New Zealand.

Public Works Legislation

The history of, and prolific enactments and amendments to, public works legislation is lengthy and beyond the scope of this discussion. However, during the 1860s settler politicians began to debate the issue of whether Maori customary land could be alienated for the purpose of public works. They already believed that there was a right to take Crown granted Maori land for these purposes. This was apparently based upon the view that land held by Crown grant was subject to British law including the law relating to public works takings.[9]

In 1864 the Public Works Act was passed. This Act authorised central government to take Maori land, whether customary or Crown granted, for public works purposes.[10] As the earliest Act, it is mentioned here to provide a sense of the climate within which public works legislation first originated. The early legislation was intended to have a punitive effect against the "rebel" Maori and was also intended to further co-opt Maori customary land into the prevailing land tenure system of title deed.

For example, compensation for Crown granted land was assessed under the Land Clauses Consolidated Act 1863, while compensation for Maori land was determined under the New Zealand Settlement Act 1863. Takings from owners deemed "rebels" did not have to be compensated.[11] These practices continued well into this century.[12]

The adoption of British legislation disregarded existing Maori customs and practices in relation to land tenure. Ironically, Maori tikanga allowed use rights over land in order to benefit a community; Maori were not totally averse to the development of public works on their lands. However, as the settler population began to level with that of Maori, the settler government, no doubt, feeling secure in numbers, began to make arbitrary decisions regarding public works over Maori land, culminating in conflicts such as that at Parihaka.[13] The following discussion

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8 See, for example, Native Lands Acts 1862 and 1865; see Lenihan, "*Maori Land in Maori Hands*", following.

9 Supra at note 5, at 43.

10 Public Works Lands Act 1864, s 2 defines "land" as including all lands whether held by Native or other owners and by any form of title.

11 Supra at note 5, at 48.

12 Ibid, 53.

13 Ibid, 47. For example, the Taranaki Provincial Omata Road Ordinance 1863 empowered the Superintendent to construct the Omata Road through native Reserve No 1 (which was Maori owned land by Crown grant).

illustrates the discriminatory nature of past public works legislation practices by looking at processes of notification, compensation, and offer back policies.

Notification

This note looks in particular at prior legislative Acts which cover the majority of takings, but it should be noted that the present Public Works Act 1981 ("1981 Act") contains similar provisions relating to the compensation and notification of Maori customary and freehold land.

Section 22 of the Public Works Act 1928 ("1928 Act") provided for the public notification of an intention to take land for public works. By s 22(3) all Maori owners of customary land were excluded from this notification process:

> The provisions of this section requiring the names of the owners and occupiers of the land to be shown on the plan thereof, and requiring copies of the notice and description referred to in this section to be served upon the said owners and occupiers and upon all other persons having an interest in the land, shall have no application to any Native [Maori] who is an owner or occupier or has an interest in the said land ... unless his title is registered under the Land Transfer Act 1915.

A discretion existed under s 32 whereby the Crown could enter into agreements with the landowners. Indeed, historical accounts in relation to public works takings show that in some instances the Crown did initially exercise this discretion in relation to Maori land owners.

Where Maori freehold land was taken, it was the practice of authorities such as the Ministry of Works to not identify the land being taken by their Maori Land Court numbers. Essentially this meant that owners could not immediately identify whether their land was affected. Under this policy, the onus of notification was reversed: owners had to be actively alert to the possibility that their land was included in the proclamation.

Notification by proclamation did not apply to land taken for railways or motorways.[14] Such land was left in a landlocked state. In effect, this led to further alienation as these blocks became uneconomic.[15]

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14 Public Works Act 1928, ss 216 and 217; Public Works Amendment Act 1847, s 4. By use of a centre line proclamation, the proclamation itself was considered sufficient notification.

15 Bassett, *Aspects of the Urbanisation of Maungatapu and Hairini, Tauranga : Report to the Waitangi Tribunal* (1996) 16.

Compensation

Section 42(1) of the 1928 Act provided that :

> Every person having any estate or interest in any lands under this Act for any public works, or injuriously affected thereby, or suffering any damage from existence of any powers hereby given, shall be entitled to full compensation for the same from the Minister or local authority, as the case may be, by whose authority such works may be executed or power exercised.

Landowners had five years within which to lodge a claim for compensation after a proclamation was made. The taking authority would make an offer which could be subject to further negotiation before agreement was reached. If no agreement was reached the matter was then taken to the Land Valuation Court.[16]

While the legislative approach seemed quite straightforward, in reality the situation for Maori was discriminatory. The negotiation process was adversarial and, due to the arbitrary and paternalistic use of the Maori Trustee as the negotiator for Maori, the concerns of owners of multiple owners of land were indiscernible to taking authorities.[17]

Under the Public Works Amendment Act 1962 the Maori Trustee was the official negotiator for compensation where any land in multiple ownership was taken for public works or was injuriously affected.[18]

Maori not only felt alienated by the process of negotiating compensation but also believed that the Maori Trustee treated their concerns with apathy.[19] Maori disenchantment with the Trustee was compounded by the delays which arose when using the Maori Trustee. For example, it was common policy for the Ministry of Works (a major taking authority) to delay negotiating compensation with the Maori Trustee until after the land had been proclaimed. This was despite the fact that entry onto the land often predated proclamation.[20] In effect, Maori land owners were expected to relocate and refinance alternative accommodation before compensation was paid.

In her research Bassett points out that the practice of arriving at a final compensation figure was often achieved by the meeting the opposing calculations of the taking authority and the Maori Trustee at halfway. She infers that this practice encouraged the taking authority to offer very low compensation to force the compromise.[21] The statutory powers of the Maori Trustee were eventually repealed by s 12(8) of the Maori Purposes Act 1974.

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16 Public Works Act 1928, ss 45 and 52.

17 While there may have been benefits to Maori who may have lacked resources to adequately negotiate compensation, it is highly likely that the use of the Trustee was in fact intended to benefit the taking authorities who now had to deal only with an individual and unaffected third party.

18 Public Works Amendment Act 1962, s 6.

19 Supra at note 15, at 24.

20 New Zealand Waitangi Tribunal, *Turangi Township Report* (1995) 268.

21 Supra at note 15, at 25.

Delay was an endemic feature of the compensation process and could last from three to seven years, and in one case, fourteen years.[22] These delays denied owners a fair and equitable assessment of compensation.

The Failure to Offer Back Surplus Maori Freehold and Customary Land

It has been contended that the difference in legal status between Maori freehold and customary land as compared to general land, acted as an impediment to the Crown policy of returning surplus land to owners. Once taken, customary or freehold status changed to title by Crown grant. Land was revested with the new designation. According to the Crown it was difficult and impractical to rejoin it to the Maori customary or freehold land status.[23]

The Crown's response to these issues was to sell to a third party rather that revest it in the original Maori owners. Later, a mechanism was created by s 436 of the Maori Affairs Act 1953 whereby Crown land could be revested in Maori by order of the Maori Land Court. This, however, was at the Crown's discretion.

One example involves the Uawa County Council (in the Gisborne District). Maori land had been taken in 1918 and 1931 as a sanitary reserve for the dumping of night soil near the inlet of Tolaga Bay. The reserve was not used for many years and in 1954 the Council changed the purpose to a recreation reserve with the intent that it would then be leased to private individuals to set up a motor camp. After objections from the East Coast Commissioner the attempt was abandoned, but not for long. The following year, the Council attempted to change the purpose from reserve to one of "general county purposes" while openly admitting that they really intended to lease the land for a motor camp.

The Commissioner again objected but to no avail. The Commissioner then took the case to the Minister of Maori Affairs, noting that the purpose intended by the Council was not a bona fide "general county purpose". Meanwhile, the original Maori owners wanted the land back for farming and were prepared to pay a reasonable price for it. The Minister of Maori Affairs on approaching the Minister of Works was given no assistance and was told that the Council was acting legally. Only in extreme cases would interference with the statutory power of a local authority be warranted, "and in this case it is noted that the only objectors appear to be the owners from whom the Council acquired the land."[24]

Current Legislation

The Public Works Act 1981 continues the practice established under earlier legislation of taking Maori customary and freehold land. The wording of the Act

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22 Supra at note 20, at 279.

23 Supra at note 5, at 192 and 193.

24 Ibid, 193.

allowing any land to be taken affords no protection to Maori land. The compensation provisions in the 1981 Act are not dissimilar to the provisions in the 1928 Act.[25]

Continued alienation of Maori land is inconsistent with the Crown's policy underlying Te Ture Whenua Maori Act 1993. It was said that the retention of Maori land in Maori ownership was at the heart of this Act. With the enactment of this Act the Crown is making a clear statement that the Crown recognises the unique nature of Maori land. This represents a departure from the Crown's agenda of dispossession, alienation, and fragmentation which characterised the trend of land tenure in this country.[26] The inconsistency between the two pieces of legislation should be rectified given the nominal Maori land that remains. Where Maori land, whether customary or freehold, exists it should be exempt from public works takings.

Contradictions in policy also arise in the context of the Crown's policy of full and final settlement of Treaty grievances. Maori regard the compulsory acquisition of their land as raupatu, regardless of whether it is authorised by legislation. In this sense it is equated with the confiscations or raupatu which occurred after the land wars in the Waikato and Taranaki.

To continue to alienate what little land remains in Maori ownership is short-sighted as it will aggravate and extend present Treaty grievances and create new grievances.

Finally, and not least of all, the compulsory alienation of Maori land does not give meaningful and practical recognition of the Crown's obligations under the Treaty of Waitangi. Specifically, no recognition is given to the full and undisturbed possession of lands which Maori may individually or collectively possess, so long as they wish to do so.

Conclusion

The Crown embarked upon a deliberate policy of the alienation of Maori land through land legislation which was reflected in early public works legislation. This legislation was designed as a punitive measure against Maori who resisted the early colonisers in their drive to settle New Zealand. It was also a mechanism used to settle the new colony.

The policies of assimilation and alienation of Maori land, whether by design or by merely following the past, became entrenched in subsequent public works legislation and inevitably were reflected in the attitudes of taking authorities and the exercise of their powers under the legislation. The unique nature of Maori land, with multiple owners holding land in accordance with Maori tikanga,

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25 Public Works Act 1981, ss 60 and 62.

26 Hon Douglas Kidd in Te Puni Kokiri Ministry of Maori Development, *Te Ture Whenua Maori Act 1993*.