Confiscation of Maori land

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New Zealand is a multi-cultural western style democracy in which the treatment of its peoples in the past as well as the present must be shown to be fair and reasonable. This article is written in the hope that the facts surrounding the extensive confiscation of Maori land during the Anglo-Maori Land Wars of the 1860s can now be looked at honestly and objectively. It is concluded that these confiscations were unnecessary and unjust. Compensation in land and money is the only suitable solution.

I. INTRODUCTION

During the years 1864 to 1867 the New Zealand Goveernment confiscated approximately 3¼ million acres of Maori tribal land on the ground that the owners of the land were in rebellion against the sovereignty of the Crown. The confiscations were made under the authority of the New Zealand Settlements Act 1863 and its amendments.[1] These Acts were passed during the so-called Maori Wars and their purpose was to enable confiscation of Maori land to punish and deter Maori "rebellion" and to prevent further insurrection by establishing military settlements on the land. It was hoped that the confiscated land could be sold to settlers and the proceeds of sale used to pay for the cost of the wars.

The legislation and the war themselves were the result of the demand by settlers for land and not because Maori land owners had rejected the Queen's authority. Land was confiscated from both loyal and "rebel" Maori land owners. Subsequent to the confiscations approximately half of the confiscated lands were given back to, or purchased from, the original owners. The portion retained and the initial confiscation have left a bitterness that has not been removed by a line of

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1 N.Z. Settlements Act 1863; N.Z. Settlements Amendment Act 1864; N.Z. Settlements Amendment and Continuance Act 1865; N.Z. Settlements Acts Amendment Act 1866. Other Acts that authorised confiscation of land owned by "rebels" without compensation were the Public Works Lands Act 1864 and the East Coast Lands Titles Investigation Act 1866. It is not known how much land was confiscated under the former Act. The latter Act was used to confiscate an area of approximately 50,000 acres: M. P. K. Sorrenson "Maori and Pakeha" in W. H. Oliver and B. R. Williams et al. *The Oxford History of New Zealand* (Oxford University Press, Wellington, 1981) 186, Table 5.

Compensation Court settlements, two Royal Commissions[2] and enactments.[3] The confiscation Acts were unnecessary and unjust and did not achieve their objectives but did much to undermine Maori confidence in the justice and impartiality of the law. The morale of the Maori people generally, especially those directly affected by the confiscations, was severely weakened.

This paper firstly looks at the historical background to the legislation, then secondly at the Acts themselves and their implementation, and finally at the effect of the confiscations and suggests a possible solution to the problems that are unresolved.

II. THE HISTORICAL BACKGROUND TO THE LEGISLATION

A. Land Acquisition Prior to the Confiscations

Between 1846 and 1864 the Crown had the sole right to acquire Maori land in New Zealand by virtue of the Native Land Purchase Ordinance 1846.[4] Once land was acquired it was regarded as "waste land" of the Crown and, unless required for public purposes, was available for distribution to settlers by way of Crown grant under the authority of the Letters Patent 1840.[5] The New Zealand Constitution Act 1852 (U.K.),[6] in section 1, repealed prior legislation, letters patent etc, in so far as they were inconsistent with the Act. There was however nothing inconsistent with the New Zealand Constitution Act 1852 (U.K.) in prior legislation concerning acquisition and disposal of Maori land. Indeed section 73 of the New Zealand Constitution Act 1852 (U.K.) states the Crown is to have the sole right to acquire Maori land.

Governmental dealings with Maori tribes during this period mostly concerned the acquisition of land. Government native policy was essentially land acquisition.[7] Governor Browne noted in 1861 that many districts had not been visited by a representative of the Government and residents in these districts had no reason

2 *Reports of the Royal Commission* New Zealand. Parliament. House of Representatives. Appendix to the Journals, Vol. 2, 1880, G2; *Royal Commission to Inquire into Confiscations of Native Lands and Other Grievances Alleged by Natives* New Zealand. Parliament. House of Representative. Appendix to the Journals, Vol. 2, 1928, G7 (hereinafter called the Sim Report).

3 Confiscated Lands Act 1867; Mohaka and Waikare District Act 1870; Confiscated Lands Inquiry and Maori Prisoners' Trials Act 1879; Maori Land Claims Adjustment Acts 1904 s.14 and 1906 s.26; Native Land Amendment and Native Land Claims Adjustment Act 1928 s.20; Native Purposes Act 1931 s.49; Waikato-Maniapoto Maori Claims Settlement Act 1946; Tauranga Moana Trust Board Act 1981.

4 The Common Law contained the same principle: *R.* v. *Symonds* (1847) No. 19. N.Z.P.C.C. 387, 388, 393.

5 Letters Patent 1840, p.6; Instructions 1840, art. 37; Instructions 1846 c.13, para. 11: A. Domett *Ordinances of New Zealand* (Colonial Printer, Wellington, 1850).

6 15 and 16 Vict. c. LXXII.

7 *British Parliamentary Papers, New Zealand* (hereinafter BPPNZ) 1864, Cmnd. 326 Vol. XLI "Observations" by Sir William Martin, p.12, para. 7; *Remarks on Notes Published for the New Zealand Government on Sir William Martin's pamphlet "The Taranaki Question"* (W. H. Dalton, London, 1861); W. P. Reeves *The Long White Cloud* (4 ed., Golden Press, Auckland, 1980) 196; Sim Report, 12, para. 20, 14, para. 26.

to think the Government was concerned with their welfare.[8] Sir William Martin, the former Chief Justice, said:[9]

> The Queen's sovereignty was not manifest through the greater part of the island in the beneficial exercise of its proper function of protecting life and property.

The 1928 Sim Royal Commission into the grievances over the confiscations found that "every function of government seemed paralysed except that of purchasing native land".[10]

The New Zealand Government was committed, by the Treaty of Waitangi, to extend to the Maori people the full rights and privileges of British subjects.[11] The Maori people were at the time of the confiscations major contributors to the revenue of the Government through the incidence of indirect taxation.[12] They were the largest landowners[13] and formed almost half the total population in 1861.[14] Very few had the right to vote because voting was tied to individual ownership of land and most Maori land was in tribal ownership. No Maori represented their interest in Parliament and the Governor, who had traditionally performed the role of protector of Maori rights and interests, was gradually losing control of native policy to the colonial Government. Settler interests dominated the General Assembly and directed Government policy. The Government made a limited attempt to meet Maori needs. Schools and hospitals were set up in some districts near to European settlement. A system of limited local self-government was belatedly introduced in some areas in 1858.[15] These measures were too limited and came too late to prevent the conflict that the Government's land acquisition policies forced on the Maori people. Land was the "fundamental source of antagonism" between Maori and the Government.[16]

B. Waitara and the First Taranaki War

The antagonism developed into war in 1860 when the Government occupied the 980 acre Waitara block of the Te Atiawa tribe.[17] The Waitara dispute was caused by Governor Browne's attempt to purchase land from Teira, a Maori sub-chief willing to sell it, regardless of the objection of the senior chief, Wiremu Kingi, speaking for the whole tribe.[18] Until this attempted purchase the Governor had refused to "buy any land the title of which was in dispute".[19] Government

8 Sim Report, 12, para. 20.
9 BPPNZ, 1864, Cmnd. 326, Vol. XLI "Observations", 9, para. 20. Grey agreed with Martin's "Observations": BPPNZ, 1864, Cmnd. 326, Vol. XLI, 4.
10 Sim Report, 12, para. 20.
11 Treaty of Waitangi, art. 3. See Treaty of Waitangi Act 1975, First Schedule.
12 A. Ward *A Show of Justice* (A.N.U. Press, Canberra, 1974) 147.
13 K. Sinclair *The Origin of the Maori Wars* (2 ed., N.Z. University Press, Wellington, 1957) 146. In the North Island 74% of the land was in Maori ownership in 1859.
14 M. P. K. Sorrenson "Maori and Pakeha", supra n.1, 168.
15 Native Districts Regulations Acts 1858 and 1862.
16 A. Ward, supra n.12, 125.
17 Martial Law was proclaimed on 22 February 1860. Troops occupied the Waitara on 5 March 1860: Sim Report, 8.
18 A. Ward, supra n.12, 114; Sim Report, 10, para. 13.
19 O. Hadfield *The Second Year of One of England's Little Wars* (Williams and Norgate, London, 1861) 22.

policy had been to purchase land only with the unanimous approval of all the tribal chiefs and users of the land.

Governor Browne felt he had no choice but to insist on the right of "lawful proprietors" to sell land without chiefly interference and that failure to insist on this right would make land acquisition impossible. He thought Kingi had no interest in the land.[20] The settlers coveted the lands and were determined to possess them. In 1859, Henry Sewell, a prominent member of the Government stated that:[21]

> the settlers outnumbered the Maoris and were stronger and would if necessary take the land, the Maoris would resist and be crushed or exterminated.

Sir William Fox, four times Premier of New Zealand, noted "They do not use the land and yet they won't sell it."[22]

It was not surprising that the open conflict broke out in Waitara, for there the demand for land was greatest.[23] There was however at the time no general Maori resistance to land sales. The so called "land league" has been exposed as a myth invented and perpetuated to justify armed intervention at Waitara.[24] Land was being sold but Maori tribes insisted on their right to retain lands if they wished. The Government's use of armed force at Waitara to force land sales against the wishes of the majority of those who had an interest in the land, and against the approval of some of the chiefs confirmed Maori suspicions that the Government was only interested in acquiring their lands and would use force if necessary.

Sir William Martin noted:[25]

> The Queen's power has not saved their lives or property, but it takes possession of their lands. It appears not as a protector but as an invader; not as a stayer of blood, but itself a shedder of blood.

It is not surprising that Maori owners reacted with armed resistance and that sympathetic neighbouring tribes offered moral and material support. The Waitara dispute was "the spark which set all ablaze".[26] After a year of sporadic fighting an uneasy truce was achieved. There was an opportunity for a peaceful resolution of the dispute but Governor Browne did not accept any responsibility for the war. He had the support of the colonial Government and they both treated the resistance as an attack on the sovereignty of the Crown. The Imperial Govern-

20 *Papers Relative to the Natvie Insurrection* New Zealand. Parliament. House of Representatives. Appendix to the Journals, 1860, E3: 2-3.
21 K. Sinclair, supra n.13, 146.
22 Letters of William Fox to G. T. Fox *The Revolt in New Zealand* (Seeley Jackson and Halliday, London, 1865) Letter VII, 33.
23 W. P. Reeves, supra n.7, 196.
24 K. Sinclair *The Maori Land League — An Examination into the Source of a New Zealand Myth* (Auckland University College, Bulletin 37, History Series 4, 1950).
25 Sir William Martin, supra n.7, 31.
26 W. P. Reeves, supra n.7, 198; see also Sim Report, 7, para. 10; K. Sinclair, supra n.13, 226; M. P. K. Sorrenson, supra n.1, 181; A. Ward "The Origins of the Anglo-Maori Wars" (1967) 1 N.Z.J. of History 148.

ment did not agree and Browne was recalled and replaced by Governor Sir George Grey.[27]

After some inquiries were made, Grey was of the opinion that the Waitara block should be returned.[28] However this period was one of conflict between the Governor and the colonial Government as to who should control native policy. As the number of Imperial troops in New Zealand increased Britain felt that its representative, the Governor, should have the final say as to native policy. Britain was not prepared to underwrite the cost of a Maori-Pakeha war without having control over native policy.[29] The situation however was unwieldy for the colonial Government controlled the legislature.

C. The Maori King Movement

In 1856-58 the Maori King Movement was born. Initially the King movement was very weak and its functions and purpose undefined. It was an attempt by Maori chiefs who subscribed to it to retain the initiative in land transactions and to control their own affairs. It became a land league designed to resist land sales but it was much more than a land league. It was essential that authority and law and order be maintained in Maori tribal districts and in the absence of any effective Government attempt to do so the Maori chiefs, threatened by the dislocations of European influence in Maori social and political life, realised some form of control was essential to the well-being of their people. The King movement was not incompatible with British sovereignty and could have been developed into a effective system of self-government. Settler culture however was deeply in competition with the Maori and settlers did not want the King movement to survive for it would entrench and legalise values they did not understand or accept. The Government and the society it represented was ethnocentric. Their view was that the Maori should be amalgamated into the British way of life.[30]

D. Invasion of the Waikato

Before the Waitara block was returned, the Government on 12 July 1863 invaded the Waikato. The justification for the invasion was that it was essential to prevent an armed Maori invasion of Auckland.[31] This was another myth. There was no planned mobilisation of Maori tribes. Only a few hotheads were in favour of a march on Auckland. The invasion of the Waikato was not defensive but an

27 A. Ward, supra n.12, 124.

28 Sim Report, 8, para. 6; A. Ward, supra n.12, 158.

29 Letter from Secretary of State Cardwell to Grey 26 April 1864, BPPNZ 1864 Cmnd. 326, Vol. XLI, 50.

30 I. H. Kawharu *Maori Land Tenure* (Clarendon Press, Oxford, 1977) 10. Sir William Martin argued the King Movement was constructive. Sir William Dennison, Governor of N.S.W., advised Governor Browne that the King Movement could be developed and given localised legislative powers: A. Ward, supra n.12,118. Cf. letter by Sir William Fox to the Aboriginals' Protection Society, London, 5 May 1865: *Papers Relative to Native Affairs* New Zealand. Parliament. House of Representatives. Appendix to the Journals, 1864, E2:10. See also Sim Report, 12, para. 19.

31 W. P. Reeves, supra n.7, 207. Cf. Sim Report, 15, para. 2; *Papers Relative to Native Affairs,* supra n.30; N.Z. Gazette, 15 July 1863, 277; N.Z. Gazette, 2 September 1865, 267; BPPNZ 1864, Cmnd. 326, Vol. XLI, 3.

act of provocative aggression.[32] It resulted in many moderate chiefs joining the King movement and in the general resistance by many Maori tribes, but by no means all, against the Government's forces.

The nation that the use of Government troops was to enforce the rule of law in areas where the Queen's authority had been rejected is false but it formed the foundation for legislation that enabled confiscation of Maori tribal lands. The Waikato invasion is perhaps more important than the Waitara occupation. At least the Government could claim it occupied the Waitara because it thought it had purchased the lands there. The Waikato invasion was unrelated to a land purchase dispute. It marked a change in Government policy from persuasion and tolerance to coercion and armed aggression[33] and "gave vent to half a century of mounting impatience among the British in New Zealand to the independent mindedness and selectivity of the Maori People".[34]

III. THE MAORI LAND WARS 1863-1866

There was no Maori Land War as such but rather a series of battles in various parts of the North Island. The Maori tribes involved did not resist as a combined force. The King movement was not universally accepted in all the areas of warfare and not all battles were under the banner of the King. There was no national uprising against the Government. The battles were mostly fought by Maori tribes to resist occupation of their lands and were in defence of house and home.

The Maori resistance, in Waitara and eventually across to the East Coast, was not rebellion but, as Sir William Martin, former Chief Justice of New Zealand, said of the resisters in the Waikato:[35]

> seeing their territory entered by armed force and their property destroyed by that force, [they] stood up to resist, ought we not in fairness to conclude that they resisted, not because they were traitors, but rather because they were New Zealanders, or because they were men.

Professor Sinclair remarked:[36]

> Not only the local authorities, but the whole population. almost to a man, welcomed the rapidly approaching war and urged the government on in a crescendo of hysterical

32 Sir William Martin, supra n.7, 15-17; M. P. K. Sorrenson, supra n.1, 182; A. Ward, supra n.12, 158; W. Rusden *A History of New Zealand* (Chapman and Hall Ltd. London, 1883) 178; B. J. Dalton *War and Politics in New Zealand* (Sydney University Press, Sydney, 1967) 176. The invasion took place three days before the Government advised Maori residents of its intentions: N.Z. Gazette, 15 July 1863, 277, Sir William Martin, supra n.7, 16, para. 16.

33 B. J. Dalton, supra n.32, 179; Sir Frederick Whitaker's letter to Colonial Office explaining the purpose of the Act: BPPNZ 1864, Cmnd. 326, Vol. XLI, 29; Sir William Fox's letter to the Aboriginals' Protection Society, London, 5 May 1864, pp. 19-20, supra n.30. The exchange of memoranda between Grey and Whitaker was the product of a struggle to control native policy. The main difference of opinion was over the extent of confiscation. The concept behind the Act originated with Grey, not the General Assembly: J .Rutherford *Sir George Grey* (Cassel and Co., London, 1961) 509.

34 A. Ward, supra n. 12, 159.

35 Sir William Martin, supra n. 7, 17, para. 16; Sim Report, 8, para. 6.

36 K. Sinclair, supra n. 13, 187.

optimism. Nursemaids and newspaper editors, the young bloods and the farmers' daughters, all were keen to defend the honour of the Crown, to fight for the liberty of the individual Maori to sell his land and to get some of it.

The engagements in Tauranga, the Bay of Plenty and Taranaki had similar objectives to the Waikato offensive though by that time Maori resistance was more organised. Opportunities for peace were not used. The Government could have negotiated for peace after the battles of Rangiriri and Te Ranga but did not make proper use of these opportunities.[37]

As the war progressed Imperial troops became disenchanted with the prospect of waging war against the Maori. They admired their courage and doubted the justice of the Government's cause. General Cameron, commander-in-chief of Imperial forces, frequently complained that the New Zealand Government's object was to obtain land not to establish law and order.[38] The extent of the operations in Taranaki confirms this view. Subjugation of the Maori who resisted was a necessary incident to occupation of their lands. The Maori tribes who fought on the Government side generally did so to settle old grievances against traditional enemies and to acquire mana and Government rewards. Looting of property belonging to "rebels" was an added bonus and was not confined to "loyal" Maori warriors fighting for the Government. Looting invariably followed each Government victory.[39]

IV. THE TREATY OF WAITANGI

The Treaty of Waitangi confirmed and guaranteed "to the chiefs and tribes of New Zealand . . . the full exclusive and undisturbed possession of their land . . . so long as it is their wish and desire to retain the same in their possession . . ."[40]

The New Zealand Government was aware the New Zealand Settlements Act 1863 was repugnant to the Treaty of Waitangi. It justified the Act on the grounds that it was essential to the security of New Zealand and that the tribes who were in "rebellion" had breached the Treaty of Waitangi in taking up arms against the Crown and thus could not rely upon it to protect their lands. Apart from this justification the Premier asserted that the Treaty could not fetter the legislative authority of Parliament and could be overridden by legislative enactment.[41] As we have already noted the justification given in support of the Act is false. The Government was the aggressor. The security of the country was not at stake. Maori resistance was provoked and mostly defensive.

37 J. Rutherford, supra n. 33, 501.

38 W. P. Reeves, supra n. 7, 214. The British troops were critical of the purpose and object of the war: J. Rutherford, supra n. 33, 516.

30 A. Ward, supra n.12, 173 and 194. Ward states that General Cameron's successor, General Chute, was more ruthless and waged a scorched earth policy in Taranaki "killing, burning villages, destroying crops, looting and occasionally shooting prisoners".

40 Article 2.

41 *Papers Relative to Native Affairs* supra n.30,40 — Memo from Whitaker to Grey 10 May 1864. See also G. W. Rusden *Aureretanga* (William Ridgeway, London; reprinted, Capper Press, Christchurch, 1975) 38. The Hon. J. E. Fitzgerald addressing the House during the debate on the New Zealand Settlements Bill 1863 said: "[This bill] is a

In connection with the Treaty reference must be made to Article 3 which extended to the Maori people "all the rights and privileges of British subjects". It is significant that an attempt to introduce comprehensive legal and political rights for the Maori in 1863 was defeated.[42] The settlers were by and large bitterly opposed to the proposals. Only when the defeat of the Maori resistance seemed assured was legislation passed to ensure the Maori had the same legal standing as British subjects.[43] The exclusion of the Maori from Parliament was not remedied until 1867 when the Maori Representation Act was passed. Even then it only provided 4-5% of members of Parliament for almost half of New Zealand's population.[44]

V. A SUMMARY OF GOVERNMENT NATIVE POLICY

Professor James Rutherford made an interesting summary of Governor Grey's native policy:[45]

> He sought to bring . . . Maoris under government control through magistrates and Commissions, and he baited the political trap with pensions and salaries for chiefs; he projected roads and European settlements through their tribal domains and promised them economic prosperity; and he offered them churches, schools and hospitals, for which however they would have to pay in taxes and land endowments. . . . [H]e required British troops to supplement his peaceful persuasions and relied on British subsidies to finance his undertakings . . . Native acceptance in the first instance was chary and incomplete, suspicion bred resistance, and resistance led to the employment of force, the confiscation of land and ill-executed schemes of military settlement.

The policy of the colonial Government did not radically differ from that of Grey. The General Assembly was usually prepared to go along with Grey's policy and the disputes between Governor and Government were mostly because the Government wanted Grey to act more quickly and extensively in confiscation of

repeal, upon the face of it, of every enactment of every kind whatsoever which has been made by the British Crown with the natives from the first day when this country was a colony of the Crown": N.Z. Parliamentary debates, Vol. 1861-1863, 1863: 783. The official Proclamation 11 July 1963 stated the Treaty of Waitangi could not be relied upon by "rebels": N.Z. Gazette, 1863, 278. See also *Papers Relative to Native Affairs* supra n.30,41; BPPNZ 1864, Cmnd. 326, Vol. XLI, 47. The Colonial Government regarded the Treaty as an obligation resting on Britain rather than itself. The courts have held the Treaty cannot prevail against legislation repugnant to it: *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Court* [1941] A.C. 308; *In re the Bed of the Wanganui River* [1962] N.Z.L.R. 600, *In re the Ninety Mile Beach* [1963] N.Z.L.R. 461; *Waipapakura* v. *Hempton* [1914] N.Z.L.R. 1065; *Tamihana Korokai* v. *Solicitor General* [1913] N.Z.L.R. 321; *R.* v. *Symonds* (1847) N.Z.P.C.C. 387; *Wi Parata* v. *Bishop of Wellington* (1877) 3 N.Z. Jur. (N.S.) S.C. 72; *Inspector of Fisheries* v. *Weepu* [1956] N.Z.L.R. 920; *Keepa* v. *Inspector of Fisheries* [1965] N.Z.L.R. 322. Cf. *Kauwaeranga Judgment,* Native Land Court, 3 December 1870, Hauraki Minute Book 4, p.236 per Chief Judge Fenton; the judgment is reprinted in (1984) 14 V.U.W.L.R. 227.

42 N.Z. Parliamentary Papers, 1861-3, 483-513; A. Ward, supra n.12, 153.

43 Native Rights Act 1865.

44 I. H. Kawharu, supra n.30, 19.

45 J. Rutherford, supra n.33, 560.

Maori land and suppression of Maori resistance and independence.[46] The Government also desired to control native policy.

VI. ANALYSIS OF THE LEGISLATION

A. The New Zealand Settlements Act 1863

This Act was the principal Act under which land confiscations were made. It was assented to by the Governor of the day, Sir George Grey, on 3 December 1863 as authorised by section 56 New Zealand Constitution Act 1852 (U.K.) and forwarded to the Colonial Office by the Governor as required by section 58 of the New Zealand Constitution Act 1852 (U.K.). It enabled the Government by Order in Council to confiscate land owned by loyal or disloyal persons, regardless of race, if that land was within an area declared a "district" within the meaning of section 2 of the Act and if it was required for settlements (sections 3 and 4). An area could be declared a district if "any Tribe" or "any considerable number thereof has since the first day of January 1863 been engaged in rebellion against Her Majesty's authority . . ."

On 26 April 1864 the Colonial Office with marked reluctance approved the New Zealand Settlements Act 1863 but as empowered by section 58 of the New Zealand Constitution Act 1852 (U.K.) reserved the right to withdraw that approval for a period of two years from the date of assent unless the following conditions were fulfilled by the New Zealand Government.[47]

1. The appropriation of land was to take the form of cession imposed by the Governor and General Cameron (chief of Imperial forces at the time) upon the conquered tribes and made by them to the representative of the Queen as a condition on which clemency is extended to them.[48]
   If this was found impossible the Act could be brought into operation subject to the following conditions:
2. The Act was to be limited to a period of two years from the date of its enactment.[49]
3. The amount of land to be confiscated was to be publicly made known as soon as possible.[50]

46 Ibid., 509; *Papers Relative to Native Affairs,* generally, supra n.30. The "Memorandum War" between Grey and Whitaker. Grey's aims were to keep confiscation within reasonable limits. Whitaker wanted to implement the Act literally if land was required for settlement and revenue. This was a clear breach of his undertaking to Secretary Cardwell.

47 BPPNZ 1864, Cmnd. 326, Vol. XLI, 47. Letter from Cardwell to Grey, 26 April 1864. The principal objection to the Act was that it gave very wide powers of confiscation.

48 This was complied with: N.Z. Gazette, 1864, 399, Proclamation 26 October 1864.

49 Implemented by N.Z. Settlements Amendment Act 1864, s.3 but subsequently reversed by N.Z. Settlements Amendment and Continuance Act 1865, s.2.

50 It appears that this was carried out by the Proclamations of Orders in Council:
29 December 1864 Pukekohe, Waiuku, etc., N.Z. Gazette, 1865, 1.
30 January 1865 East Wairoa etc., N.Z. Gazette 1865, 15.
30 January 1865 Middle Taranaki, N.Z. Gazette, 1865, 15-16.
30 January 1865 Waitara South, N.Z. Gazette 1865, 16.

4. A commission was to be set up for the special purpose of inquiring into what lands were to be confiscated.[51]
5. Confiscations were not to be mere ministerial acts but must meet the personal approval of the Governor.
6. Land was not to be confiscated from innocent persons merely because it was in the same district as that of land owned by rebels unless this was unavoidable because it was jointly owned by "rebels" and loyal Maori or if it was essential for communications, security or public purposes.
7. The Crown should distinguish between those natives of "lesser guilt" and the "more guilty" natives when making confiscations.[52]
8. A general amnesty was to be announced at the end of the war and only those accused of specifically mentioned crimes were to be denied amnesty.[53]

Not all of these conditions were fulfilled by the New Zealand Government and despite the fact that the Colonial Office in London reiterated many times that they were to be complied with by the New Zealand Government the Imperial Government did not withdraw its assent from the Act although it had the power to do so under section 58 of the New Zealand Constitution Act 1852 (U.K.).[54]

In the face of the threat by the Colonial Office to withdraw its approval many promises and assurances were made by the Colonial Government that the Instructions of 26 April 1864 would be complied with. The Colonial Office was assured by the New Zealand Government that it would only confiscate land from

30 January 1865, Oakura, N.Z. Gazette 1865, 17.
16 May 1865 Central Waikato, N.Z. Gazette, 1865, 169 — areas set aside separately.
16 May 1865 Mangere etc., N.Z. Gazette, 1865, 171.
16 May 1865 East Wairoa, N.Z. Gazette, 1865, 172.
18 May 1865 Tauranga, N.Z. Gazette, 1865, 265 — This added to the area declared on 16 May 1865.
2 September 1865 Ngatiawa etc. (Taranaki Area), N.Z. Gazette, 1865, 266.
17 January 1866 Bay of Plenty, N.Z. Gazette, 1866, 17.
1 September 1866 Bay of Plenty, N.Z. Gazette, 347 — Correction of boundary of areas declared 17 January 1866.
12 January 1867 Mohaka-Waikare District, N.Z. Gazette, 1867, 44.

51 This was not complied with as Cardwell noted to his dismay in his letter to Grey: BPPNZ 1866 Cmnd. 3695, Vol. L, 129, Despatch No. 24; *Despatches from Rt. Hon. Edward Cardwell to His Excellency Sir George Grey.* New Zealand. Parliament. House of Representatives. Appendix to the Journals, 1865, A6: 18. The purpose of the proposed commission was to provide non-political decision making machinery to ensure impartial assessment of what lands were to be confiscated.

52 Cardwell noted this was not fully carried out: supra n.51. The Government promised Cardwell that if there was any doubt whether the tribes were in rebellion no land would be confiscated: N.Z. Gazeette, 1864, 358.

52 This was complied with: N.Z. Gazette, 1865, 267 Proclamation of 2 September 1865.

54 See correspondence from Cardwell to Grey 26 December 1864, 26 January 1865: BPPNZ, 1864 Cmnd, 3386, Vol. XLV, fp. 201; 20 August 1864: BPPNZ 1864, Cmnd. 3601 ,Vol. L, 185; 26 October 1865: BPPNZ, 1866, Cmnd. 3601, Vol. L, 250; 26 April 1866; BPPNZ, 1866, Cmnd. 3695, Vol. L, 128; Instructions from Cardwell to Grey 26 January 1865: BPPNZ 1865, Cmnd. 3455, Vol. XXXVII, 202. As late as 1865 there was considerable apprehension in New Zealand that England would withdraw its approval to the N.Z. Settlements Act 1863.

rebels or land which was necessary for the establishment of military settlements in which case compensation would be given to the former owners of the land.[55] A solemn undertaking was given that no land would be confiscated if there was any doubt whether the owners were in a state of rebellion.[56]

The fact that many of the assurances were not honoured by the New Zealand Government of the day did not render the New Zealand Settlements Act 1863, or its amendments, invalid or ultra vires the legislative power of the New Zealand Parliament. The assurances place a moral obligation on the Crown to honour them but such an obligation does not affect the validity of the legislation.

In relation to the content of the New Zealand Settlements Act 1863 it is to be noted that the meaning of "rebellion" in section 2 is not defined.[57] Land within a duly declared "district" could be confiscated from persons who were not "rebels" under section 5, namely from those who "comforted" rebels (subsection 2), or who on being requested by the Government to give up arms refused to do so (subsection 5). It was necessary however for the Governor to be satisfied that at least a large number of natives in the area were in a state of rebellion before an area could be declared a district under section 2. Unless the owner of the land was a person described in section 5 his land could not be confiscated.

The New Zealand Settlements Act 1863 was enacted and assented to on 3 December 1863 but by section 2 had retrospective effect and was deemed to commence from 1 January 1863. There is a general presumption that statutes concerning the criminal law do not have restrospective effect. Indeed New Zealand is committed by Article 15 of the International Covenant on Civil and Political Rights to ensure no one is held guilty of a criminal offence by retrospective legislation.[58] However the International Covenant was of course ratified many years after the New Zealand Settlements Act 1863 was passed and the principle that the courts will not impute retrospectivity to an Act of Parliament must give

55 Letter from W. Fox to Colonial Secretary 4 May 1864: N.Z. Gazette, 1864, fp. 233; Letter from Colonial Treasurer to Cardwell: N.Z. Gazette, 1864, fp. 357. See also W. Fox's reply to objections to the N.Z. Settlements Act 1863 by the Aboriginals' Protection Society: N.Z. Gazette, 1864, fp. 233 and also Grey's reply to the Society 7 April 1864: BPPNZ 1864, Cmnd. 3386, Vol. XLI, fp. 4. Cardwell's letter to Grey refers to concern of the colonial Ministers as to possible disallowance: 26 October 1865: BPPNZ ,1865, Cmnd. 3601, Vol. L, 250.

56 N.Z. Gazette, 1864, 358; BPPNZ, 1864, Cmnd. 3356, Vol. XLI, 19. Grey told Cardwell ". . . rest assured nothing shall be done [under the N.Z. Settlements Act] which will not meet your entire approval": *Despatches from the Governor of New Zealand to the Secretary of State* New Zealand. Parliament. House of Representatives. Appendix to the Journals. 1865, A5A: 4. Despatch No. 6.

57 For the meaning given to rebellion by the Government see BPPNZ, 1865, Cmnd. 3435, Vol. XXXVII, 91, Enclosure No. 4 of 1 July 1864: "the term rebel natives is intended to include all those persons whose lands, taken under the New Zealand Settlements Act 1863 shall be found not entitled to compensation."

58 Ratified by New Zealand on 19 December 1978. In force for New Zealand from 28 March 1979. The Criminal Justice Act 1954, s.43B enacts the provision and goes further tan te Common Law maxim *nulla poena sine lege: Latailakepa* v. *Dept. of Labour* [1982] 1 N.Z.L.R. 632. See also P.J. Downey *Human Rights in New Zealand* (Human Rights Commission, Wellington, 1983) 189.

way before the express provision of a statute that the Act is to have retrospective effect.[59] It is clear that the mere fact that the New Zealand Settlements Act 1863 was retrospective did not affect its validity.

B. The New Zealand Settlements Amendment Act 1864

This Act enabled the Governor in Council to increase compensation and also limited the 1863 parent Act to a period of two years in accordance with the request of the Imperial Government.[60]

C. The New Zealand Settlements Amendment and Continuance Act 1865

This Act provided that the New Zealand Settlements Act of 1863 would be perpetual. It also stipulated that no land was to be confiscated after 3 December 1867.[61] The Colonial Office was reluctant to allow the Act because it felt it was contrary to British policy. However as British troops were to be withdrawn and the Colonial Office was reluctant to interfere with the internal affairs of the colony, the Act was allowed despite disapproval of it.[62]

D. The New Zealand Settlements Act Amendment Act 1866

This Act made various amendments to the Acts of 1863, 1864 and 1865. The most important provision is section 6 which states:

> All orders, proclamations and regulations and all grants, awards and other proceedings of the Governor or any Court of Compensation or any Judge thereof heretofore, made, done or taken under authority of the said Acts, or either of them 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 Acts or either of them.

This provision is so wide as to validate almost any irregularity or proceeding of the Governor or Court of Compensation but only if that irregularity is made under the authority of the Acts.[63]

59 *De Luxe Theatre Co. Ltd.* v. *Commissioner of Taxes* [1938] N.Z.L.R. 782, 784: "the overriding rule . . . [is] . . . if it is a necessary implication from the language employed that the Legislature intended a particular section to have a retrospective operation, the Courts will give it such an operation". See also *Re Coutts* [1903] N.Z.L.R. 203 and 44 *Halsbury's Laws of England* (4 ed., Butterworths, London) para. 923.

60 Supra, n.49.

61 N.Z. Settlements Amendment and Continuance Act 1865, s.2.

62 BPPNZ, 1866, Cmnd. 3695, Vol. L, 127 — Letter from Cardwell to Grey 26 April 1866. Britain's main concern was to reduce it financial burden in supporting and supplying troops: *Despatches from the Rt. Hon. E. Cardwell to Sir George Grey,* supra n. 51, 7, 13, 16, 17.

63 Thus Grey's Proclamation of 17 December 1864, N.Z. Gazette, 1864, 461, is not a valid confiscation of land as it was not made under the authority of the Act. It is best seen as a Proclamation of an intention to confiscate. Subsequent proclamations for the Waikato were made under the authority of the Act and are valid. In conjunction with s.6 of the 1866 Act are the two Acts of Indemnity for persons involved in suppressing the "Rebellion": Indemnity Acts 1866 and 1867. The 1866 Act was so wide that it legalised retrospectively almost any atrocity committed against "rebels" or their property and was disallowed for that reason.

E. New Zealand Constitution Act 1852, section 73

Are the New Zealand Settlements Act 1863 and its amendments void for repugnancy with section 73 of the New Zealand Constitution Act 1852 (U.K.)? Section 73 of the Act read as follows:

> It shall not be lawful for any person other than her Majesty, her heirs or successors, to purchase or in anywise acquire or accept from the aboriginal natives, land of or belonging to, or used or occupied, by them in common as tribes or communities, or to accept any release or extinguishment of the rights of such aboriginal natives in any such land as aforesaid; and no conveyance or transfer or agreement for the conveyance or transfer of any such land, either in perpetuity or for any term or period, either absolutely or conditionally . . . shall be of any validity or effect unless the same be made to . . . and accepted by Her Majesty . . .

This section reserved the transfer or purchase of native lands to the Queen. Section 2 of the New Zealand Constitution Amendment Act 1857 (U.K.)[64] prevented the New Zealand Parliament from repealing section 73. Section 73 enacted the Crown's right of pre-emption established by Article 2 of the Treaty of Waitangi and the Letters Patent and Instructions of 1840. This right was also reiterated by the Native Land Purchases Ordinance 1846.[65] The argument as to repugnance would thus be that section 73, in its insistence that only the Crown could "purchase or in anywise acquire or accept" land from the Maoris, precluded a mode of acquisition such as confiscation. This argument is based on the reading of the words "or in anywise acquire" as being coloured by the voluntariness of the surrounding words. However in 1862 the British Parliament enacted the New Zealand Provincial Governments Act (U.K.)[66] and section 8 reads:

> And whereas it is expedient to enable the General Assembly of New Zealand to repeal the 73rd section [of the New Zealand Constitution Act 1852 (U.K.)]. Be it further enacted as follows . . . It shall be lawful for the said General Assembly to alter or repeal all or any of the provisions contained in the said section; and no Act passed by the said General Assembly, nor any part of such Act, shall be or be deemed to have been invalid by reason that the same is repugnant to any of the said provisions.

It is thus clear that the New Zealand Parliament was able to repeal section 73 of the New Zealand Constitution Act 1852 (U.K.) after the abovementioned Act was passed. By enacting the New Zealand Settlements Act 1863 the New Zealand Parliament impliedly repealed section 73 to the extent that section 73 was incompatible with it. This was the view taken by the court in *In re The Lundon and Whitaker Claims Act 1871*[67] by the full bench of the Court of Appeal. The judgment delivered by Arney C.J. held that:

> The 25 & 26 Victoria Act c.48(1862) enabled the General Assembly to repeal or alter that section (i.e. s.73) and therefore a provision of an Act of the colony since that time at variance with s.73 must be taken so far as to repeal it.

64 20 and 21 Vict., c.53.

65 BPPNZ, 1854, Cmnd. 1779, Vol. XLV, 320 Sir John Pakington to Grey 16 July 1852, para. 20.

66 25 and 26 Vict. c. XLVIII. The Native Lands Act 1862 (approved 1864) enabled direct purchase of Maori land by private individuals and thus impliedly repealed s.73 as did the Native Lands Act 1865.

67 (1872) 2 C.A. 41.

The decision of *In re the Lundon and Whitaker Claims Act 1871* is in accord with the general principles established in *Kutner* v. *Phillips*[68] that a later enactment impliedly repeals an earlier one if it is so inconsistent with or repugnant to that other enactment that the two are incapable of standing together.[69] It was held in *The India*[70] that "The prior statute would be repealed by implication if its provisions were wholly incompatible with a subsequent one". The principle set out in *Kutner* v. *Philips* has been steadfastly maintained to the present time. What a legislature can do expressly it can do impliedly so long as such an intention is clearly expressed.[71]

No particular "manner and form" was required to repeal section 73, as section 8 of the New Zealand Provincial Governments Act 1862 (U.K.) requires no special "manner and form" to be followed. Section 73 can be repealed by subsequent legislation, impliedly or expressly. It is clear that the New Zealand Settlements Act 1863 and its amendments are not repugnant to section 73 of the New Zealand Constitution Act 1852 (U.K.) nor are they void for any failure to conform with any "manner and form" requirement.

F. New Zealand Constitution Act 1852, section 53

Are the New Zealand Settlements Act 1863 and its amendments authorised by section 53 of the New Zealand Constitution Act 1852 (U.K.)? Section 53 of the New Zealand Constitution Act 1852 (U.K.) reads:

> It shall be competent to the said General Assembly . . . to make laws for the peace, order and good government of New Zealand, provided that no such laws be repugnant to the law of England . . .

The New Zealand Parliament of the day could not expressly or impliedly repeal this provision because it was forbidden from doing so by section 2 of the New Zealand Constitution Amendment Act 1857 (U.K.).

The provision of section 53 raises two questions, namely:

(i) Are the New Zealand Settlements Act and its amendments necessary for "the peace order and good government of New Zealand"?
(ii) Are the New Zealand Settlements Act and its amendments repugnant to the laws of England?

Dealing with the first question it is to be noted that the courts have not been ready to strike down an Act on the grounds it is not necessary for "the peace, order and good government of New Zealand". There has been only one case in New Zealand on this point, *R.* v. *Fineberg (No. 1)* in 1968[72] in which the Supreme Court, sitting with one judge, Moller J., held that[73] although the legislature had power to alter section 53 the fact it had not done so expressly meant the New

68 [1891] 2 Q.B. 267, 271.
69 44 *Halsbury's Laws of England* (4 ed., Butterworths, London) 557.
70 (1864) Brown and Lush 221, 224.
71 *Wallwork* v. *Fielding* [1922] 2 K.B. 66, 74; *R.* v. *National Arbitration Tribunal ex parte Bolton Corp.* [1941] 2 K.B. 405, 415; *Pattinson* v. *Finningley Internal Drainage Board* [1970] 2 Q.B. 33, 38; [1970] 1 All E.R. 790.
72 [1968] N.Z.L.R. 119.
73 Ibid. 122.

Zealand legislature could only enact law that was necessary for the "peace, order and good government of New Zealand". *R.* v. *Fineberg (No. 1)* did not define what "peace, order and good government" meant and the Court of Appeal in *R.* v. *Fineberg (No. 2)*[74] did not consider it necessary in that case to inquire into the correctness of the judgment of Moller J. in *R.* v. *Fineberg (No. 1)* on that point of law. It may be suggested that confiscation of lands under the New Zealand Settlements Act were not necessary for the peace, order and good government of New Zealand. This may be true in fact but in law such a proposition would probably be rejected by the courts as untenable. The courts have interpreted the words in the section as bestowing plenary powers on the colonial legislature over its own affairs.[75]

The second question raised by section 53 is whether the New Zealand Settlements Act 1863 and its amendments are repugnant to the laws of England. In *Ninewa Heremaia* v. *The Minister of Lands*[76] the Chief Justice, Sir Robert Stout, held:

> Repugnancy as defined by the Imperial Statute 28 & 29 Victoria c.63 [ie the Colonial Laws Validity Act 1865 (UK)] means repugnant to the provisions of any Act of Parliament of England or repugnant to any order or regulation made under the authority of such Act of Parliament.

The Chief Justice further held that there was no express provision, order or regulation that conflicted with the New Zealand Act in question and thus there was no repugnancy between the Act and the law of England. Many years later the Court of Appeal in *Woolworths (N.Z.) Ltd.* v. *Wynne*[77] held per F. B. Adams J.:

> There is . . . no repugnancy to the law of England unless there is repugnancy to such a statute, order or regulation [as set out in section 2 of the Colonial Laws Validity Act 1865 (U.K.)] . . . To raise a case of repugnancy, one must find . . . an express or implied prohibition.

It is submitted that the New Zealand Settlements Act 1863 and its amendments are not repugnant to the law of England as there is no express provision of the English Parliament in relation to New Zealand to which the colonial Act could be repugnant. Indeed this was the view of legal counsel for the Imperial Government at the time the Acts were passed.[78]

74 [1968] N.Z.L.R. 443, 450. The court was not asked to decide this point. It is noted that s.53 is now replaced by s.53(1) N.Z. Constitution Act 1852 (U.K.). Other cases relating to s.53 deal with the territorial aspect, e.g. *Poingdestre* v. *Poingdestre* [1909] N.Z.L.R. 604, 606 and 608; *In re Gleich* (1879) O.B. & F. (S.C.) 39; *Semple* v. *O'Donovan* [1917] N.Z.L.R. 273, 281; *In re the Award of the Wellington Cooks and Stewards Union* [1907] N.Z.L.R. 394; *R.* v. *Lander* [1919] N.Z.L.R. 305.

75 *Hodge* v. *R.* (1883) 9 App. Cas. 117, 132; *Powell* v. *Apollo Candle Co. Ltd.* (1885) 10 App. Cas. 282, 290; *Riel* v. *The Queen* (1885) 10 App. Cas. 889, 904-905; 5 *Halsbury's Laws of England* (3 ed., Butterworths, London) para. 1050.

76 [1903] N.Z.L.R. 54, 63.

77 [1952] N.Z.L.R. 496, 515 and 516. See also *Re T.E.V. "Rangatira"* [1936] N.Z.L.R. 357, 366.

78 N.Z. Gazette, 1864, 355 letter from Cardwell to Grey 26 May 1864. The legal counsel's opinion was that the Act was not repugnant to the law of England "for the laws of England have repeatedly recognised the necessity for exceptional legislation to suppress a rebellion threatening the existence of the State": Public Records Office, London CO 885.6.91, *Law Officer's Opinions 1860-1907* Vol. 1, p.249, 14 May 1864. It may be

It may be thought that it is repugnant to the law of England for the Crown to take land without compensation. The Crown in England if authorised by statute has the power to take land without compensation and this was upheld by Lord Atkinson in *Central Control Board* v. *Canon Brewery*:[79]

> [T]hat an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms.

This view was also taken in New Zealand by Read J. in *Whatatiri* v. *The King*.[80] The presumption that the Crown will not take land without compensation must give way to a statutory provision to the contrary.[81] The consequences of a statute are to be disregarded where the statute is unambiguous.[82]

The New Zealand Settlements Act 1863 and its 1864 amendment were enacted prior to the Colonial Laws Validity Act 1865 (U.K.). The meaning of repugnant to the law of England in relation to both of these Acts may not have been confined to "repugnant to the provisions of any Act of Parliament" of the Imperial Parliament that extended to New Zealand, as stated in the Colonial Laws Validity 1865 (U.K.), but may mean repugnant to all the laws of England, both statute law and Common Law. Despite this difference there does not appear to be any law in force in England to which the New Zealand Settlements Act 1863 and its 1864 amendment are repugnant. It would appear the New Zealand Settlements Act 1863 and its enactments are not repugnant to the laws of England or to the provision that laws must be necessary for "the peace, order and good government of New Zealand" as required by section 53 of the New Zealand Constitution Act 1852 (U.K.).

G. The Imperial Loan Guarantee Act 1856

Are the New Zealand Settlements Act 1863 and its amendments repugnant to the Imperial Loan Guarantee Act 1856 (U.K.)? Section 3 of the Imperial Loan Guarantee Act 1856 (U.K.)[83] provides that no Act passed by the New Zealand legislature in anywise discharging or varying the security shall be valid unless it contains a clause suspending the operation of the Imperial Loan Guarantee Act. The waste lands of New Zealand were security for New Zealand Government loans guaranteed by the Imperial Government. The purpose of section 3 was to ensure that the New Zealand Government did not reduce or dispose of the security without expressly declaring it was doing so in the enactment which discharged or varied the security. As every enactment had to be sent to England for Royal Assent the British Government had the power to withhold assent from any enactment that discharged or varied the security. The New Zealand Settlements

noted that the Privy Council considered Proclamations made under the Act and did not hold them repugnant to the law of England. However it did not address this point: *Manu Kapua* v. *Para Haimona* (1913) N.Z.P.C.C. 413 and *Te Teira Te Paea* v. *Te Tareha* (1901) N.Z.P.C.C. 399.

79 [1919] A.C. 744, 752.

80 [1938] N.Z.L.R. 676, 688.

81 44 *Halsbury's Laws of England* (4 ed., Butterworths, London, 1983) para. 906.

82 Acts Interpretation Act 1924, s.5(j).

83 20 and 21 Vict., c. 53.

Act 1863 and its amendments contained no such clause. As a result they were repugnant to the Imperial Loans Guarantee Act (U.K.). To remedy this situation section 3 of the Loan Guarantee Act 1866 (U.K.)[84] was enacted which provides that nothing in the New Zealand Settlements Act 1863 shall be void or inoperative on account of any repugnancy to any of the provisions of the Imperial Loans Guarantee Act (U.K.). This provision retrospectively removed the repugnancy of the New Zealand Settlement Act and its amendments to the Imperial Loan Guarantee Act 1856 (U.K.).

H. Estoppel

May the Crown be estopped from enacting or implementing the New Zealand Settlements Act 1863 because of previous assurances made by it with regard to the rights of Maori people to retain the lands? From the time Britain decided to annex New Zealand and up until the enactment of the New Zealand Settlements Act 1863 the Imperial and colonial Parliaments gave many assurances that native land would not be alienated from the indigenous peoples of New Zealand without their prior consent.[85] James Busby, the British Resident, convened a meeting of 34 northern chiefs at Waitangi in October 1837 and pledged recognition of native land ownership.[86] These assurances were repeated in the Instructions issued to Captain Hobson, on 14 August 1839 by Lord Normanby, Secretary of State for Colonial Affairs.[87] The Treaty of Waitangi, 6 February 1840, guaranteed to the Maori people the possession of their lands. As late as 15 July 1863 Governor Sir George Grey publicly proclaimed that the rights of Maori to their land would be guaranteed to them by the Government.[88] At the historic meeting at Kohimarama in 1860 between 120 Maori Chiefs and Governor Browne the Governor undertook to protect Maori customary rights to their lands.[89] The meeting was accorded great importance by the Imperial and colonial Governments as well as the Maori people generally and a further meeting was arranged for the subsequent year. Unfortunately war broke out prior to this date and the proposed meeting was abandoned.

Whilst these many assurances affect the justice and equity of the Acts passed between 1863 and 1866 under which the confiscation of Maori land took place they do not make the Acts ultra vires. However the question is would the

84 29 and 31 Vict., c. 104.

85 BPPNZ, 1864, Cmnd. 326, Vol. XLI "Observations", 10-18: "The Maori tribes title to the Soil and to the sovereignty of New Zealand is indisputable, and has been solemnly recognised by the British Government". See also BPPNZ, 1866, Cmnd. 3695, Vol. L, 129 — letter from Cardwell to Grey 26 April 1866.

86 J.M.R. Owens "New Zealand Before Annexation" in W. H. Oliver and B. R. Williams et al. *Oxford History of New Zealand* (Clarendon Press, Wellington, 1981) 43.

87 W. D. McIntyre and W. J. Gardner (eds.) *Speeches and Documents of New Zealand History* (Clarendon Press, Oxford, 1971) 10-18.

88 N.Z. Gazette, 1863, 278. The Government on 15 July 1863 guaranteed that "those who remain peaceably at their own villages in Waikato or move into such districts as may be pointed out by the government will be protected in their persons, property and land".

89 BPPNZ, 1861, Cmnd. 2798, Vol. XLI, 95. Contains a detailed report of the meeting and a reply from the Duke of Newcastle, Secretary of State for Colonial Affairs.

assurances estop the Crown from enacting or enforcing the provisions of the New Zealand Settlements Act and its amendments? Estoppel is defined thus:[90]

> A person who by his words or conduct, wilfully causes another person to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his position for the worse, is estopped from setting up against the latter person a different state of things as existing at the time in question.

In reliance upon the Government's promises, under the Treaty of Waitangi and subsequently, the Maori tribes had surrendered their sovereignty. Was the New Zealand Government estopped from passing or enforcing legislation that was in breach of these representations?

A principal case relating to estoppel against a statute is *Maritime Electric Co. Ltd.* v. *General Dairies Ltd.*[91] in which Lord Maugham delivered the decision of the Privy Council saying "Their Lordships are unable to see how the Court can admit an estoppel which would have the effect pro tanto and in the particular case of repealing the statute."[92] Much later in the House of Lords in *Society of Medical Offices of Health* v. *Hope*[93] held "It has been said on other occasions that there is no estoppel against a statute". And later in *North Western Gas Board* v. *Manchester Corporation*[94] the Court of Appeal per Sellers L.J. held "There cannot be an estoppel to prevent a public authority from carrying out its statutory duty". This principle was expanded in *Southend-on-Sea Corporation* v. *Hodgson Ltd.*[95] to cover statutory discretion "estoppel cannot operate to prevent or hinder the performance of a positive statutory discretion". The New Zealand courts have followed England in not allowing estoppel to be raised against a statutory discretion. In *O'Neill* v. *Eltham Co-operative Dairy Co.*[96] Hay J. held "the admission of an estoppel would tend to nullify the statutory provision" and disallowed estoppel for that reason.[97] In *Smith* v. *Attorney General*[98] Roper J. held "There is ample authority for the proposition that estoppel cannot be raised to hinder the exercise of a statutory duty or discretion". In conclusion it may be said the law in New Zealand does not allow estoppel to be raised against a statutory discretion or an enactment. The assurances by the Crown to protect Maori land and not alienate that land without the consent of the Maori owners may make subsequent confiscation unjust and inequitable but does not estop the Crown from enacting legislation such as the New Zealand Settlements Act 1863. Whether the Act is just and fair is irrelevant to the question of estoppel. In the face of a provision giving a clear statutory discretion, estoppel cannot be raised to prevent

90 Hinde and Hinde *N.Z. Law Dictionary* (3 ed., Butterworths, Wellington, 1979) 115; see also Cheshire and Fifoot *Law of Contract* (5 N.Z. ed., Butterworths, Wellington, 1979); 44 *Halsbury's Laws of England* (4 ed., Butterworths, London) para. 949.
91 [1937] A.C. 610.
92 Ibid. 621.
93 [1960] A.C. 551, 568.
94 [1963] 3 All E.R. 442, 451.
95 [1962] 1 Q.B. 416, 422.
96 [1950] N.Z.L.R. 275, 291.
97 Ibid. 292.
98 [1973] 2 N.Z.L.R. 393, 397.

or restrict the exercise of that discretion.[99] Estoppel thus could not be raised against the New Zealand Settlements Act 1863 or its amendments or their implementation.[100]

VII. THE SCHEME OF THE ACT AND ITS IMPLEMENTATION

A. The Orders in Council

There were three requirements whereby land might be confiscated under the 1863 Act:

1. The Governor in Council may, if he is satisfied there has been a rebellion of any Native tribe or considerable number thereof, declare the area a District: Section 2.
2. The Governor in Council may set apart within any District eligible sites for settlement for colonisation: Section 3.
3. The Governor in Council may for the purpose of such settlements reserve or take any land within such District and such land shall be deemed to be Crown land freed and discharged from any claim of any person as soon as the Governor in Council shall have declared the land is required for the purposes of this Act: Section 4.

It would appear that it was intended each of these requirements would have been distinct steps of procedure. In fact when the Orders in Council were made steps 1, 2 and 3 were combined within the one Order in Council for six of the Districts and for the remaining five districts step 1 was covered by an Order in Council and steps 2 and 3 were combined in another Order in Council.[101]

Premier Weld's justification for this was:[102]

> The natives do not distinguish between proclaiming a district and taking the land in it. Both alike are confiscation in their eyes. It is therefore thought better, for every reason, at once to include the territory over which the right of conquest is admitted in one operation proclaiming it and taking it for administration.

The Act required that the Governor in Council declare the area a district if he was "satisfied" the Native tribes etc, had been in rebellion, and then set aside eligible areas for settlement and finally take land required for those settlements. There was no power to take land for "administration" as Premier Weld asserts. Land could not be taken for any purpose other than for settlements. It could not even be taken from "rebels" unless it was required for settlement.

As half of the confiscated lands were returned to their original owners could it be said the entire area taken was required for settlements? Land was returned to "rebels" to satisfy their needs. Land was also returned to loyal Maoris to avoid

99 *Halsbury's Laws of England, New Zealand Commentary,* Ch.59 (4 ed., Butterworths, 1977) para. C 515; Spencer Bower and Turner *Estoppel by Representation* (3 ed., Butterworths, London, 1977) 141; *Chapman* v. *Michaelson* [1908] 2 Ch. 612 ,621; *Stockwell* v. *Southport Corp.* [1936] 2 All E.R. 1343. There are minor exceptions to this rule but these relate only to local government statutory discretion — see *Western Fish Products* v. *Penwith D.C.* [1981] 2 All E.R. 204, 219 per Megaw L.J. and also *Lever (Finance) Ltd.* v. *Westminster Corp.* [1971] 1 Q.B. 222; also *Rootkin* v. *Kent C.C.* [1981] 2 All E.R. 227.

100 Supra nn.95 and 98.

101 Proclamations are listed in n.50.

102 *Memoranda Between His Excellency the Governor and Ministers* New Zealand. Parliament. House of Representatives. Appendix to the Journals, 1865 A1: 27.

payment of compensation.[103] It is doubtful that all the land returned was for these purposes. The Government's aim was, inter alia, to individualise titles of all land within the district and it could only do this by first confiscating the land and then returning it.[104] Is this the "administration" Premier Weld was referring to? If any land was taken for "administration" and not for settlements it renders the proclamations invalid and ultra vires section 4 of the 1863 Act. Even if the entire Districts were required for settlement the procedure used was contrary to the scheme of the Act.

The fact that the Governor in Council had discretionary power in declaring "Districts" under Section 2 of the Act raises the question whether the exercise of that discretion must be seen as being reasonably capable of serving the purpose of the legislation. Section 2 of the Act requires the Governor in Council to be "satisfied that any native tribe . . . has since 1 January 1863 been engaged in rebellion against Her Majesty's authority". This raises the question whether a declaration by the Governor in Council under section 2 could be invalid if it could be shown the Governor in Council was not "satisfied" or had no reasonable grounds to be "satisfied" that the requirements of section 2 were met.

The first case in which the courts were prepared to look at the discretion of the executive in these situations was *Lipton* v. *Ford*.[105] Lord Atkin in that case held the executive had to show that circumstances were such that they were reasonably capable of allowing use of the statutory discretion. *Lipton* v. *Ford* established the test that is now law in New Zealand.[106] However the courts were reluctant to inquire into statutory discretion prior to *Lipton* v. *Ford*. In 1915 the court in *In re a Petition of Right*[107] held the Crown's statement on oath conclusive. In 1916 in *The Zamora*[108] the court held that "those who are responsible for the national security must be the sole judges of what the national security requires". As the law stands today the courts could review the exercise of the discretion vested in the Governor in Council in statutory provisions such as section 2 of the New Zealand Settlements Act 1863.[109] The discretion is not now regarded as a purely subjective one. The courts would attribute an objective element to the exercise of the discretion. The test applied by the court is whether the discretion exercised by the Governor in Council could be seen as reasonably capable of

103 1865 Act ss 6.9,10; 1866 Act ss.3,4.

104 Some "rebel" Maori such as those of the Ngati Maniapoto, who were very militant against the Government, did not have any land confiscated, whilst loyal Maori such as those in the Lower Waikato lost most of their lands because it was more suitable for farming. "In the selection of the land for confiscation, fertility and the strategic location of land were more important than the owners' part in 'rebellion' ": M. P K. Sorrenson, supra n.1, 185.

105 [1917] 2 K B. 647.

106 *Reade* v. *Smith* [1959] N.Z L R. 996; *Labour Dept.* v. *Merritt Beazley Homes* [1976] 1 N.Z.L R. 505; *Brader* v. *Ministry of Transport* [1981] 1 N.Z L R. 73. See also n.110.

107 [1915] 3 K B. 649, 660.

108 [1916] 2 A.C. 77, 107. Interestingly this principle has been upheld in the *Government Communications Headquarters Case* by the English Appeal Court, see *The Evening Post*, Wellington, 7 August 1984, p.7 [See now [1984] 3 W.L.R. 1174, H.L.]

109 Unless the N.Z. Settlements Act Amendment Act 1866 s.6 prevents such a review.

fulfilling the object and purpose of the statutory provision. In accordance with the declaratory theory of the Common Law it is clear that even in 1863 the courts would have had the same jurisdiction and would have been able to question the exercise of the statutory discretion by the Governor in Council. This is because according to the declaratory theory the Common Law is regarded as having always existed and the courts merely articulate the law.

A *Lipton* v. *Ford* type approach may be prevented by the fact that the courts take a more narrow view during a time of national emergency or war and are less likely to inquire into the validity of the executive's discretionary powers.[110] The time of the Maori land wars was claimed by the Government to be a time of national emergency and if it was it would favour a more narrow approach in relation to the investigation by the courts of the executive's discretion.

It is difficult to understand how the Governor-in-Council could have been "satisfied", as required by section 2, for the areas confiscated were vast. The table below indicates the size of the districts and the tribes affected:[111]

LOCALITY	AREA ORIGINALLY CONFISCATED*	AREA PURCHASED OR RETURNED*	AREA FINALLY CONFISCATED*	TRIBES AFFECTED
TARANAKI	1,275,000	813,000	462,000	Te Atiawa, Taranaki Ngati Ruanui Ngarauru
WAIKATO	1,202,172	314,364	887,808	Ngati Paoa Ngati Haua Waikato
TAURANGA	290,000	240,250	49,750	Ngai Te Rangi
BAY OF PLENTY	448,000	236,940	211,060	Ngati Awa Tuahoe Whakatohea
HAWKES BAY			50,000[112]	Ngati Kahungunu

* Areas in acres.

In 1864 the Whitaker Government requested Governor Grey to sign Orders in Council confiscating a total of eight million acres. The Governor refused because he said he was not "satisfied" the tribes covered by the Orders in Council had been in rebellion as required by section 2. The Government then reduced the area to approximately what Grey eventually agreed to confiscate under the succeeding Government but still Grey refused to sign. The real reason for Grey

110 *Hewitt* v. *Fielder* [1951] N.Z.L.R. 755; *Liversidge* v. *Anderson* [1942] A.C. 206; [1941] 3 All E.R. 338; *Combined State Unions* v. *State Services Co-ordinating Committee* [1982] 1 N.Z.L.R. 742; *N.Z. Drivers' Association* v. *N.Z. Road Carriers* [1982] 1 N.Z.L.R. 374.

111 See Sim Report, supra n.2 for the area and location. Tribes affected were obtained from W. H. Oliver et al., supra n.1, 464, 465.

112 M. P. K. Sorrenson, supra n.1, 186, Table 5.

not signing was not because he was not "satisfied" but because he did not agree with the extent of the confiscations proposed by the Whitaker Government and because he wanted to control native policy.[113] When the Weld Government replaced that of Whitaker, Grey signed Orders in Council because he accepted that native policy was to be controlled by the new Government and not by himself. Premier Weld formed a Government on this understanding. It would appear the Governor in Council was "satisfied" that the tribes within the Districts, or a substantial part of them, were in rebellion. It is less clear that the *Lipton* v. *Ford* test is satisfied but it is doubtful that the courts would now exercise their powers to enquire into the exercise of the Governor in Council's discretion in 1864-1866, even though they have the power to do so.

B. Compensation Provisions

1. *Eligibility for compensation*

The Crown generally confiscated all land within the Districts that were proclaimed. Subsequently some land was returned to loyal natives and to "rebels". Land required for settlement was not returned and if the original owners had not been in "rebellion" they were entitled to compensation in respect of the land confiscated. Compensation was initially to be in money, but section 3 of the 1866 Amendment enabled the Crown to award compensation wholly or partly in land in lieu of money. The Crown under section 6 of the 1865 Amendment could abandon land in respect of which compensation was payable.

2. *The court system*

Sections 8-13 established a Compensation Court to handle claims for compensation. Section 7 of the 1863 Act required the claimant to apply for compensation within 6 months if he resided in New Zealand.[114] This was an extremely harsh provision and must have resulted in many Maori landowners being denied compensation. At the time many tribes and persons would have been living in other areas due to the dislocations caused by the war. Many would not be aware that their land was confiscated or that they could claim compensation.

C. Disposal of Confiscated Land

The Crown was first required to grant confiscated land to military settlers with whom the Government had a contractual obligation to provide land. The balance of the land was available for sale, or return to the original owners: section 16, 1863 Act. The fact that military settlers had first call on the land meant that in Taranaki there was not sufficient land left to provide for the rights of Maori owners entitled to land by way of compensation, or, in the case of "rebels",

113 *Papers Relative to Native Affairs* supra n.30, especially at 54; *Further Papers Relative to Native Policy, Confiscation, Etc.* New Zealand. Parliament. House of Representatives. Appendix to Journals, 1864, E2C: especially at 2 and 9.

114 N.Z. Settlements Act 1863, s.7 — within six months for a native residing in New Zealand and eighteen months for those residing overseas. The N.Z. Settlements and Continuance Act 1865, s.11 replaced the above section and required a claim to be lodged not before three months or after six months from confiscation but gave the Colonial Secretary discretion to refer claims to the Compensation Court up to twelve months from the date of confiscation.

provision of land for their support. In some cases they received land in other areas. Some did not receive any land at all until the 1880 Royal Commission resulted in an Act being passed to remedy the situation.

D. Disposal of Proceeds of Sale of Confiscated Land

The proceeds from the sale of confiscated land were to be applied towards the cost of the war and the expense of forming settlements. The fund also was to be used to compensate those who suffered loss as a result of the war: section 19.

VIII. PROMISES BY THE GOVERNMENT TO RETURN LAND

On 2 September 1865 the Governor by proclamation, after consultation with the Government, announced he would "at once restore considerable quantities [of land] to those of the Natives who wish to settle down upon their lands"[115] and that the Government would "put the Natives who may desire it upon their lands at once".[115] This promise was not honoured, nor was a similar one promulgated on 17 December 1864.[116] In 1880 the Royal Commission into the West Coast confiscations found the Government had failed to fulfil promises to return land.[117] The Commission found the delays were often long and loyal Maoris were often not given land.[118] The Government had made numerous promises to restore land. Its tardiness exacerbated the grievance of the Maori peoples who lost land. An Act was passed in 1928 to remedy, inter alia, this situation.[119] Grievances still continued in relation to other areas where the Government had promised to return land.

IX. THE EFFECT OF THE LEGISLATION

A. Military Settlements

It was hoped that the use of land by military settlement would be of economic benefit to New Zealand. However many settlements were failures. Settlers often lacked the qualities necessary to establish viable economic farm units. Many abandoned their lands for the cities and for the gold fields of Australia and Otago. Magistrates often found it more difficult to control military settlers than Maori residents as Secretary Cardwell had predicted in 1864.[120]

B. Sales of Confiscated Land

The New Zealand Government had hoped sale of confiscated land would pay for the cost of the war. This expectation was not realised. The end of the 1860s saw New Zealand carrying a heavy debt, in a large part the result of the failure of the land settlement scheme and the cost of the war (approximately £4 million).

C. Individualisation of Maori Land Tenure

The land that was returned to Maori owners was converted from tribal to

115 N.Z. Gazette, 1865, 267.
116 N.Z. Gazette, 1864, 461.
117 *Reports of the Royal Commission*, supra n.2, xlvii.
118 N.Z. Parliamentary debates, Vol. 34., 1879: 864.
119 Native Land Amendment and Native Claim Adjustment Act 1928, s.20.
120 BPPNZ, 1864, Cmnd. 326, Vol. XLI, 47, Letter from Cardwell to Grey 26 April 1864.

individual ownership. This enabled Europeans to easily acquire Maori land by direct purchase at low prices. Many unscrupulous dealings occurred enticing or forcing Maori owners to sell land. The properties that were returned were often too small to become viable economic units. Land given to claimants was not always land they originally owned. Sometimes it was land from other areas. These various factors combined to sever the relationship of the Maori with his land. The communal nature of Maori land and society was broken.

D. The Legacy

The confiscation of Maori land under the New Zealand Settlements Acts resulted in a mass of petitions to the Queen and Parliament. Two Royal Commissions were appointed to investigate the grievances.[121] The most notable was that of the Sim Commission 1928. It found that the Taranaki confiscations were unjust and assessed compensation to the tribes affected at $10,000 p.a. in respect of 462,000 acres finally confiscated.[122] This is an annual payment of 2 cents per acre. The Sim Commission also found the Waikato confiscations exceeded what was just and fair and that confiscation should have only been nominal because the Government had precipitated the war there and forced the tribes to act in self-defence. A payment of $6,000 per annum was made for the 887,808 acres confiscated.[123] This is an annual payment of 0.7 cents per acre. In respect of the other confiscated lands the Commission found that they were just except for a small area owned by the Whakatohea tribe for which an annual payment of $600 was awarded.

The decision that confiscations in the Bay of Plenty were just is inconsistent with a finding by the Commission that land was probably confiscated without compensation from loyal Maori sub-tribes.[124] This was a breach of the undertaking that no land would be confiscated if there was any doubt as to whether the owners had been in rebellion, unless the land was required for public purposes or military settlement in which case compensation would be paid.[125] The New Zealand Settlements Act required compensation to be paid for land taken from loyal Maori owners.

In 1981 the Government awarded compensation to the Tauranga Maori tribe $250,000 for 49,750 acres confiscated. This was a payment of $5.03 per acre and was a final payment. The value of land in Taranaki at the time was $5,000-$10,000 per acre and the land confiscated was of high quality.[126] The Bay of

121 Supra n.2.

122 Sim Report, supra n.2, 11, paras. 14 and 15. Implemented by Native Purposes Act 1931. Land taken in Central Waikato under Proclamation 16 May 1865, N.Z. Gazette, 1865, 169, specifically excluded land of loyal Maoris; *Manu Kapua* v. *Para Haimona* (1913) N.Z.P.C.C. 413, 416. Land taken in Mohaka-Waikare District under Proclamation 12 January 1867, N.Z. Gazette, 1867, 44 included land of loyal Maoris: *Te Teira Te Paea* v. *Te Toera Tareha* (1901) N.Z.P.C.C. 399.

123 Sim Report, supra n.2, 17, paras. 35 and 36; Waikato-Maniapoto Maori Claims Settlement Act 1946.

124 Sim Report, supra n.2, 21, para. 55.

125 N.Z. Gazette, 1864, 357; N.Z. Settlements Act 1863 s.5.

126 Tauranga Moana Trust Board Act 1981.

Plenty confiscations are currently the subject of negotiations between the Government and the Ngati Awa tribe.[127] An amount of $400,000 has been offered for 124,060 acres.[128] If accepted this would be a final payment of $3.22 per acre.

The compensation that has been paid by the Government has been grossly inadequate. Further claims for compensation are pending.[129] The inadequacy of earlier settlements has been so low as to render them unjust and unreasonable and it is inevitable they will come up for re-negotiation. The Waikato settlement was particularly inadequate. An assessment of compensation necessary to settle the claims in a just and fair manner will require consideration of the necessity of retrospective compensation.

E. The Failure of the Legislation

In many ways the legislation was a failure. It did not bring the war to a speedy end. Resistance to the Government's forces dragged on for another seven or so years after the first Act came into force. The battles with Te Kooti and Titokowaru are examples of this. The Queen's writ still did not run in much of the King Country when the war ended. Confiscation did not eliminate armed resistance but provoked it[130] and made the Maori "fight with the courage of despair".[131] The Hon. J. E. Fitzgerald in addressing the House said:[132]

> I am compelled to say that we cannot regard the operations of the war as having been attended with success . . . there existed on the part of many of the Natives a determination to resist the relinquishment of their lands, believing that to be the only means left of saving their nation and race.

The social objective of assimilating the Maori into European society was largely unsuccessful. This was because settler culture sought to make Maori people subject to their society. It ignored the Maori social identity. The twentieth century has seen the progression of New Zealand society from a monocultural to a multicultural society. Ethnocentric ideology has been rejected by Maori people generally. There has been a growth in Maori cultural identity. The Treaty of Waitangi recognised this right but the legislation supporting confiscation of Maori tribal land breached it.

127 *The Ngati Awa Case 1983* The Ngati Awa Trust Board, 14 September 1983.

128 There is uncertainty as to the total area involved. 87,000 acres were given to the Arawa tribe as payment for their "loyalty" to the Government in fighting the "rebel" Ngati Awa and other tribes. The Sim Report figures are inconsistent apart from the Arawa gift. There is an amount of 16,940 acres not accounted for and I have included this in the total area of 124,000 acres confiscated without compensation.

129 The Tuhoe Tribe.

130 The Government claimed that rebellion could only be crushed by confiscation of land on the assumption the Maori did not consider himself defeated unless his land was confiscated: *Papers Relative to Native Affairs* supra n.30, 20. BPPNZ, 1864, Cmnd. 326, Vol. XLI, Whitaker's note on the purpose of the legislation 4 January 1864. An analogy was drawn with confiscation of land in Ireland from Irish liberation fighters by the British Government in 1798.

131 Shrimpton and Mulgan *Maori and Pakeha: A History of New Zealand* (Whitcombe & Tombs, Auckland, 1921) 238.

132 N.Z. Parliamentary debates, Vol. 1864-1866, 1865: 322.

X. A POSSIBLE SOLUTION

One hundred and twenty years after the confiscation of Maori land, a period almost as long as the European occupation of New Zealand, the grievance over unjustly confiscated Maori tribal land remains a divisive issue in Maori-Pakeha relations.[133] No society can afford to ignore the legitimate rights of citizens, who form almost 10% of its population, to a fair and just settlement of their claims. It is submitted that a solution to the grievance can be found. In most cases a return of all the land would be impossible. It would be possible however to return some land and to make a monetary payment in respect of the balance, at a fair price, with an allowance for the delay in the compensation, to a tribal trust.[134] Inadequate compensation settlements of the past require resettlement and the question of retrospective compensation must be considered. In addition to the matter of compensation the official record as to the cause of the war should be adjusted. The Government should not be reluctant to accept responsibility for starting the war. New Zealand's historians and the Sim Royal Commission are unanimous as to the injustice of the war and have found it was the result of Government actions and settlers demands for land and historical records endorse this view. The official record should express the actual cause of the war and not that of a prejudiced settler Government.[135]

133 I. H. Kawharu, supra n.30, 15.

134 Similar to the Tauranga Moana Trust Board: Tauranga Moana Trust Board Act 1981.

135 After the Government realised that it was in error in forcing the Waitara sale the Assistant Native Secretay, Mr. T. H. Smith, was unprepared to apologise for the error. Smith said "It will never do for the Government to admit error to a Maori": A Ward, supra n.12, 115. A similar attitude has existed in relation to the land confiscation under the N.Z. Settlements Acts.