Law and Confiscation: Essays on Raupatu in New Zealand History

P G McHugh, Richard P Boast and Mark Hickford

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ISBN 978-0-475-12350-3 ISSN 1177-2077

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Treaty of Waitangi Research Unit
Stout Research Centre for New Zealand Studies
Victoria University of Wellington
Wellington, New Zealand

Phone: 64 4 463 5930
Fax: 64 4 463 5439
Email: stout-centre@vuw.ac.nz

Occasional Papers Series Editor
Richard Hill

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The opinions expressed and conclusions drawn in the Occasional Papers are solely those of the writer. They do not necessarily represent the views of the Treaty of Waitangi Research Unit. The Unit gratefully acknowledges subsidy for the series from the Faculty of Humanities and Social Sciences, Victoria University of Wellington.

Published by

Treaty of Waitangi Research Unit

Stout Research Centre for New Zealand Studies

Victoria University of Wellington

Wellington, New Zealand

2010

'An expensive mistake': Law, Courts and Confiscation on the New Zealand Colonial Frontier

Richard P Boast[1]

> We have lost all Imperial control in this portion of the Empire [New Zealand], and are reduced to the humble but useful function of finding men and money for a Colonial Assembly to dispose of in exterminating natives with whom we have no quarrel, in occupying lands from which we derive no profit, and in attracting to their shores a vast Commissariat expenditure which we have the honour to supply out of the taxes of the United Kingdom, and from which they derive enormous profits. (*The Times*, 28 April 1864)
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> I believe that Members of the Cabinet are agreed that the confiscation policy, as a whole, has been an expensive mistake. (Donald McLean, 1869)

Introduction

This has been a difficult paper to write, much more difficult than I anticipated, and to some extent even a frustrating exercise. My initial objective was simply to consider confiscation and the law and to dwell on some overseas precedents that seemed interesting, focusing especially on Ireland as a source of coercive precedent, a role that Ireland so often played in British imperial history. I have come to the conclusion, however, that it would be wrong to overstate the significance of law. To be sure, confiscation came about through law, in the sense that it derived from a specific statute of the colonial parliament. But the intricate edifice of statute did not always reflect reality on the ground. Law had to give way before the practical realities of power and the interests of competing groups in the regions, which makes an assessment of the relationship between law and confiscation rather difficult. In embarking on its confiscation policy, the colonial regime bit off a lot more than it could chew, although this was not obvious at first. The state was still small-scale, weak, almost wholly dependent on Maori support in a number of key areas (in Hawke's Bay, for example) and could not always count on imperial backing, political or military. This meant that in at least some areas the letter of the law had to give way to pragmatic solutions and deals. Confiscation ran aground on the rocks of a very confused local scene but also on objections at the imperial centre.

Confiscation is important in New Zealand history, but it is also significant in what used to be known as imperial history and is now sometimes called the 'new British' history,[2] or the history of 'Greater Britain'.[3] David Armitage has noted that:

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[1] Barrister and Professor of Law at Victoria University of Wellington. My thanks to Shaunnagh Dorsett, Reader in Law at Victoria University of Wellington, for comments on an earlier draft of this paper. All standard caveats apply.

> [t]he alliance between the New British History and Atlantic History could … become the first step novel integrative histories of "Greater Britain," as well as new comparative histories of "A America" and "Atlantic Europe". By that means, it might be possible to show that "British" history always happen in Britain, or only to Britons, just as "American" history was not always the crea Americans, nor did it take place solely in the Americas.[4]

But Greater Britain by the 19th century was no longer only 'Atlantic', it was also 'Pacific' history of confiscation certainly did not take place solely in New Zealand. It had links earlier events in Ireland, always a source of coercive statutory precedent within the empire parallels with contemporary developments in the South African colonies. Governor Grey Irish, and was governor in New Zealand and at the Cape, and in both places played a vital in introducing schemes of soldier-settlement. And the confiscation project in New Zealand the centre of a great deal of attention, mostly hostile, at the imperial centre and this ca reverberations back in the colony. A full examination of these dimensions of the subject is overdue, especially since the last full-length political study of the New Zealand wars as from an imperial perspective was last published in 1937.[5] On the other hand, as this essay also argue, confiscation, if imperial, also turned out to be excruciatingly local.

More needs to be known and understood about the actual realities of confiscation, especially in the Waikato, before *any* generalisations about it can be made with confidence. But at least it can be said that the North Island was not occupied Poland, N Zealand colonial politicians were not Nazis, the colonial state had little coercive force at disposal, and the British army – which had independent-minded commanders and which not always on the scene, in any case – was not the Wehrmacht. Politicians in Wellington, from being arrogant masters of the situation (an all-powerful 'Crown' meditating on the n opportunity to Breach The Principles Of The Treaty Of Waitangi), were uncertain as to w London would allow them to get away with, and were well aware, too, both that they neec Maori support in the localities and faced the hostile scrutiny of influential critics at the imper centre. Some politicians, like McLean, accepted the reality that Maori support was necessa

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[2] See J G A Pocock, 'British History: A Plea for a New Subject', *New Zealand Historical Journal*, 8 (197 Pocock, 'History and Sovereignty: The Historiographic Response to Colonization in Two British Culture *Journal of British Studies*, 31 (1992). If there can be a history of the Anglo-Atlantic world, why not of the Ang Pacific, focusing on California, Oregon, British Columbia, the Anglo-American presence in the Pacific Islands (Hawai'i), the Australian colonies and New Zealand? One would not want to overstress these links, but th probably do merit some overdue reflection.

[3] See David Armitage, 'Greater Britain: A Useful Category of Historical Analysis?', *The American Historic Review*, 104 (1999). A probably inevitable reaction to an emphasis on 'Atlanticism' is now becoming appare seen e.g. with Brendan Simms, *Three Victories and a Defeat: The Rise and Fall of the First British Empire, 171 1783*, London, Allen Lane/Penguin Books, 2007.

[4] Armitage, pp 444-5.

[5] A J Harrop, *England and the Maori Wars*, London, New Zealand News, and London, Whitcombe and Tomb 1937. This is a book that suffers from a bad case of intellectual timidity and is little more than a collection extracts from newspapers, parliamentary debates and official papers (for that reason is actually in some ways sti rather useful). For a valuable and more recent comparative study see W P Morrell, *British Colonial Policy in th Mid-Victorian Age: South Africa, New Zealand, the West Indies*, Oxford, Clarendon Press, 1969.

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and that this had to involve tradeoffs; others (J C Richmond) resented it, and resented too the 'Maori doctors' like McLean. All of these realities powerfully structured confiscation law, which may have begun with a bang in the shape of the New Zealand Settlements Act 1863 but ended up, if not exactly with a whimper, certainly with a disorderly collection of ill-drafted statutes that reflected deals done on the frontiers. Confiscation often metamorphosed into agreement or into the ordinary processes of title investigation and purchase.[6]

'The law', moreover, needs to be considered in its dual nature, both as legal norm and as process. As legal norm or rule, this means of course the evolving statutory framework, most of the details of which need to be banished to the Appendix, simply because there was, in the end, so much law. To comment on it all would make this paper far too long, as well as mind-numbingly dull. The principal statute was the New Zealand Settlements Act 1863, but its enactment in 1863 was just the beginning. It led to a luxuriant growth of other statutes – 21 in all – some of which dealt with the general law of confiscation, others which concentrated on particular confiscations (such as the Tauranga District Lands Act 1867, the Mohaka and Waikare Districts Act 1870, or the Poverty Bay Lands Titles Act 1874). 'Law', moreover, means not only Acts and proclamations, it is also a process, one by which conflicts are litigated and adjudicated upon through Courts. With respect to confiscation, this has two aspects. First, there is a group of cases in which the confiscation process was reviewed and analysed by the ordinary courts through the ordinary processes of civil litigation. The latest of these cases, on the Tauranga confiscation, was decided by the High Court in 1995,[7] so this seems to be a category of litigation that is by no means closed. Second, the confiscation legislation set up a specialist Tribunal of its own, a remarkably interesting one as it happens, this being the Compensation Court. Also, the Native Land Court became involved in the confiscation project in some places. The rule of law was a reality in colonial New Zealand, and the Courts did not necessarily do what colonial politicians wanted or hoped; Chief Judge Fenton, who ran the Native Land Court as well as the Compensation Court, whatever else historians have to say about him, and they have said plenty, was no toady of the government.

The published historiography relating to the confiscations in New Zealand is remarkably thin,[8] especially when compared to that relating to similar processes that took place two centuries

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[6] On the centrality of Crown–Maori agreement making in New Zealand legal history see R P Boast, 'Recognising Multi-Textualism: Rethinking New Zealand's Legal History', (2006) , 27, *Victoria University of Wellington Law Review (VUWLR)*, pp 547-582; Vincent O'Malley, 'Treaty-Making in Early Colonial New Zealand', *New Zealand Journal of History (NZJH)*, 33 (1999).

[7] *Faulkner v Tauranga District Council* [1995] 1 NZLR 357.

[8] There is no focused monograph on the confiscation process in New Zealand. A very useful survey article is Michael Litchfield, 'Confiscation of Maori Land', (1985), 15, *VUWLR*, pp 335-360. I briefly discuss confiscation in *Buying the Land, Selling the Land: Governments and Maori Land in the North Island 1865-1921*, Wellington, Victoria University Press, 2008, pp 49-61. General accounts of war and politics during the 1860s deal with confiscations to some extent, especially B J Dalton, *War and Politics in New Zealand 1855-1870*, Sydney, Sydney University Press, 1967, pp 211-19, a very reliable guide to the political background to confiscation. Harrop's book on imperial policy has already been mentioned. Some local histories throw some light on aspects of the process, notably Evelyn Stokes, *A History of Tauranga County*, Palmerston North, Dunmore Press, 1980. There is one

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earlier in Ireland.[9] Fortunately, the lack of a published historiography has been made up some extent by a number of Waitangi Tribunal reports[10] and commissioned research r prepared by Crown, claimant and Waitangi Tribunal historians for the Tribunal inquiries. current Rohe Potae (King Country) Waitangi Tribunal inquiry will stimulate some f research, and already some valuable scoping reports have now appeared. The confiscatio have been most thoroughly studied are the Tauranga, Eastern Bay of Plenty, Poverty Ba Mohaka–Waikare confiscations; ironically the one that has been least investigated Waikato Confiscation, the largest and the most important. The Rohe Potae inquiry w doubt help remedy this to some extent, although the 'King Country' strictly speaking is o

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major book and a number of articles which explore the effect of confiscation on particular iwi: Tony Sole *Ruanui: A History*, Wellington, Huia Press, 2005; Judith Binney, 'Te Mana Tuatoru: The Rohe Potae of *NZJH*, 31 (1997), and Stokes, 'Pai Marire and Raupatu at Tauranga, 1864-1867', *NZJH*, 31 (1997). There key books on events in Taranaki in the late 1870s and early 1880s which, although not focused on the Taranaki raupatu itself, do of course deal with some of its after-effects: Dick Scott, *Ask That Mountain*, Au Heinemann/Southern Cross, 1975; Hazel Riseborough, *Days of Darkness: Taranaki 1878-1884*, Wellingtor & Unwin/Port Nicholson Press, 1989. On the effects of the Eastern Bay of Plenty Confiscation on Tuh Binney, *Encircled Lands*, Bridget Williams Books, Wellington, 2009.

[9] On confiscation in Ireland, see particularly Nicholas Canny, *Making Ireland British 1580-1650,* New Oxford University Press, 2001. See also a review by Brendan Bradshaw, *The English Historical Revie* (2002). Other key studies are T C Barnard, *Cromwellian Ireland: English Government and Reform in I 1649-1660*, Oxford, Oxford University Press, 1975; 'Planters and Policies in Cromwellian Ireland', *Pa Present*, 61 (1973); 'New Opportunities for British Settlement: Ireland, 1650-1700', in Canny (ed), *History of the British Empire, Vol I,* Oxford, Oxford University Press, 1998; T W Martin, F X Martin Byrne (eds), *A New History of Ireland: Vol III: Early Modern Ireland,* Oxford, Clarendon Press, 1976 (esp chs 8 and 9 by Patrick J Corish); J G Simms, *The Williamite Confiscations in Ireland, 1690-1703*, London On the historiography of early modern Ireland and its relationships with the 'New British history' and history see generally Canny, 'Writing Early Modern History: Ireland, Britain, and the Wider Worl *Historical Journal*, 46 (2003).

[10] Confiscation was a central or very important focus of *The Ngati Awa Raupatu Report*, Wai 46, Well Legislation Direct, 1999 [Eastern Bay of Plenty]; *The Taranaki Report: Kaupapa Tuatahi*, Wai 143, Well GP Publications, 1996 [Taranaki]; *The Mohaka ki Ahuriri Report*, 2 Vols, Wai 201, Wellington, Leg Direct, 2004 [Mohaka-Waikare]; *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation* Wai 215, Wellington, Legislation Direct, 2004 [Tauranga]; and *Turanga Tangata, Turanga Whenua: The on the Turanganui a Kiwa Claims*, Wai 814, Wellington, Legislation Direct, 2004 [Poverty Bay]. T omission is the Waikato confiscation. It was never the subject of a Waitangi Tribunal inquiry and was set means of a deed of settlement negotiated between Waikato-Tainui and the Crown, and implemented in legis

[11] These include Heather Bauchop, *The Aftermath of Confiscation: Crown Allocation of Land to Iwi, Ta 1865–1880'*, research report commissioned by the claimants, Wai 143, I18, 1993, [Taranaki]; Binney, *En Lands: Part One: A History of the Urewera from European Contact until 1878*, research report commissio the Crown Forestry Rental Trust (CFRT), Wai 894, A12, 2002 [Eastern Bay of Plenty, with particular refer Tuhoe]; Boast, *The Mohaka-Waikare Confiscation, Consolidated Report*, research report commissioned CFRT, Wai 201, J28 and J29, 1995 [Mohaka-Waikare]; Cecilia Edwards, *Implementing a Policy of Confi in Turanganui a Kiwa*, research report commissioned by the Crown Law Office (CLO), Wai 814, F18 [Poverty Bay]; Bryan Gilling, *The Policy and Practice of Raupatu in New Zealand*, Parts A and B, re reports commissioned by the claimants in association with the CFRT, Wai 201, J27 and M9, 1996 and O'Malley, *The Aftermath of the Tauranga Raupatu, 1864-1981: An Overview Report*, research commissioned by the CFRT, Wai 215, A22, 1995 [Tauranga]; O'Malley, *The East Coast Confiscation Legi and its Implementation*, research report commissioned by the CFRT, Wai 894, A34, 1994; Ann Parsonso *Whenua Tautohetohe o Taranaki: Land and Conflict in Taranaki 1839-1859*, research report commissioned Waitangi Tribunal, Wai 143, A1(a), 1993 [Taranaki]; Stokes, *Te Raupatu o Tauranga Moana: The Confisc Tauranga Lands*, research report commissioned by the Waitangi Tribunal, Wai 215, A12, 1990. For bibliography, see Tim Shoebridge, *Waitangi Tribunal Bibliography 1975-2005*, Waitangi Tribunal, Well 2006.

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the Waikato confiscation boundary. In terms of complexity and importance, Taranaki comes a close second to Waikato; this too, has not been studied as comprehensively as the Bay of Plenty and East Coast confiscations.[12] Even in the case of the latter however, much of the recent work that has been done is essentially unpublished, existing only in the 'grey literature' of expert reports to the Waitangi Tribunal and not easily accessible. There has been no discernible historiographical debate about the confiscation of land in colonial New Zealand, although there is probably a consensus among historians that it was A Bad Thing (Bad, but also Very Difficult To Unravel). And very little that has been done has focused on the law, in either of the two senses described above. One important discussion which does stand out and which does indeed deal with legal issues, in a sense, is Michael Belgrave's study of the Waitangi Tribunal process, a long chapter of which is concerned with the Tribunal's inquiry into the Taranaki confiscations. Belgrave's analysis is, however, more of a historiographical discussion and a critical reflection on the Tribunal inquiry process than a consideration of the Taranaki confiscation itself.[13]

The Waitangi Tribunal process has distorted the historiography of confiscation by reinforcing the tendency to see confiscation as Maori grievance, an issue between Maori and the Crown but not particularly impacting on anyone else. But of course this is a mistake, as confiscation as practised in New Zealand was a policy of plantation and settlement, as it was earlier in 17th century Ireland (I do not mean to suggest that Maori do not have a lot to be aggrieved about: those in doubt should read Tony Sole's excellent new history of Ngāti Ruanui[14]). Historians of confiscation in Ireland are just as interested in the settlers as in those who lost their lands through the process, a very marked contrast with New Zealand. In New Zealand virtually nothing has been written about confiscation as settlement. The only full discussion of this I am aware of is an interesting study by a Waikato local historian, H C M Norris's *Armed Settlers*, published in Hamilton in 1963.[15] Stokes also covers military settlement at Tauranga in her

on particular iwi: Tony Sole, *Ngāti Tuatoru: The Rohe Potae of Tuhoe'*, 57', *NZJH*, 31 (1997). There are two although not focused on the earlier Scott, *Ask That Mountain*, Auckland, *anaki 1878-1884*, Wellington, Allen Plenty Confiscation on Tuhoe, see

and British 1580-1650, New York, *The English Historical Review*, 117 *Government and Reform in Ireland,* in Cromwellian Ireland', *Past and* 550-1700', in Canny (ed), *Oxford* ; T W Martin, F X Martin and F J , Clarendon Press, 1976 (especially *Ireland, 1690-1703*, London, 1956. 'New British history' and Atlantic tain, and the Wider World', *The*

apatu Report, Wai 46, Wellington, *apa Tuatahi*, Wai 143, Wellington, Wai 201, Wellington, Legislation *the Tauranga Confiscation Claims*, *ata, Turanga Whenua: The Report* ct, 2004 [Poverty Bay]. The key Tribunal inquiry and was settled by n, and implemented in legislation. *location of Land to Iwi, Taranaki,* 993, [Taranaki]; Binney, *Encircled* , research report commissioned by Plenty, with particular reference to earch report commissioned by the *lementing a Policy of Confiscation* ffice (CLO), Wai 814, F18, 2002 *Zealand*, Parts A and B, research 01, J27 and M9, 1996 and 1997; *verview Report*, research report *ast Coast Confiscation Legislation* , A34, 1994; Ann Parsonson, *Nga* search report commissioned by the *anga Moana: The Confiscation of* Wai 215, A12, 1990. For a full 5, Waitangi Tribunal, Wellington,

[12] Although the Waitangi Tribunal has reported on the Taranaki confiscation, and a number of important reports were written for that claim, the Taranaki confiscation was a massively dislocating and complex process and much remains to be learned about it. Some understanding of the consequences of the years of conflict, invasion by the British army, confiscation and confusing purchasing for the iwi of Taranaki can be obtained from a recent history of one of the South Taranaki iwi, Sole's *Ngāti Ruanui*.

[13] Michael Belgrave, *Historical Frictions: Maori Claims and Contested Histories*, Auckland University Press, Auckland, 2005 (see especially ch 5, 'Taranaki Victims Triumphant').

[14] Sole.

[15] H C M Norris, *Armed Settlers: The Story of the Founding of Hamilton,* Hamilton, Paul's Book Arcade, 1963 and a sequel, *Settlers in Depression 1875-1894*, Hamilton and Auckland, Paul's Book Arcade, 1977. There is some information in Richard Stowers, *Waikato Troopers: History of the Waikato Mounted Rifles*, published by the author, Print House, Hamilton, 2008, although this book mainly follows the fortunes of the regiment through the South African war and the two world wars. The regiment, which began as a volunteers force patrolling the aukati boundary, soon had Maori volunteers in its ranks and later fought at, or contributed to units fighting in South Africa, Gallipolli, France, Crete, North Africa and Italy. It is somehow inspiring to see that the foreword to this book was written by Lieutenant General Mateparae.

history of the Tauranga region, this being the only other reasonably full treatment,[16] alth the subject is touched on in other local histories, there being, seemingly, no corner o country without one.[17] Norris's account, based on a wealth of primary sources, is actu rather good book, but it is now naturally somewhat outdated, and a more modern treatm required. Norris wrote only about the Waikato in any case, and there were military settl Tauranga, South Auckland, Taranaki and maybe other areas. The settlement side of the Zealand Settlements Act was itself a legal process, although it was one of granting land various terms and conditions – rather than taking it. This, too, is an aspect of confiscatio the law. Perhaps no one is interested in the settlers any more, but if so that seems unfortu in my view, at least, we should be.

Norris makes it clear that life was far from easy for those who took up the military g around Hamilton. The daily newspapers of the day were full of the many difficulties problems that confronted the Waikato military settlers, who were owed substantial arrea pay and who had to endure theft from their farms and mutilation of stock by resentful M not surprisingly there were occasional brawls involving settlers and Maori, assaults, arrest other collisions.[18] Often enough the soldier-settlers decided to simply leave, many l tempted by the hopes of better opportunities on the South Island or Australian goldf Stokes regards the military settlement scheme at Tauranga, which was affected significant a fresh conflict in 1867 between the Crown and Pirirakau, as 'a failure'.[19] If little is kı about the settlers, not much is known about the effects of the policy on local Maori either they all leave the confiscated zones, or remain in situ? What were relations between Maor the new grantees really like? A whole social history of interaction between incoming se and dispossessed Maori awaits exploration.

The Maori term 'raupatu' means 'conquest', and now seems to carry a secondary meanii referring in particular to the well-known New Zealand Settlements Act land confiscatio the 1860s. Implicit in the notion of confiscation is taking property as *punishment*. Public w takings, however unjustified, and however niggardly the compensation paid, are non-pun and have to be distinguished from confiscation, although it sometimes might not have see that way to the owners. As practised in Ireland and on the imperial frontiers, 'confiscation' linked with settlement, especially military settlement, or 'soldier-settlement'. It is no acci that the main statute in New Zealand was the New Zealand *Settlements* Act 1863; land wa

[16] See Stokes, *A History of Tauranga County*, pp 86-118.
[17] See P J Gibbons, *Astride the River: A History of Hamilton*, Christchurch, Hamilton City Council/Whitc 1977; Laurie Barber, *Frontier Town: A History of Te Awamutu 1884-1984*, Auckland and Te Awamutu Richards and Te Awamutu Borough Council, 1984.
[18] See e.g. *Daily Southern Cross*, March 12, 1866, p 6.
[19] Stokes, *A History of Tauranga County*, p 102.

just to be taken off 'rebels' but was taken to be settled ('planted' was the term used in Ireland). The taking and the settling were linked, part of a single policy. The settlers were to hold the land, defend it, and expand the sphere of the Crown's practical sovereignty. That, at least, was the policy underpinning the enacted law. Its application in practice was another matter. Putting to one side the issue of what precisely is meant by 'rebellion', in one of the confiscated areas (Opotiki–Whakatane) not only was there no rebellion, there was no real warfare in the district either.[20] In reality, often the real point of confiscation, as it developed in practice, was simply to wipe the existing tenurial slate clean and then start again with a process of regrant to loyal Maori as well as to military settlers, with the Crown keeping portions of strategic or commercial value here and there. Fairly significant parts of the confiscated areas are Crown land to this day – Mt Taranaki, for instance.

Finally, it needs to be emphasised that the Waitangi Tribunal enquiry process has revealed that 'confiscation' was a much larger and more sprawling process than was earlier thought. Rather than there being four discrete confiscation areas there were in fact more like six (if South Auckland is treated separately from the Waikato). Confiscation and Crown purchasing in many areas were not discrete processes, but interconnected ones. Moreover, it can now be appreciated that confiscation had a much larger role on the East Coast than was previously believed. Here especially messy and intractable variants of it were applied: at Mohaka–Waikare, Gisborne, and the upper Wairoa confiscation (Or was this a purchase? Or both?[21]). And finally, and this is where the Irish experience most closely parallels events in New Zealand, confiscation on the statute book turned out to be disorderly chaos on the ground.

Precedents, Parallels and Origins

Confiscation–regrant–settlement of the Irish and New Zealand type appears to be a Very British Practice; it seems, for example, not to be a feature of Spanish colonisation in the Americas. Some examples of taking land for rebellion might be found in the viceroyalties of New Spain or Peru, but nevertheless it was not a standard or important aspect of colonial policy there. This must indicate in its turn that the use of confiscation has some connection with the structures of imperial law and policy, which were based on quite different foundations in the British and Spanish colonial empires. Part of the reason may be that in the Spanish colonies there was an abundance of land and thus no particular need to confiscate it; more important than land was the control and appropriation of indigenous labour through such devices as *encomienda* and *repartimiento*.[22] In the Spanish colonial world labour was more

[20] Or so the Waitangi Tribunal has concluded: *The Ngati Awa Raupatu Report*, p 63.
[21] See Belgrave and Grant Young, *Te Urewera Inquiry District and Ngati Kahungunu: War, Confiscation and the 'Four Southern Blocks'*, report commissioned by the CFRT, Wai 894, A131, 2003.
[22] On *encomienda* and related policies see e.g. Nancy Farriss, *Maya Society under Colonial Rule: The Collective Enterprise of Survival*, Princeton NJ, Princeton University Press, 1984; Charles Gibson, *The Aztecs Under Spanish Rule: A History of the Indians of the Valley of Mexico, 1519-1810*, Stanford, Stanford University Press, 1964; Karen B Graubart, *With our Labour and Sweat: Indigenous Women and the Formation of Colonial Society*

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important than land. Legal superstructure grew out of an economic base, at least in this cas
However, the extent to which comparisons might be pursued admittedly depends very much o
how confiscation is perceived. If it is seen more broadly as coercively imposed shifting
indigenous populations hither and yon in order to suit the convenience, ideologies, land hung
or deranged dreams of settlers, missionaries, colonial authorities and ideologues then the scop
for comparative analysis is broadened as well, and might well extend to policies
congregación in New Spain, the Jesuit *reducciones* of Brazil and Paraguay,[23] or, mo
appositely maybe, Indian removal in the United States.[24] Where 'congregation' slides in
'reduction' and into 'removal' or 'annexation' or 'confiscation' is not clear at all, and
focusing on statutory confiscation for rebellion coupled with military settlement as practised
Ireland and the North Island, I do not mean to suggest that delimiting this practice from oth
forms of coercively moving populations around is obvious or easy.

Confiscation in English law probably derives from the Common Law doctrine of forfeiture,
which the estates of those convicted of high treason were forfeited to the Crown. This was
aspect of the general law of tenures. In Common Law conceptions, land is an estate, granted
and held from the Crown; 'by my treason I break the bond with the Crown and thus my estat
revert back to it. How, logically, can I hold land from my sovereign whom I have betrayed w
my treasonous behaviour?' But we are concerned here with *statutory* confiscation, of necess

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in Peru, Stanford, Stanford University Press, 2007; Ramón A Gutiérrez, *When Jesus Came the Corn Moth
Went Away: Marriage, Sexuality, and Power in New Mexico, 1500-1846*, Stanford, Stanford University Pr
1991; Susan Kellogg, *Law and the Transformation of Aztec Culture*, Norman, University of Oklahoma Pr
1995; James Lockhart, *The Nahuas After the Conquest*, Stanford, Stanford University Press, 1992; Matth
Restall, *The Maya World: Yucatec Culture and Society 1550-1850*, Stanford, Stanford University Press, 19
Steve J Stern, *Peru's Indian Peoples and the Challenge of Spanish Conquest: Huamanga to 1640*, Madis
Madison, The University of Wisconsin Press, 2nd edn, 1993; Karen Spalding, *Huarochirí: An Andean Soc
under Inca and Spanish Rule*, Stanford, Stanford University Press, 1984; James W Zion and Robert Yaz
'Indigenous Law in North America in the Wake of Conquest', (1997), 20, *Boston College International
Comparative Law Review*, pp 55-84.

[23] See J Eisenberg, 'Cultural Encounters, Theoretical Adventures: 'The Jesuit Missions to the New World and
Justification of Voluntary Slavery', *History of Political Thought*, 24 (2003); Harro Höpfl, *Jesuit Polit
Thought: The Society of Jesus and the State, c.1540–1630*, Ideas in Context Series, 70 (2004), Cambri
Cambridge University Press.

[24] On Indian removal see especially Howard Berman, 'The Concept of Aboriginal Rights in the Early L
History of the United States', (1977-1978), 27, *Buffalo Law Review*, pp 637-67; Joseph C Burke, 'The Cherc
Cases: A Study in Law, Politics and Morality', (1969), 21, *Stanford Law Review*, pp 500-47; Daniel Wa
Howe, *What God Hath Wrought: The Transformation of America 1815-1848*, Oxford History of the United St
Series, New York, Oxford University Press, 2007, pp 342-57; William G McLoughlin, *Cherokee Renaissanc
the New Republic*, Princeton, Princeton University Press, 1986; *Cherokees and Missionaries, 1739-1839*, Nor
and London, University of Oklahoma Press, 1995; Anthony F C Wallace, *The Long Bitter Trail: Andrew Jac
and the Indians*, New York, Hill and Wang, 1993; Robert A Williams, 'Documents of Barbarism:
Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian L
(1989), 31, *Arizona Law Review*, pp 159-81. The removal of the 'Five Civilised Tribes', including the Cherok
from Georgia to Oklahoma during the presidency of Andrew Jackson was the background to the 'Mar
trilogy', the famous group of United States Supreme Court decisions on the status of the Indians in Federal In
Law, namely *Johnson v McIntosh* 21 US (8 Wheat.) 543 (1823); *Cherokee Nation v Georgia* 30 US (5 Pe
(1831); and *Worcester v Georgia* 31 US (6 Pet.) 515 (1832). These decisions, so important in American
history, had however no impact on the matter at hand, i.e. the expulsion of the Cherokees and the other gr
from Georgia and Tennessee, which went ahead.

mic base, at least in this case. nittedly depends very much on oercively imposed shifting of nience, ideologies, land hunger and ideologues then the scope well extend to policies of zil and Paraguay,[23] or, more ere 'congregation' slides into n' is not clear at all, and in itary settlement as practised in miting this practice from other y.

Law doctrine of forfeiture, by ted to the Crown. This was an ıs, land is an estate, granted by the Crown and thus my estates gn whom I have betrayed with *ıtory* confiscation, of necessity

directed against collectivities and not individuals, and – even more importantly, at least in New Zealand and in Southern Africa – against those whose lands were held allodially and not under Crown grant.[25]

Comparative accounts of the interaction between the law and indigenous peoples in the British empire have not devoted much attention to statutory confiscation.[26] That is because it is the common law as a factor of imperial and cultural unity that has so far been of greatest interest to legal historians.[27] Statute law is a very poor relation to the common law, historiographically speaking, for very understandable reasons, statutes being inherently tedious to read and to analyse. As Douglas Hay and Paul Craven have put it, '[t]o the limited degree that it has been described by historians and lawyers, rather than simply evoked, the general law of empire usually has been treated as the common law'.[28] It seems to be the case, in fact, that it is Marxist legal historians, more ready to see the law as simply coercive, who have shown the greatest interest in statute.[29] Statutes in fact do have precedents and genealogy, a whakapapa as we would say in this part of the imperium. Statutes employed in one colony were applied in another, and their movements about the empire can certainly be charted, as for example, Douglas Hay and Paul Craven have done with master-servant Acts, and Hilary Golder and Diane Kirkby with married women's property legislation.[30] Nor was this legislation a simple matter of precedent being invented at the imperial centre and radiating outwards from there, as

Then Jesus Came the Corn Mothers Stanford, Stanford University Press, ıan, University of Oklahoma Press, d University Press, 1992; Matthew 'd, Stanford University Press, 1997; *ıest: Huamanga to 1640*, Madison, ng, *Huarochirí: An Andean Society* James W Zion and Robert Yazzie, , *Boston College International and*

Missions to the New World and the)03); Harro Höpfl, *Jesuit Political* text Series, 70 (2004), Cambridge,

)original Rights in the Early Legal 67; Joseph C Burke, 'The Cherokee *Review*, pp 500-47; Daniel Walker Oxford History of the United States :Loughlin, *Cherokee Renaissance in d Missionaries, 1739-1839*, Norman *Long Bitter Trail: Andrew Jackson* s, 'Documents of Barbarism: The Traditions of Federal Indian Law', ed Tribes', including the Cherokees, s the background to the 'Marshall atus of the Indians in Federal Indian *Nation v Georgia* 30 US (5 Pet,) 1 ns, so important in American legal the Cherokees and the other groups

[25] In 1863 Maori still held their lands under customary title, although there had been a few Crown grants to Maori in some areas. In 1862, the House of Representatives had enacted the Native Lands Act of that year, which provided a mechanism for the conversion of customary title to freehold grant, but the Act had not come into operation by 1863. On the Native Lands Acts and the Native Land Court see Boast, *Buying the Land, Selling the Land*, pp 66-119; D M Loveridge, *The Origins of the Native Lands Acts and Native Land Court in New Zealand*, report to the CLO, October 2000. Land titles in Ireland in the 17th century would mainly have been held by Crown grant, but in much of Ireland, probably the Crown granted titles would not have borne much relation to the on-the-ground reality of the survival of customary Gaelic Irish tenures over much of the country. In Ireland confiscation cut through very confused tenurial complexities.

[26] The leading comparative studies are McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-determination*, Oxford University Press, Auckland, 2004; and John C Weaver, *The Great Land Rush and the Making of the Modern World, 1650-1900*, Montreal and Kingston, McGill-Queen's University Press 2003. Neither of these two fundamental texts deals with statutory confiscation, no doubt for the reason that the subject is not very germane to the phenomena being analysed by these two scholars.

[27] See e.g. Daniel J Hulseboch, 'Imperia in Imperio: The Multiple Constitutions of Empire in New York, 1750-1777', (1998), 16, *Law and History Review (LHR)*, pp 319-79; Hulseboch, 'The Ancient Constitution and the Expanding Empire: Sir Edmund Coke's British Jurisprudence', (2003), 21, *LHR*, pp 439-82; McHugh, *Aboriginal Societies and the Common Law*; McHugh, 'Sovereignty this Century: Maori and the Common Law Constitution', (2000), 31, *VUWLR*, pp 187-214; Mark Walters, '*Mohegan Indians v Connecticut* in British North America (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America', (1995), 33, *Osgoode Hall Law Journal*, pp 785- 829; Walters, 'Towards a 'Taxonomy' for the Common Law, Legal History and the Recognition of Aboriginal Customary Law', in Cathy Colborne and Diane Kirkby (eds), *Law, History, Colonialism: The Reach of Empire*, Manchester, Manchester University Press, 2001; Walters, 'Histories of Colonialism, Legality and Aboriginality', (2007), 57, *University of Toronto Law Journal*, pp 819-32.

[28] Douglas Hay and Paul Craven, 'Introduction', in Hay and Craven (eds), *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955*, Chapel Hill and London: University of North Carolina Press, 2007, p 2.

[29] A famous example is E P Thompson, *Whigs and Hunters: The Origins of the Black Act*, London, Penguin, 1977.

[30] See Hay and Craven; Hilary Golder and Diane Kirkby, 'Mrs Mayne and Her Boxing Kangaroo: A Married Woman Tests Her Property Rights in Colonial New South Wales' (2003), 21, *LHR*, pp 585-605; Rosemary Hunter, 'Australian Legal Histories in Context', (2003), 21, *LHR*, pp 607-14.

Hay and Craven have demonstrated: statutes of great importance as precedents could equally as well originate in the West Indies, say, as in England. A famous example of a precedent created on the imperial periphery, the importance of which is difficult to exaggerate, is the celebrated 'Torrens' system of land registration, pioneered by the radical Liberal Robert Richard Torrens in South Australia in 1858 and exported from there all over the empire.[31] This was a statute that actually *abolished* the Common Law rules relating to arguably the most important of all legal matters to the colonial mind, title to land.[32] The implications of this legislation for Maori title were colossal.[33] Imperial legal unity could thus sometimes revolve around abolition of the Common Law rules. As I have argued on a number of occasions, New Zealand's essential constitutional reality is the centrality of statute,[34] but statute could certainly be borrowed from elsewhere whenever necessary.

One source of precedent for statutory confiscation in New Zealand, Ireland, has been mentioned already. There are obvious similarities between the Irish and the New Zealand confiscations, as a number of scholars have pointed out[35] – although not always with an especially sophisticated grasp of either Irish historiography or New Zealand complexities – but the difficulty is that no evidence has yet been found of a direct connection, in the sense that the 17th century Irish Acts were consciously used as a model for their New Zealand counterparts. The connection between Irish legislation and the Suppression of Rebellion Act,[36] enacted concurrently with the New Zealand Settlements Act in December 1863, is much closer. There certainly were confiscations in the Cape Colony and Natal, and no doubt elsewhere in Africa as well. It would be interesting to know whether, and to what extent, statutory confiscation was employed in British India, and if so what the legal foundations for such policies may have been.

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[31] See generally D Whalan, 'The origins of the Torrens system and its introduction into New Zealand', in G W Hinde (ed), *The New Zealand Torrens System: Centennial Essays*, Wellington, Butterworths, 1971, p 1; S R Simpson, *Land, Law and Registration*, Cambridge, Cambridge University Press, 1978.

[32] Real Property (South Australia) Act 1858. This was adopted in Queensland in 1861 and in New South Wales and Victoria in 1862. New Zealand's first 'Torrens' Act was the Land Transfer Act 1870, which was re-enacted in 1885, 1908, 1915, and 1952.

[33] See *Beale v Tihema Te Hau* [1905] 24 NZLR 883; *Assets Co Ltd v Mere Roihi and Wi Pere*, [1905] AC 176; Binney, *Encircled Lands*, A15, pp 46-67, 326-51 (on the *Beale* decision); Boast, *Buying the Land, Selling the Land*, pp 197-201; Gilling, ''Vexatious and an Abuse of the Process of the Court': The *Assets Company v Mere Roihi* Cases', (2004), 35, *VUWLR*, pp 145-64; Kathryn Rose, *Te Aitanga-a-Mahaki Lands, Alienation and Efforts at Development, 1890–1970'*, research report commissioned by the CFRT and the Te Aitanga-a-Mahaki Claims Committee, Wai 814, A18, 2000.

[34] See Boast, 'Maori Fisheries 1986-1998: A Reflection', (1999), 30, *VUWLR*, pp 111-34 at 120-1.

[35] See Brigid Kelly, 'The Alienation of Land in Ireland and in Aotearoa/New Zealand under English Colonization', (2003), 9, *Auckland University Law Review*, pp 1353-66.

[36] 27 Vict No 27, ('An Act for the suppression of the Rebellion which unhappily exists in this Colony and for the Protection of the Persons and Property of Her Majesty's Loyal Subjects with the same (Temporary)'). This enactment was essentially a statutory establishment of martial law, allowing the Governor in Council to make to issue 'Orders' to suppress rebellion (s 2) (such Orders could not be questioned in the Supreme Court: (s 3)); and provided for the establishment of Courts Martial (ss 4-8). This Act is not part of the 'confiscation' legislation, strictly speaking, but is obviously an important dimension of the general context of the New Zealand Settlements Act. Both Acts were passed on the same day, 3 December 1863.

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The Irish example was certainly well-known at the time, due to the prominence of Irish land issues in 19th century British politics. It must be the case that New Zealand politicians would have been aware of Irish precedent in a general way, and they also would have had some understanding that confiscation of land from 'rebels' was tried and true practice in the British Isles, and perhaps elsewhere in the empire. Maori who opposed land-selling in the 1850s were often stereotyped as forming a 'land league'[37], a term of high opprobrium in the colonial mind carrying overtones of rural terrorism and inducements to break contracts which probably derived from the emergence of 'land leagues' in the volatile Irish countryside. Certainly Ireland's experience was turned to by those who sought to *criticise* policy in New Zealand. Ireland may have provided helpful coercive precedent but it stood also as a counter-example and a warning. Sir William Martin, retired chief justice, denounced the confiscation project in a paper published in 1863:

> The example of Ireland may satisfy us how little is to be effected towards the quieting of a contrary by the confiscation of private land; how the claim of the dispossessed owner is remembered from generation to generation, and how the brooding sense of wrong breaks out from time to time in fresh disturbance and crime. [38]

The late 1850s and the early 1860s had seen the rapid rise of the Fenian movement in Ireland and in the United States, probably what Sir William had in mind when he wrote about 'fresh disturbance and crime'.[39] More generally what in those days was referred to as the Irish Land Question had been a core issue of British politics since the 1848 famine, if not before, and was to last out the 19th century.[40] It could well have been Ireland that the Aborigines Protection Society had in mind when it too protested against confiscation in New Zealand to Grey in January 1864:

> We can conceive of no surer means of adding fuel to the flame of War, of extending the area of disaffection; and of making the Natives fight with the madness of despair, than a policy of confiscation. It could not fail to produce in New Zealand the same bitter fruits of which it has yielded so plentiful a harvest in other countries, where the strife of races has perpetuated through successive generations; and that, too, with a relentlessness and cruelty which have made mankind blush for their species. [41]

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[37] See Dalton, pp 62-3:
> Indeed the mere inability to buy land in a given area or from a particular Maori community was for most Europeans proof that a 'land league' existed, or that 'the Land League was in force' there. The expression 'land league' – used interchangeably with 'combination', 'compact', and 'confederacy' – was first used widely of Taranaki, where since 1854 almost the whole of the Manukorihi and the majority of the Puketapu had cooperated with the Ngatiruanui and with other sections of the Atiawa in waging war against the section of the Puketapu that favoured land sales.

[38] Sir William Martin, *'Observations on the Proposal to take Native Lands under an Act of the Assembly'*, Appendices to the Journals of the House of Representative (AJHR), 1864, E-2, pp 7-8.

[39] See F S L Lyons, *Ireland since the Famine*, London, Fontana, 1963, pp 124-38.

[40] William O'Connor Morris wrote that '[f]or fifty years the Land Question of Ireland has formed the chief part of that Irish question which, at this moment, is shaking the Empire. During this period it has attracted the notice, and baffled the wisdom of many statesmen; it has caused two revolutions in Ireland with many results in the national history; and though it has been probed and examined with care, and the amending hand has been applied to it in every conceivable way, it largely remains an unsolved problem': Morris, 'The Land System of Ireland', (1887), 10, *Law Quarterly Review*, pp 133-57.

[41] Aborigines Protection Society to Grey, 26 January 1864, AJHR, 1864, E-2, p 16, cited in Waitangi Tribunal, *The Taranaki Report*, p 113.

The New Zealand government, stung by these and other criticisms of its behaviour, responded somewhat lamely that Maori themselves had confiscated land in pre-European times – that is, that confiscation was well-known in Maori customary law, although it was not put quite that way – and that being punished by land taking was the only thing that Maori would understand. In a pamphlet published in November 1864 the Society dismissed this out of hand as merely self-serving: '[t]he truth is that confiscation is persisted in because the colonists want the land, and they would rather that the last Maori should cease to exist than forgo their insatiable cupidity'.[42] A harsh judgment, but not altogether an incorrect one.

That confiscation in Ireland was an undesirable precedent is something modern Irish historians would undoubtedly agree with: in a recent review of Nicholas Canny's magisterial study of confiscation in 17th century Ireland Brendan Bradshaw has noted the 'gloom of this abysmally naughty world' and has remarked, as well, that the greatest challenge presented to Irish historians in the present 'post-modern phase of Irish historical writing' will be how 'to come to terms with the mythological [that is, Irish nationalist] version of Irish history when it turns out to be not so far from the truth after all'.[43] And no doubt much the same could be said of confiscation in New Zealand.

The other obvious parallel is South Africa, or to be precise the Cape Colony and Natal during the 19th century, but there does not appear to be a large literature on confiscation in 19th century southern Africa, or on the legal means by which it was brought into operation. The subject is touched upon in general histories[44] and in some articles, and of course it is no accident that the Cape Colony and New Zealand, both confiscation zones, also happen to share Sir George Grey as a colonial governor. Grey had favoured a scheme of soldier-settlement in British Kaffraria and was of course a prime architect of the confiscation policy in New Zealand, as he himself claimed.[45] In South Africa at present the principal focus of interest at present appears to be the Natives Land Act of 1913, segregationist rather than confiscatory – it would be wrong to insist on a strict division between the two, however – a first major step towards the full-blown *apartheid* regime that emerged after 1948.

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[42] Aborigines Protection Society, Pamphlet, *The New Zealand Government and the War of 1863-64*, London. November 1864, cited in Harrop, p 209.

[43] Bradshaw, p 913. Bradshaw is citing Canny's book in an Irish historiographical controversy between 'nationalist' history, which sees Ireland as an oppressed victim of English misbehaviour, and those historians such as Canny or D B Quinn who regard the nationalist vision as constricting and who have done their best to escape from it. The debate seems similar to that between 'fatal impact' historians and their opponents in New Zealand and Pacific historiography.

[44] See generally J S Galbraith, *Reluctant Empire: British Policy on the South African Frontier, 1834-1854*. Berkeley, 1963; Timothy Keegan, *Colonial South Africa and the Origins of the Racial Order*, Charlottesville. University Press of Virginia, 1996; Noel Mostert, *Frontiers: The Epic of South Africa's Creation and the Tragedy of the Xhosa People*, London, Jonathan Cape, 1992; Frank Welsh, *A History of South Africa*, London, Harper Collins, 1996.

[45] Grey to Newcastle, 17 December 1863, cited in Harrop, p 198; on Grey's policies in South Africa see Harrop, p 200; James Rutherford, *Sir George Grey, K.C.B., 1812–1898: A Study in Colonial Government*, London, Cassell 1961, pp 431-9.

There is also one other interesting, and very contemporary parallel, recently suggested by Dr O'Malley – the American Civil War.[46] Confiscation seems to have been used very extensively by both sides in that conflict, and this may well have been something New Zealand politicians and officials were aware of. The timing, at least, fits very well. As O'Malley points out, 'it would appear remarkable if key new Zealand figures such as Grey, Whitaker and others were not aware of these developments, especially given the fact that the Civil War was being fought at the same time invited obvious comparisons'. So far no evidence of American practice having influenced events in New Zealand appears to have emerged, however.

Statutory Confiscation in New Zealand

Professor Weaver has noted the propensity of British colonial regimes to create colossal mountains of statute law relating to land,[47] and there could be no clearer illustration of this propensity than the efflorescence – if that is the right word: perhaps a rampant spread of noxious weeds might be a better metaphor – of statute law relating to confiscation in New Zealand. Statute led inexorably to yet more statute, a long process of legislative intervention, a process that was closely paralleled by the law relating to the ordinary process of title investigation to Maori land by the Native Land Court. In the New Zealand case, the mountains of statute so casually built up were also disregarded, flouted or ignored when the occasion demanded; sometimes the various floutings and shortcuts necessitated yet further subsequent validating enactments. Here again, the New Zealand experience was not dissimilar from the Irish. The law was, in short, a mess; but this did not seem to matter especially. Inherent in confiscation, it seems, as both the New Zealand and Irish examples point to, is legal complexity at the centre, and tenurial mess on the ground.

One overlooked legal dimension of statutory confiscation is that in a way it does in fact recognise pre-existing Maori ownership and tenure. There was no need to confiscate land belonging to Aborigines in New South Wales or Victoria: all their land was assumed to belong to the Crown *in dominium* anyway.[48] It could be, and indeed was, Crown-granted without *any* intervening stage of extinguishment of the Native title. The Australian Courts see inconsistent grant as a valid means of extinguishment of Native titles; the New Zealand Courts do not. The New Zealand Settlements Acts do at least recognise that there was a Maori title *to* extinguish.

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[46] O'Malley, *Te Rohe Potae War and Raupatu: Scoping Report*, report commissioned by the Waitangi Tribunal, Wai 898, A14, November 2008, p 56. O'Malley refers to Daniel W Hamilton, *The Limits of Sovereignty: Property Confiscation in the Union and the Confederacy during the Civil War*, Chicago, University of Chicago Press, 2007.

[47] Weaver, p 64:

> Throughout the nineteenth century, the most complex legislation in settlement colonies concerned lands. In all jurisdictions, authorities responded to administrative problems, shifting ideals, pressure groups, bribery, new environments, and evolving modes of exploitation.

Except perhaps for 'bribery' (New Zealand does not seem to have been a particularly corrupt place) these words apply to New Zealand perfectly.

[48] The literature on terra nullius and land rights in Australia is colossal. Some very illuminating recent discussions are Stuart Banner, 'Why *Terra Nullius?* Anthropology and Property Law in Early Australia', (2005), 23, *LHR*, pp 95-131.

Statutory confiscation was perceived as one of the ways to do it. Sir John Salmond's belief tha the Crown acquired full proprietary rights over the entirety of the country on annexation is i anything, refuted by the New Zealand Settlements Acts.[49] If it was the Crown's already, wh confiscate it? Confiscation in New Zealand was one of the means by which the Maori title wa extinguished, although in fact the principal method, by far, was not confiscation but Crow purchase, both before and after the enactment of the Native Lands Acts of the 1860s.[50]

The principal statutes up to 1880 (by no means was this the end of statutory provisions dealin in some way with the confiscations – in fact such statutes are still being enacted) have bee tabulated in the Appendix, and it can be seen that they fall into two main groups. There ar those statutes that build on or supplement the original parent Act – the New Zealan Settlements Act 1863 – and there are those that relate to specific confiscated areas. None of th confiscations went smoothly or simply; they *all* sank into a morass of confusion, and they a required special legislative interventions of various kinds. Amending Acts were passed i 1864, 1865 and 1866. In 1867, the government also enacted the Confiscated Lands Act, whic made significant changes, especially with regard to reserves in confiscated lands. This group c statutes can be thought of as the core group of enactments. But there was much legislatio relating to specific confiscations as well, such as the Tauranga District Lands Act of 1867 an 1868 or the Poverty Bay Grants Act of 1869. By my count, in the period 1863–80 two statute were enacted relating to Taranaki; six for East Coast–Poverty Bay; one for the Waikato; tw for Tauranga, and one for Mohaka–Waikare. There were probably provincial enactmen relating to particular confiscations as well.

In short, there was an ample and intricate body of statute law requiring continuous amendmen And the reasons for the amendment are not hard to see; partly – of course – the amendmen reflect omissions or problems in the parent statutes, but more importantly, they also give leg effect to various pragmatic solutions and agreements achieved locally. The Mohaka ar Waikare Districts Act, for example, ratified an agreement between local Maori and th Hawke's Bay Provincial Government, led at the time by Donald McLean, which simp bypassed the elaborate procedures of the New Zealand Settlements Act 1863 and settled th Mohaka–Waikare New Zealand Settlements Act confiscation by agreement. The Tauran legislation ratified Governor Grey's promises made to the Tauranga tribes that most of the confiscated lands would be returned to them.[51] The later Acts are in fact full of *ex post fac*

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[49] See Boast, 'Sir John Salmond and Maori Land Tenure', (2007), 38, *VUWLR*, pp 831-52; Mark Hickford, 'Jol Salmond and Native Title in New Zealand: Developing a Crown theory on the Treaty of Waitangi, 1910-192((2007), 38, *VUWLR*, pp 853-924.

[50] See generally Boast, *Buying the Land, Selling the Land.*

[51] Tauranga District Lands Act 1867. The preamble to this statute refers to Grey's promise made to the Tauran tribes on 6 August 1864, and then retrospectively validates various grants and so on already made. Section states:

> All grants awards contracts or agreements of or concerning any of the land described in the Schedule to this Act purporting to have been made pursuant to and in accordance with the terms of the said Order in Council of t eighteenth day of May 1865 and all grants awards contracts or agreements of or concerning any of the said lan

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validating and deeming provisions.[52] Moreover, some of the legislation was not enforced at all: putting to one side, for the present, the effect of this legislation as background threat in the upper Wairoa, the East Coast Land Titles Acts and the East Coast Act of 1868 had no effect whatever. These Acts were simply forgotten about after a new crisis broke out on the East Coast with the escape of Te Kooti and his whakarau from the Chatham Islands. Confiscation was later resumed at Turanga (Gisborne) but on a quite different legal footing and with a very different focus.

The original purpose of the New Zealand Settlements Act of 1863 was to finance the cost of war, in particular the costs of the invasion of the Waikato. The Act was part of a group of basically financial measures passed at the same time, the New Zealand Loan Act 1863 and the Loan Appropriation Act 1863. All three Acts were passed by the General Assembly in December and formed part of a connected programme. Here again there are parallels with Ireland's unhappy seventeenth century. The linkage with paying for the costs of war and invasion can certainly be seen, for example, in the Commonwealth's Act of Settlement of 1652.[53] At the time of the New Zealand Settlements Act in 1863, there was no Maori representation in parliament,[54] just as Irish Catholics were not represented in the Irish parliament or the various parliaments and assemblies of the Interregnum.

The Loan Act made provision for a loan of £3 million to be raised in London, and the Appropriation Act laid down how the loan was to be allocated amongst the General and Provincial governments for bringing settlers to the country, for the 'cost of Surveys and other expenses incident to the location of Settlers'[55] and 'for suppressing the present Rebellion',[56] this last being a euphemism for the costs of invading and conquering the Waikato. It was fully anticipated that the loan would be repaid out of the profits from the sale of the confiscated land; indeed the Colonial Treasurer, Reader Wood, said as much to the House on 10 and 12 November.[57] This understanding was reflected in s 5 of the Loan Appropriation Act, which stated specifically that if the profits from the sale of confiscated land were insufficient to repay

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hereafter to be made or entered into by the Governor or by any person or persons authorized by the Governor in that behalf … are hereby declared to have been and to be absolutely valid and none of them shall be called in question by reason of any uncertainty in the said Order in Council or of any omission or from any of the forms matters or things provided by 'The New Zealand Settlements Act 1863' [and its amendments] …

[52] For example, Confiscated Lands Act 1867, s 9, (deeming various lands at Tuakau conveyed by Crown grant to the provincial Superintendent at Auckland to be vested in the Crown); Tauranga District Lands Act 1867 s 2.

[53] The Waitangi Tribunal in its *Taranaki Report,* refers to 'Cromwell's Act of Settlement 1652' at p 133, but the legislation was passed not by the Cromwellian Protectorate but by the English Republican regime which was in power 1649-53. Cromwell was Lord General at the time and had of course commanded the Republican armies in Ireland and Scotland.

[54] This came about with the Maori Representation Act 1867, which set up the four Maori Electoral Districts for parliament. The Act granted the franchise to all male Maori over the age of 21 years (Maori Representation Act 1867 s 2). The Act also empowered the Provinces to extend the franchise to Maori for provincial elections (I am not certain whether they did, or on what terms).

[55] Loan Appropriation Act 1863, s 3.

[56] Loan Appropriation Act 1863, s 3.

[57] See Dalton; *New Zealand Parliamentary Debates (NZPD)*, 1861-63, pp 861-2, 846-8.

loan monies advanced to the provinces, the shortfall was to stand as a charge against the provincial revenue to be later repaid as the Assembly would determine.[58] In fact when Reader Wood went to London in 1864 to negotiate the loan, the Imperial Government was prepared to advance only £1,000,000, and there was considerable objection even to this, as Dalton puts it, 'from economic puritans like Richard Cobden, and many severe reflections on the injustice of the war'.[59] Edward Cardwell, Secretary of State, had his own misgivings about confiscation as well, and agreed to it only reluctantly – and thus not supporting disallowance of the New Zealand Settlements Acts – and largely because of Grey's support of the confiscation project.[60]

Typical of the reaction of many in Britain to the legislation was a letter by J E Gorst sent to *The Times* on 24 December 1863.[61] Gorst stated – quite accurately, I would say – that the duty of governing Maori had been 'absolutely neglected'. The only department of state connected with Maori affairs 'which had any life' was focused solely on land buying. Nothing had been done for Maori education except to provide some subscriptions to mission schools, most of which were 'extremely bad'. The colonial newspapers tended, he said, to be full of insults and affronts to Maori. Gorst noted that '[t]he Maoris have a firm persuasion, derived, I believe, from the lessons of mischievous and traitorous Europeans, that as soon as ever the white race is sufficiently powerful their lands will be seized and they will be reduced to a condition of servitude as other aboriginal races have been before'. Gorst, who of course had formerly served as a resident magistrate and civil commissioner in the Waikato from 1860–63, went on to set down in print his thoughts on the confiscation policy in his famous book *The Maori King*. Here again, Gorst did not mince his words:

> The colonists, having reluctantly undertaken the management of the Maoris, have promptly published their scheme of government and civilization. They propose to take the land of those tribes who have, as they term it, rebelled; divide part among military settlers, who are to protect the colonists in their peaceful money-making avocations; sell part to future immigrants, to repay the cost of the war; and reserve part as farms for the conquered natives, who, it is hoped, will suddenly turn into quiet agriculturalists, and live at peace with the Pakeha intruders.[62]

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[58] Loan Appropriation Act 1863, s 5.

[59] Dalton, p 195.

[60] See Dalton, p 196. Cardwell was prepared to approve the Act but only subject to a number of strict conditions, the first of which was that 'Grey was instructed to bring the Act into force only if he were unable, in conjunction with [General] Cameron, to obtain the requisite land by cession from conquered tribes, as a condition of clemency'. The Act also had to be limited to a period of two years, and had to provide for compensation for loyal Maori and for 'less culpable' (Dalton) rebels. Cardwell wrote (Cardwell to Grey, AFHR, 26 April 1864, E-2, pp 20-3, reproduced in Waitangi Tribunal, *Raupatu Document Bank:17*, pp 6684-5):

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

[61] Cited in Harrop, p 202.

[62] J E Gorst, *The Maori King*, London, 1864, reprinted Auckland and London, Hamilton, 1959, pp 253-4.

Gorst thought that the effect of this policy would be to 'exterminate the natives, upon false pretences, at the cost of the British government', but he found it difficult to really credit the New Zealand government with 'a design so wicked'. The scheme was so obviously 'impracticable' that it must have some other objective, and Gorst was sure that he knew what that object was. The real plan was one of 'involving the British Government in an undertaking which will require the presence of a large body of troops, thus continuing that military expenditure which is so profitable to the New Zealand colonists'.[63] Gorst, it should be remembered, knew the colonial politicians and Governor Grey very well.

On 26 April 1864, the confiscation policies of the New Zealand government were denounced in the House of Commons and the debates received much coverage in *The Times* and other newspapers. English public opinion failed to see why British resources should be expended on a conflict in New Zealand of scant significance to the British taxpayer. On 26 April 1864, *The Times* noted:

> that for some years past, and for we know not how long a time to come, the lives of 10,000 English soldiers and more than £1,000,000 of money raised by taxes in the United Kingdom annually have been and will be under the control of the Legislature of New Zealand, which contributes not one penny to our taxes, which gives not one soldier to our army, which makes and unmakes its own Ministers, passes and repeals its own laws, and pursues its own policy, without the least reference to our wishes, our convenience, or our interests … What possible benefit do the people of England derive from the most successful campaign against the Waikatos, from the most signal victory over the Ngatiruanui tribe? What does the poor man, whose sugar, tea and beer are taxed for such a purpose, receive as an equivalent for what he expends? What justification can be urged for the conduct of the House of Commons in thus delegating its own duties to a remote assembly, the names of whose members it does not know, with whose constitution it is not acquainted, and over whom it can exercise no manner of influence … [?][64]

'The next Maori war', *The Times* thought, 'must not be fought with British troops nor paid out of British taxes'. If this is something less than a moral, or human-rights critique,[65] nevertheless it shares with the views of Gorst, the Aborigines Protection Society and many others a critical attitude towards the war, the New Zealand government and the confiscation programme. The tendency of Tribunal-derived history at the present day, by conflating all government into 'the Crown' can sometimes create the impression of a monolithic and resolute entity which did not actually exist; the imperial and New Zealand governments were not necessarily of the same mind, and there were of course competing factions, parties and interest groups within both. Both Grey and settler politicians knew that their actions were controversial at home and that

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[63] Gorst, p 395.
[64] Cited in Harrop, p 208.
[65] See Dalton, p 18, where he notes that the principal objections to policies of war and confiscation in New Zealand as expressed by officials and politicians in Great Britain tended to focus on expense rather than on the rights and wrongs of the proceedings. 'A single reference to British lives sacrificed for the colonists' advantage', Dalton adds, 'or to the claims of the Maori people to the protection of the Crown, would help to relieve the chill with which these constant complaints fall upon a modern ear; but even if these more generous sentiments were present, they leave no trace whatsoever in the minutes and private letters which discuss the issues most frankly'.

support from the imperial centre might be withdrawn at any time: as of course it ultimately was, with the withdrawal of British troops and Grey's recall in 1867.

The New Zealand Settlements Act 1863, which (as the Waitangi Tribunal has said, 'attracted little debate'[66], at least in the New Zealand parliament – in contrast to the House of Commons) laid down a very complex and unwieldy process for confiscation. The first step was the proclamation of a *District* as subject to the Act. Where the Governor in Council was satisfied that 'any Native Tribe or Section of a Tribe or any considerable number thereof' were in 'state of rebellion' he could then declare that the district in which the group lived to be 'a District within the provisions of this Act'.[67] The Act was retrospective; although enacted in December the operative date was 1 January 1863. The second step was the selection by the Governor in Council of '*eligible sites* for settlements for colonization'.[68] The third step was the actual taking of areas of land within these 'eligible sites' for 'the purposes of such settlements'.[69] The fourth step was the payment – or non-payment – of compensation for lands so taken. Compensation had to be paid for any such taking *except* to particular individuals 'engaged in levying or making war or carrying arms' against the Crown, or who had aided and abetted any such person.[70] In fact the Act resembles public works legislation in some respects, the equivalent of a public work here being taking land for settlements within an 'eligible site' which in turn was located within a proclaimed district. (In fact general public works legislation was enacted at the

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[66] Waitangi Tribunal, *Taranaki Report*, p 110. Apart from the Native Minister (Fox), who introduced the Bill (*NZPD*), 5 November 1863, pp 782-3), only two other members spoke, J E Fitzgerald (pp 783-9), who attacked the Bill as contrary to the Treaty of Waitangi and who was particularly critical of the policy of taking the land of 'friendly' Maori as well as rebels, and G Brodie, who spoke briefly in support (p 790). The Bill received more sustained scrutiny in the Legislative Council, where it was criticised by William Swainson, former Attorney-General, and by Daniel Pollen (pp 824-5). There is a good discussion of the parliamentary debates in the Waitangi Tribunal's *Taranaki Report*, pp 110-15.

[67] New Zealand Settlements Act 1863, s 2:

> Whenever the Governor in Council shall be satisfied that any Native Tribe or Section of a Tribe or any considerable number thereof has since the first day of January 1863 been engaged in rebellion against Her Majesty's authority it shall be lawful for the Governor in Council to declare that the District with which any land being the property or in the possession of such Tribe or Section or considerable number thereof shall be situate shall be a District within the provisions of this Act and the boundaries of such District in like manner to define and vary as he shall think fit.

[68] New Zealand Settlements Act 1863, s 3:

> It shall be lawful for the Governor in Council from time to time to set apart within any such district eligible sites for colonization and the boundaries of such settlements to define and vary (emphases added).

[69] New Zealand Settlements Act 1863, s 4:

> For the purposes of such settlements the Governor in Council may from time to time reserve or take any Land within such District and such Land shall be deemed to be Crown land freed and discharged from all Title Interest or Claim of any person whomsoever as soon as the Governor in Council shall have declared that such Land is required for the purposes of this Act and is subject to the provisions thereof.

[70] New Zealand Settlements Act 1863, s 5. Compensation was payable except to any person:

> (a) Who shall since the 1st January 1863 have been engaged in levying or making war or carrying arms against Her Majesty the Queen or Her Majesty's forces in New Zealand or –
> (b) Who shall have adhered to aided assisted or comforted any such persons as aforesaid or –
> (c) Who shall have counselled advised induced enticed persuaded or conspired with any other person to make or levy war against Her Majesty or to carry arms against Her Majesty's forces in New Zealand or to join with or assist any such persons as are before mentioned in Sub-Sections (1) or (2) or –
> (d) Who in furtherance or in execution of the designs of any such persons as aforesaid shall have been either as principal or accessory concerned in any outrage against person or property or –
> (e) Who on being required by the Governor by proclamation to that effect in the Government Gazette to deliver up the arms in their possession shall refuse or neglect to comply with such demand after a certain day to be specified in such proclamation.

same time as the New Zealand Settlements Act, seemingly as part of the same package.[71]) There is recent judicial authority to the effect that taking land for settlements under the New Zealand Settlements Act indeed was a form of public works takings, a question of some practical importance as a result of the 'offer back' provisions – principally s. 40 – of the current 1981 Public Works Act.[72] The New Zealand Settlements Act also provided for the Governor to call upon 'any Native Tribes or individuals' in arms against the Crown to 'come in and submit to trial according to law'. Anyone refusing or neglecting to come in was similarly not 'entitled to Compensation under this Act'.

The various confiscation proclamations did not occur at the same time. The proclamations relating to the Waikato were made from 17 December 1864 to 2 September 1865,[73] and those in Taranaki in two rounds, the first in January 1865 and the second in September.[74] The Tauranga region was proclaimed a district under the Act and confiscated in May 1865[75] and Whakatane–Opotiki[76] on 16 January 1866. The Mohaka–Waikare district, the last to be confiscated under the 1863 Act, was not confiscated until 12 January 1867, following a recommendation from Donald McLean, the Hawke's Bay Provincial Superintendent.[77]

Most of us will have seen the maps in various textbooks which show the 'confiscated areas', but strictly speaking all that these boundaries delineate were the areas in which the Act was to operate, not the area actually confiscated. The Act did not in fact confiscate by area; rather it authorised a particular type of taking and then excluded anyone in arms against the Crown from their ordinary right to compensation. But of course to see the Act as a relatively

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[71] Provincial Councils Powers Extension Act 1863; Provincial Compulsory Land Taking Act 1863; Land Clauses Consolidation Act 1863.

[72] Section 40 stipulates that where land has been taken for 'any public work' and is now no longer required 'for that public work' or 'any other public work' the land has to be offered back at current market value 'to the person from whom it was acquired or to the successor of that person' (Public Works Act 1981, s 40(1)). In *Te Runanga o Ngati Awa v Attorney-General* [2004] 2 NZLR 252, Goddard J was confronted with the argument that a taking under the New Zealand Settlements Act 1863 fell within s 40; she concluded that it did. The area in question was formerly part of the tidal seabed of the Whakatane River, confiscated from Ngati Awa in 1866 and subsequently reclaimed. According to Goddard J at [2004] 2 NZLR 259:

> The land in the eastern Bay of Plenty that was taken by the proclamation of 1866, was not simply in the category of the demesne lands of the Crown to be held in a land back against possible future uses *but was expressly taken for the purpose of an active settlement programme that necessitated and envisaged positive activity in relation to the land, including public works activity*. [emphasis added].

The implications of this decision, which has not attracted much attention, are potentially very significant, as it means that all formerly confiscated land still in Crown ownership now not being used for the purposes for which it was taken is required by law to be offered back at market values to the successors in title of those from whom it was originally confiscated. (My thanks to Deborah Edmunds for this reference.)

[73] See *AJHR*, 1928, G-7, p 15.

[74] Middle Taranaki, Waitara South, Oakura, *New Zealand Gazette (NZG)*, 31 January 1865, p 16; Ngatiawa, Ngatiruanui, Ngatiawa Coast, Ngatiruanui Coast, *NZG,* 5 September 1865, p 266. These dates are the *NZG* Publication dates. The September Proclamations were made on 2 September.

[75] Proclamation of 18 May 1865, *NZG*, 27 June 1865, p 187. The Tauranga proclamation followed a lengthy process of negotiation and surveying, complicated by Crown purchasing of the Katikati and Te Puna Blocks.

[76] *NZG*, 18 January 1866, p 17 (declaring the area to be a district and reserving and taking all the lands within the boundary for settlements). See Gilling, *Te Raupatu o Te Whakatohea: The Confiscation of Whakatohea Land, 1865-1866*, Wai 894, A53, 2003, p122. The area had to be re-proclaimed on 1 September.

[77] See below.

innocuous variant of public works legislation would be a mistake. Sir William Martin, the Aborigines Protection Society and Edward Cardwell were not deceived. The Act was potentially of very wide application, as was certainly to be demonstrated by its application in practice. The key question was whether the areas to be selected as 'eligible sites' were only to be relatively restricted parts of the proclaimed area – to which the answer was, no.

In the case of the Taranaki confiscation, for example, the selected areas and the proclaimed/taken areas were more or less identical. The three proclaimed areas were Middle Taranaki, Ngatiawa, and Ngatiruanui, and the four eligible sites were Waitara South, Oakura, Ngatiawa Coast, and Ngatiruanui Coast. Apart from some areas already purchased, the boundaries of the three former and the four latter proclaimed areas were the same.[78] The boundaries of both the proclaimed area and of the area for eligible sites were massively expanded by Grey on 2 September 1865. The Waitangi Tribunal concluded that the Taranaki confiscations were intra vires the powers of the New Zealand Parliament but, following an opinion of Professor F M Brookfield, of the Faculty of Law at the University of Auckland, were *ultra vires* the New Zealand Settlements Act itself.[79] The key issue was the massive extension of the proclamations on 2 September. In the Tribunal's words:

> The Act required a three-stage process. By section 2, the Governor was obliged to declare districts where tribes or a significant number of tribes were in rebellion. By section 3, he was then to set apart 'eligible sites for settlement', being prescribed and suitable areas within such districts. By section 4, he was finally to take such lands within those areas as might be necessary. The statutory prescription, which was necessary for the survival of the hapu in this case, was not followed. The Governor declared extremely large districts then purported to take the lot on the basis that the whole was an eligible site. This was done without an inquiry, which he was obliged to make, into such matters as which lands were suitable for settlement and how settlement could be arranged and without first laying out the settlements by survey in order to define the parts to be taken. [80]

The Government's actions altered 'fundamentally' the Act's objective 'of taking land in discrete areas for such numbers of settlers as might be sufficient to keep the peace'.[81] There was no inquiry at all, just a 'global taking of mountain, hill, and vale', including the whole of Taranaki mountain (obviously unsuited for settlement). The Tribunal thought 'the whole confiscation to have been unlawful'.[82]

The same thing happened in the case of the Eastern Bay of Plenty confiscation. Here, too, all of the first three steps were telescoped into one step. The Waitangi Tribunal has eloquently described what happened there:

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[78] See Waitangi Tribunal, *The Taranaki Report*, figures 10 (p 123) and 11 (p 125).
[79] See discussion in Waitangi Tribunal, *Taranaki Report*, pp 127-9; F M (Jock) Brookfield, Opinion for the Waitangi Tribunal on Legal Aspects of the Raupatu (Particularly in Taranaki and the Bay of Plenty), Wai 143, M19(a), 1996.
[80] Waitangi Tribunal, *Taranaki Report*, pp 128-9.
[81] Waitangi Tribunal, *Taranaki Report*, p 129.
[82] Waitangi Tribunal, *Taranaki Report*.

> A confiscation district was simply proclaimed, and in the same step the whole of the land in that district was taken, whether suitable for military settlement or not, and without plans for military settlements being prescribed. It is now clear that the greater part of the land was either unsuitable for settlement, being hill country or swampland, or was more than could have been settled by military personnel at the time. Large areas have not been settled to this day. A significant portion was given 20 years later for the purposes of a university endowment. [83]

If the Tribunal's analysis with regard to the Taranaki confiscation is right, then the same applies equally to the Eastern Bay of Plenty confiscation. In fact, even at the time the Compensation Court had very strong doubts as to the legality of what had been done.[84] And yet, without wishing to state the position too crudely, what of it? Had the confiscations been shown at the time to have *ultra vires* the legislation – which would have been difficult, as the Crown could not have been sued civilly at that time without its own consent – then the legislation would simply have been retrospectively validated. Retrospective statutory validation of illegality can be thought of, to paraphrase Oscar Wilde's – or de la Rochefoucauld's – definition of hypocrisy, as a kind of tribute paid by power politics to the rule of law. The New Zealand state has seldom been hesitant when it comes to retrospective statutory validation of its actions, especially in the area of Native lands, where tangled complexities of all kinds tended to be routine.[85] Statute was and is a handy way of cutting and burning a path through legal and tenurial jungles, especially in the New Zealand political system where, at least until the advent of Mixed Member Proportional, there has been nothing easier than enacting a statute.

In its review of the confiscation process in its *Mohaka ki Ahuriri* report, the Waitangi Tribunal noted the 'capricious' nature of confiscation as applied in this country:

> Though the Mohaka–Waikare confiscation might seem a logical extension of the [confiscation] policy, applied in response to the spread of 'rebellion' into Hawke's Bay, it appears to us to have been an anomaly. Indeed, as the earlier raupatu reports have pointed out, there was no consistent application of the confiscation policy. Rather, it was applied capriciously in response to changing circumstances, and as a consequence of frequent changes in ministries. [86]

The Tribunal noted the rich diversity of legal forms that characterised confiscation:

> In the eastern Bay of Plenty, for instance, the Outlying Districts Police Act was passed to provide for the confiscation of the land of those suspected of killing Volkner and Fulloon, but it was not used for that purpose and the Government fell back on the New Zealand Settlements Act as a basis for that confiscation. Then, in 1866, the East Coast Land Titles Investigation Act was passed to provide for the confiscation of land in Wairoa and Poverty Bay. That Act used the Native Land Court rather than the Compensation Court to investigate the titles of non-rebels. But the Act was not applied further south, and the Mohaka–Waikare confiscation, like the eastern Bay of Plenty confiscation, was based on the New

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[83] Waitangi Tribunal, *Ngati Awa Raupatu Report*, p 65.
[84] See Waitangi Tribunal, *Ngati Awa Raupatu Report*, p 85; Gilling, *Te Raupatu o Te Whakatohea*, pp 143-5.
[85] Another example is the government's purchasing programme in the Ureweras after 1914. This large-scale programme of undivided share-buying within the various subdivisions of the Urewera District Native Reserve was in fact completely illegal as it bypassed the Urewera General Committee, thereby ignoring the requirements of the statute. The purchasing was done with the specific intention in mind of ratifying the purchasing by means of an *ex post-facto* statute. See Boast, *Buying the Land, Selling the Land*, pp 235-6.
[86] Waitangi Tribunal, *Mohaka ki Ahuriri Report*, p 221.

Zealand Settlements Act. Having used that Act, however, the Government did not use the Compensation Court to distinguish the land of 'rebels' from that of 'loyalists': instead it relied on agreements between Crown officials and Māori claimants, and these were subsequently blessed by validating legislation.[87]

Particularly characteristic of such diversity were the various judicial and quasi-judicial bodies created to implement confiscation.

The Compensation Court and Special Commissioners

Confiscation came with a process of judicial inquiry. The Compensation Court was initially provided for by ss 8–14 of the New Zealand Settlements Act 1863. The task of the Court was to determine 'claims for compensation under this Act'.[88] By s 12 the Judges of the Court were given the same powers as resident magistrates in terms of controlling proceedings, compelling the attendance of witnesses and so on. The judges were also given power to 'make rules' for the conduct of the Court, a provision which, according to Heather Bauchop, was to cause 'some confusion'.[89] The Court's powers and functions were subject to constant adjustment and amendment. In essence, however, the Compensation Court was basically the same institution as the Native Land Court as constituted under the 1865 Native Lands Act, and both institutions had the same chief judge, Francis Dart Fenton. Other judges, such as Rogan and Monro also overlapped. Precedent developed in one jurisdiction was routinely applied in the other, notably the famous '1840 Rule'. The Court's procedural rules were set out in an Order in Council of 16 June 1866.[90]

In the Waikato and South Auckland we know next to nothing about the Court's actions. Rather more is known about the workings of the Compensation Court in Taranaki and in the eastern Bay of Plenty. Heather Bauchop prepared a detailed report on the Court for the Taranaki Inquiry, a very valuable study and in fact, the only really detailed study of the Court in action – but one which necessarily has left out a great deal, and which had to grapple with the complex intricacies of the process by means of selected case studies.[91] Bauchop has carefully analysed the vital role played in the hearings by Robert Parris, appointed Civil Commissioner in Taranaki in August 1865 who had the task of acting as Native Agent in the various hearings, and of Henry Hanson Turton, who was Crown Agent. The confiscation–compensation process resulted in decades of chaos in Taranaki. Some of the judges who were involved in the business felt embarrassed and humiliated by their role in it. Judge Rogan wrote to McLean in 1867 that while he had been prepared to issue awards to Maori 'if the land be not surveyed I might as well have given them an order on the moon for all the benefit it is to them'.[92]

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[87] Waitangi Tribunal, *Mohaka ki Ahuriri Report*, pp 221-2.
[88] New Zealand Settlements Act 1863, s 8.
[89] Bauchop, p 12.
[90] For an analysis, see Bauchop, pp 26-33.
[91] See generally Bauchop.
[92] Rogan to McLean, August 1867, cited Bauchop, p 224.

Bauchop's study was a pioneering attempt at getting to grips with the Court's work in Taranaki, but there is still much to be learned about what exactly happened there, if indeed the full story ever could be unravelled: to do so would certainly be an enormously technically demanding task. It seems that the confiscation process essentially completely redrew the Taranaki tenurial map, making it essentially unrecognisable, but in an enormously time-consuming and destructive way. One of the key problems was that there simply was not enough ungranted available land for the Court's awards to be carried out, and even where they were carried out the land that was allocated was often inaccessible bush country, the better parcels already having been granted to settlers.[93] What is especially bewildering about the history of confiscation in Taranaki is the government's shift after McLean became Native Minister to a policy of purchasing land from Maori within the confiscated area as a way of cutting free from the tenurial mess, a possibly well-intentioned policy but one which seems to have only added to, rather than resolved, the confusion on the ground.[94] A number of the Taranaki raupatu claims have now already been settled through the current negotiations process, but these settlements have been carried out in the absence of a full and accurate understanding of what exactly occurred in Taranaki. The full story of the confiscation and the Court there remains to be written.

In the eastern Bay of Plenty the Court sat at Opotiki (7 March to 8 April 1867), at Maketu (8–12 July) and at Te Awa o te Atua (Matata) (9 September to 1 October). Its activities have been analysed by the Waitangi Tribunal to some extent, and rather more fully by Dr Gilling in his report for Whakatohea, but I believe that everyone would agree that the activities of the Court in the eastern Bay of Plenty could also do with a lot more scholarly attention before we can claim to really understand what went on there.[95] It seems clear enough that the tapestry of chaos and confusion in the eastern Bay of Plenty was no less rich than in Taranaki. According to Gilling:

> The actual way in which the confiscated lands were disposed of is difficult to trace. The problems begin with the changes in the boundaries, even in the proclamations establishing the district and are then compounded by the multitude of individual arrangements made by the Compensation Court, by Crown Agent Wilson, and for the military settlers, and the varying records of those.[96]

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[93] See Bauchop, pp 122-5.
[94] See especially Sole, pp 358-61.
[95] Unfortunately, no specific study of the Compensation Court in this area and of the Eastern Bay of Plenty grants was commissioned as part of the Wai 46 Inquiry, and the Tribunal has only reported on this confiscation insofar as it impacted on Ngati Awa and Tuwharetoa ki Kawerau (that is, not on Whakatohea). Gilling did write a full analysis of the Whakatohea confiscation: see Gilling, *Te Raupatu o Te Whakatohea: The Confiscation of Whakatohea Land, 1865–1866*, Wai 46, C9, 1994, but it is not discussed by the Tribunal (in fact I am not sure that Gilling's work was ever presented in evidence). Jane Luiten has dealt with aspects of the process in the research she carried out on behalf of Tuwharetoa ki Kawerau: see Luiten, *Historical Research Report for Te Runanga o Tuwharetoa ki Kawerau*, research report commissioned by Te Runanga o Tuwharetoa ki Kawerau, Wai 46, I5, 1995. The Tribunal's discussion of the activities of the Compensation Court in this area is fairly brief: see *The Ngati Awa Raupatu Report*, pp 83-92. There was a very intricate process of confiscation and regrant in the western part of this confiscation but it has never been researched.
[96] Gilling, *Te Raupatu o Te Whakatohea*, p 145.

Gilling makes the important observation, however, that for all the problems associated with it, the 'Compensation Court seems to have been much more sensitive to, and careful of Maori rights and sensibilities, and observant of the strict letter of the law, than were the various politicians and officials charged with the administration of the confiscation/compensation policy'.[97] Its judges had an unenviable job to do, one which they disliked (Bauchop has noted the reluctance of some judges to have anything to do with the appalling mess in Taranaki); but they were judges, not mere administrators.

The Compensation Court did not sit in all of the confiscated districts. It sat in Taranaki, the Waikato, South Auckland, and in the eastern Bay of Plenty, but not in Hawke's Bay or at Tauranga. In the case of Mohaka–Waikare there was no judicial or quasi-judicial process at all. At Tauranga, instead of the Compensation Court, special commissioners were given power to carry out investigations and inquiries, although quite what their powers were is hard to know as the Tauranga District Lands Acts do not say. The operation of the Commissioner's Court at Tauranga seems to have been, as far as I can see, fairly similar to the functioning of the Compensation Court in Taranaki and the eastern Bay of Plenty. The process of investigation and allocation of grants dragged on at Tauranga for well over a decade. The first Tauranga commissioner was Henry Tacy Clarke (1868–76 and 1878), succeeded by Herbert Brabant (1876–78), J A Wilson (1878–81) and then Brabant again in 1881. Historians who gave evidence for the claimants in the Tauranga Inquiry tended to be critical of the Commissioner's Court's performance. Evelyn Stokes, for instance, argued that the 'process of inquiry and allocation of lands to Maori in the Tauranga confiscated lands fell far short of the independent judicial process that Maori as British subjects might have expected from the Crown'.[98] Dr O'Malley has also pointed out that the Tauranga Commissioners were under no specific obligation – unlike the Judges of the Native Land Court – to make their findings on a foundation of Maori customary law.[99] The Waitangi Tribunal has upheld these criticisms.

Similarly at Gisborne a deed of cession that J C Richmond extorted out of the chiefs – achieved by hinting, none too subtly, that the government might pull out its forces and leave them to cope with Te Kooti on their own – provided for the establishment of a special commission, the Poverty Bay Commission, charged with the task of adjudicating on claims to the 'ceded' lands. Both the 'cession' and the Commission rested on no legal underpinnings other than the Deed and a Proclamation made by the Governor on 13 February 1869, a fact that raises some serious questions about the legality of the whole affair.[100] Earlier confiscation legislation enacted for

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[97] Gilling, *Te Raupatu o Te Whakatohea.*

[98] Stokes, *The allocation of reserves for Māori in the Tauranga confiscated lands*, Vol 1, Hamilton, 1997, p 98.

[99] O'Malley, '*The Aftermath of the Tauranga Raupatu, 1864–1981*, p 27.

[100] As there was no statutory platform for the arrangement, the legality of both the deed of cession and the Stafford government's proclamation are entirely governed by the ordinary common law of Native title. For a comprehensive account of the cession and the Poverty Bay Commission see O'Malley, *'An Entangled Web: Te Aitanga-a-Mahaki Land and Politics, 1840-1873*, Wai 894, 10, 2000, pp 348-466; for a study of one Turanga descent group who had a significant area actually confiscated see Gilling, *'Great Sufferers Through the Cession':*

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the East Coast was simply forgotten about. The government did not, of course, intend to retain ownership of the whole of the ceded area in its own hands; as so often with confiscation the point of the exercise was as much one of tenurial remodelling as one of direct land acquisition, and once again there are some parallels with the Crown's 'surrender and regrant' policies in sixteenth-century Ireland. Loyal Maori could bring claims to the Commission which could inquire into their titles, following which grants could be awarded by the Governor. The process can be seen as partly a compulsory, short-circuit version of the Native Land Court process, minus a full-scale system of title investigation, and has many similarities with the post-confiscation process set up at Tauranga at more or less the same time. The Poverty Bay Commission had a number of peculiarities. One was that (strangely) Europeans could also apply to it for Crown grants. Another was that the Commission's Maori grants were all as joint tenancies rather than as tenancies in common.[101] This was a departure from standard practice. Why that was done at Tauranga and nowhere else, I have, frankly, no idea. In 1874 the ordinary jurisdiction of the Native Land Court was restored to the balance of the ceded area.[102]

Were the Courts active collaborators in the confiscation project? It seems not. Again, more research is needed, but some incidents are now well-known. There was for instance a well-documented collision between Chief Judge Fenton and the government over the Tauranga confiscation. Fenton decided that the Native Land Court, set up by the Native Lands Act 1865, should start hearing cases at Tauranga under its ordinary jurisdiction. Frederick Whitaker, at this time Agent for the General Government at Auckland, then informed Fenton that there was no point in the Court sitting at Tauranga given that all the land there had been confiscated.[103] Fenton's response was that he could take no notice of behind-the-scenes pronouncements made by the Crown, and that the matter would have to be dealt with by means of evidence and submission before the Native Land Court, just like any other point. Moreover Maori applicants before the Court had 'a right to be heard'.[104] There was quite a bit more acrimonious correspondence after this. Fenton's recalcitrance was one of the main reasons why legislation was passed placing the management of the Tauranga confiscation into the hands of special commissioners and keeping Fenton and his court out of the region.

Te Whanau a Kai and the Loss of Patutahi, research report commissioned by Te Whanau a Kai Trust in association with the CFRT, Wai 814, C1, 2001. See also the Preamble to the Poverty Bay Lands Titles Act 1874, where the various legal steps taken at Turanga are recited in detail.

[101] The difference is that joint tenancies are not incorporeal hereditaments and do not pass by will or administration: if a joint tenant dies, the interest does not pass to their heirs but instead vests in the surviving co-tenants (known to lawyers as the 'right of survivorship').

[102] Poverty Bay Grants Act 1874, s 2.

[103] Whitaker to Fenton, 14 December 1865, DOSLI Hamilton, Box 2, Folder 8, *Raupatu Document Bank:123*, pp 47893-4.

[104] Fenton to Whitaker, 18 December 1865, DOSLI Hamilton, Box 2, Folder 8, *Raupatu Document Bank:125*, pp 47895-1.

In 1867 there was another collision between the judiciary and the government over confiscation, this time in Poverty Bay. When the Crown sought an adjournment in the Land Court in July 1867, Judge Monro, one of the ablest of all the Land Court judges ('the best of us', was Fenton's own opinion), came out with some scathing criticisms of the government's actions with regard to the Poverty Bay confiscations and awarded costs against the Crown and in favour of Te Aitanga a Mahaki. The government was enraged. J C Richmond, de facto Native Minister in the Stafford regime, suggested to Monro that he pay the Crown's costs himself as the government had no intention of paying anything. Monro was rebuked for his impertinence in presuming to criticise government policy. Richmond accused the judge of obstructing the 'pacifying of the country' and went on to lecture him for his 'objectionable' remarks in Court:

> The Native Land Court is not a proper place for indicating or promoting political opinions of any sort. The whole tone of your address is highly objectionable, as attempting to draw deep the distinction between the Court and the Government, with a view to extol the former at the expense of the latter … The Government do not discuss opinions as to their general conduct with respect to the East Coast Titles, and to their industry or otherwise in bringing them before the Court, opinions which you, as a Judge, seem to have expressed without a particle evidence on the subject.[105]

And lest it be thought that this sort of thing has come to an end, when in 2003 Judge Wickliffe (now Judge Fox) of the Maori Land Court commenced hearing applications for investigation of title to areas of the foreshore and seabed on the East Coast following the Court of Appeal's decision in *Ngati Apa*[106] she was subjected to some criticism in the media by the Prime Minister, who expressed the view that the Court probably had better things to do with its time.[107]

Legal Aftermaths without end: The Mohaka–Waikare Confiscation as a Case Study

The only New Zealand Settlements Act confiscation which I claim to have studied in detail from the primary sources – it took me four years, on and off, to unravel it – is the Mohaka–Waikare confiscation.[108] (I should add that I was but one of a number of people who worked on it: in particular Richard Moorsom of the Waitangi Tribunal wrote a number of valuable

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[105] See J C Richmond to Monro, AJHR, 21 August 1867, A-10D, pp 7-8.
[106] *Ngati Apa v Attorney-General*, [2003] 3 NZLR 643.
[107] See Boast, *Foreshore and Seabed*, Wellington, Lexis Nexis, 2005, pp 124-5.
[108] On this confiscation see John Battersby, *Evidence for the Crown Concerning the Mohaka ki Ahuriri Claims (New Zealand Wars Period)*, research report commissioned by the CLO, Wai 201, W1, 1999; Boast, *The Mohaka-Waikare Confiscation*; Dean Cowie, *Hawke's Bay*, Rangahaua Whanui District 11B, Waitangi Tribunal, Rangahaua Whanui Series, 1996, pp 101-30; Richard Moorsom, *Supplementary Report on Aspects of Raupatu in the Mohaka-Waikare District*, research report commissioned by the Waitangi Tribunal, Wai 201, U14, 1999; *Raupatu, Restoration, and Ancestral Rights: The Title to Tarawera, Tataraakina and Te Haroto: Main Report*, research report commissioned by the Waitangi Tribunal, Wai 201, R3, 1998; *Raupatu, Restoration and Ancestral Rights: The Title to Tarawera, Tataraakina and Te Haroto: Supplementary Report*, research report commissioned by the Waitangi Tribunal, Wai 201, R9, 1998; Patrick Parsons, *The Mohaka-Waikare Confiscated Lands: Ancestral Overview (Customary Tenure)*, research report commissioned by the CFRT and the Claimants, Wai 201, J18, 1994.

reports.[109]) This confiscation, which, with Tauranga, is one of the best-understood, shows how a New Zealand Settlements Act confiscation could be a fertile source of subsequent law, whether in the form of endless statutory interventions, decisions of the Native Land Court, or decisions of the ordinary courts – including one case, over the Kaiwaka block northwest of Napier, which eventually made its way to the Privy Council. In its propensity to generate ever more law the Mohaka–Waikare confiscation was not unusual. The Mohaka–Waikare confiscation demonstrates that the 'confiscation' issue is not a discontinuous matter of investigation and settlement of events that happened in the 1860s, but rather a continuous process of confiscation, inquiry, litigation, petition, and statutory intervention that only began in the decade of the New Zealand wars and which has carried on to the present day.[110]

The immediate context, or pretext, for the Mohaka–Waikare confiscation was the battle of Omaranui, fought near Taradale in October 1866. A group of Pai Marire supporters, mostly belonging to Ngati Hineuru and led by a Pai Marire prophet named Panapa, had encamped at Omaranui. After pondering for some time what he should do about these unwelcome guests (and writing them a few letters, getting some interesting replies[111]), the Provincial Superintendent, Donald McLean, decided to allow Major Whitmore to attack them with the enthusiastic support of local 'friendly' Maori. The 'battle', if it can be called that, was over within a couple of hours; many of the survivors were transported to the Chathams, to join Te Kooti and his whakarau who had already been exiled there from Poverty Bay the preceding year. Whitmore and the Hawke's Bay chiefs, including Renata Kawepo, then led a punitive expedition against Ngati Hineuru, most of whom had already prudently fled.

Following these events, a large area of some 340,500 acres[112] running up the coast from just north of Napier to a point beyond the Mohaka and then inland to run along the central North Island ranges was confiscated under the New Zealand Settlements Act by proclamation in 1867.[113] The area was confiscated at McLean's urging, mainly because Hawke's Bay Maori who had fought on the government side wanted tenurial uncertainty in the area resolved: in other words, it was *Maori* who were pressing for a confiscation.[114] This was the last of the New Zealand Settlements Act's confiscations: the New Zealand Settlements Act had to be used as

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[109] See preceding footnote.

[110] The Waitangi Tribunal report on the Mohaka ki Ahuriri claims in 2004: *The Mohaka ki Ahuriri Report*, was not concerned only with the Mohaka-Waikare confiscation: other issues included the Mohaka and Ahuriri Crown pre-emptive purchase deeds of 1851 and the effects of the Native Land Court on the Petane block. No settlement legislation has to date been enacted with respect to the Mohaka-Waikare confiscation.

[111] The correspondence is printed in AJHR, 1867, A-1A.

[112] This is the Government's own estimate: see *Return of Lands Confiscated by the General Government*, AJHR, 1871, C-4.

[113] *NZG*, 15 March 1867, pp 112-3.

[114] McLean, Colonial Secretary, 11 Feburary 1867, IA 1, 1867/566, Archives New Zealand (ANZ), [Confiscation in Mohaka-Waikare District] Reprinted in *Raupatu Document Bank:131*, pp 50, 615-22. According to McLean:

> The Chiefs of Hawkes Bay and all the Natives interested are agreed that the land of the Natives taken in arms should be confiscated and they urge that this should be done without delay in order that they may afterwards deal with such portions of the land not liable to confiscation as they may think fit.

the East Coast Land Titles Investigation Act did not extend to Hawke's Bay. In fact some blocks within the proposed confiscation boundaries had already been surveyed for the purpose of investigations of title in the Native Land Court. But this confiscation, like all the others, was not the end of a process but rather marked its beginning.

It was assumed at first that – as a New Zealand Settlements Act confiscation – the Compensation Court would deal with the matter, but in fact the Court took its time in getting to Hawke's Bay, and in January 1868 McLean, no friend of Chief Judge Fenton's in any case,[115] resolved to dispense with the court and settle the matter himself by agreement. Two agreements were drawn up between the Hawke's Bay Provincial Government and local Maori chiefs, the first in 1868[116] – abandoned, as a result of renewed war on the East Coast after Te Kooti's escape from the Chatham Islands[117] – and the second, drawn up on McLean's instructions in June 1870,[118] McLean now being Native Minister in the Fox–Vogel government. Samuel Locke and John Davies Ormond – Ormond being McLean's friend and his successor as provincial superintendent – met with local rangatira and settled the issue to their own satisfaction. Ngati Hineuru, the main victims of the tenurial rearrangement, were either in exile or were with Te Kooti and being chased around the North Island interior by government forces and their Maori allies at the time. They were not consulted, needless to say.

There is not a great deal of documentation on the actual negotiations – a few telegraphs from Locke to Ormond and McLean in 1869–70, two letters from Locke to McLean in 1870 and Ormond's final report to McLean of 4 July 1870 seem to be about all that has survived.[119] From these and other sources the following seems to be roughly what occurred. Not long after Omarunui, McLean met with rangatira of the Tangoio area north of Napier and perhaps with some others. The discussion led in turn to the first Mohaka–Waikare agreement of 8 May 1868.

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[115] Fenton and McLean were long-standing opponents, dating back to conflicting opinions and conflicting advice they had given Governor Browne in the late 1850s: see W L Renwick, 'Fenton, Francis Dart', *DNZB*, 1 (1990), pp 121-3; and Dalton, p 71. McLean had never seen much point in the Native Land Court and did not believe Maori customary interests in land could be translated into individualised interests, cognisable in English law. See generally Loveridge, *The Origins of the Native Lands Acts and Native Land Court in New Zealand.*

[116] McLean called a meeting of the local chiefs, probably held in early May 1868 at Napier; he reported the outcome to central government on May 8 (McLean, Colonial Secretary, AGG-HB 4/1, ANZ). The first Mohaka-Waikare deed is reprinted in H H Turton, *Maori Deeds of Land Purchases in the North Island of New Zealand*, Wellington, 1877, 2:45, pp 556-8. For an analysis, see Boast, *The Mohaka-Waikare Confiscation,* J28, pp 59-63.

[117] Te Kooti and his whakarau, some of whom were Ngati Hineuru, escaped from the Chatham Islands in July 1868. To counter Te Kooti, McLean and the Hawke's Bay Provincial Government were virtually totally dependent on Maori support.

[118] See Turton, pp 559-60; there is an English text of the deed on MA 1/5/13/132 (the main Native Department file on the Mohaka-Waikare confiscation), ANZ, or *Raupatu Document Bank: 60*, pp 22932-48. What became of the original agreement I do not know. There are copies on MA 1/5/13/132 but none of these appears to be an original.

[119] Or that I was successful in finding. See Locke–Ormond, telegraph, 7 November 1869, AGG-HB 3/18, ANZ; Locke–McLean, March 28 1870, McLean papers, MS 32/292, Alexander Turnbull Library, Wellington; Locke–McLean, April 23 1870, McLean Papers; Ormond–McLean, 4 July 1870 MA 1/5/13/132. There is also some information about the negotiations in a petition from Toha Rahurahu, Hemi Puna, and Haoni Ruru, received on 10 September 1889, MA 1/5/13/132 or *Raupatu Document Bank*, pp 22691-704. For a full review of the documentation, see Boast, *The Mohaka-Waikare Confiscation*, pp 73-5.

This agreement failed to resolve the situation, which was complicated by applications relating to some of the Mohaka–Waikare blocks within the confiscation boundary pending in the Native Land Court. The unexpected escape of Te Kooti and his followers, quite a few of whom were actually Ngati Hineuru, and the involvement of the Hawke's Bay provincial government and Maori of the region in the campaigns against him meant that implementation of the 1868 agreement was in any case necessarily delayed. There were nevertheless some further meetings in 1868–69, including at least one in Napier at which McLean was present. It seems that final agreement on the blocks to be retained and those to be given up to the Crown were settled before McLean took up his Ministerial position in 1869, after which McLean moved to Wellington and took no further direct role in the negotiations, leaving that to Ormond as provincial superintendent and to officials in the field. There is some evidence of an important meeting at Waiohiki, the village of the prominent pro-government rangatira Tareha, and another meeting held at some stage in the Council Chambers in Napier. The essence of the agreement was the Crown could retain the large Tangoio North and Waitara blocks and a sequence of smaller areas at Te Haroto and Tarawera along the strategic access route connecting Hawke's Bay with Taupo and the North Island interior. McLean's choice of the areas he wanted for the government was probably mainly determined by strategic considerations but other factors seem to have been relevant as well – including the location of areas already leased to Pakeha farmers by Maori owners and his wish to acquire some land along the coast. One gets the impression from such sources as are available of a fairly open, flexible and equal discussion between officials and powerful Hawke's Bay rangatira, at this time still a force to be reckoned with in the province.

McLean by this time saw the confiscation simply as a loose end that needed tidying up, and he directed Ormond and Locke to tell the chiefs that 'the Government did not expect or desire to reap any pecuniary or other advantage from the confiscation of the block'.[120] In fact not all the land actually was returned: two comparatively large sub-blocks were retained by the government, and one of them is still largely Crown land to this day. By this time McLean had become completely disillusioned with the whole confiscation programme. In 1869 Ormond had asked McLean whether the Taupo chief Te Heu Heu Horonuku should have some of his land confiscated for having aided Te Kooti. McLean's answer had been, emphatically, no: confiscation had turned out to be an 'expensive mistake':

> I believe that Members of the Cabinet are agreed that the confiscation policy, as a whole, has been an expensive mistake. I am clearly of opinion that cession, in all cases where land is required, is the most politic and satisfactory mode of acquiring territory for the purposes of Government, as it will not require a standing army to maintain possession … The Imperial Government to which the Colony is applying for assistance is decidedly adverse to a confiscation policy and I believe the sooner it is abandoned in our

[120] McLean to Locke, 18 November 1869, MA 1/5/13/132.

> dealings with the Natives of this island the better for all parties concerned, as the loss of such acquisition even on economic grounds is vastly greater than the gain.[121]

The Mohaka–Waikare agreement provided that virtually all of the confiscated land would be placed in Maori ownership. The confiscated land was split up into a number large sub-blocks or subdivisions. Just two were retained by the Crown, Tangoio North (8550 acres) and Waitara (34,000 acres). The government also kept the reserve areas on the strategic route inland. The rest of this vast region was split into 13 blocks and went into Maori ownership. (To say, however, that it was 'returned' or 'went back' to Maori ownership would not be quite right, for reasons that will be explained). The average number of 'loyal Maori' grantees in each of the returned blocks was about 30.[122] The agreement was then quickly given effect to in legislation, this being the Mohaka and Waikare Districts Act 1870, which I have mentioned a few times already. The Bill was introduced into the House on 24 August 1870; only McLean spoke to it, and the Bill, obviously not regarded as in the least controversial or even interesting, passed through all its stages with no divisions and no debate. Presumably it was just seen as some arcane matter of McLean's, 'the Maori doctor'. The legislation provided that the 'Crown' blocks were to become unencumbered Crown land[123] and the 'Maori' blocks were to be Crown-granted to the Maori owners as identified in the deed.[124] The legislation also stipulated that the blocks were inalienable, but as was so often the case the real meaning of 'inalienable' was 'inalienable to anyone except to the Crown'. The Crown later acquired most of the returned blocks by purchase after 1910.

The big losers by this arrangement, however, were Ngati Hineuru, as they – as rebels – completely missed out in the reallocation, the lands going to 'loyalist' Maori instead. One of the most choice parts of the Mohaka–Waikare lands, the large and valuable Kaiwaka block, was allocated solely to the Hawke's Bay rangatira Tareha solely. It is interesting that a report in 1939 by Judge Browne of the Native Land Court concluded that 'it is very improbable that Tareha alone would have been entitled to this area if this block had been dealt with as uninvestigated Native land'.[125] (All the others went to groups of people listed by name, ranging from 40 names in Tutira to 13 in Pakuratahi). Ngati Hineuru's lands were allocated to other people. After the New Zealand wars were over, Ngati Hineuru trekked back home to find that they had nowhere to live, and so they crowded into the government reserve areas at Te Haroto and Tarawera. Te Haroto was eventually given to them, and that is where what remains of the Ngati Hineuru lands and their one remaining marae still are.

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[121] McLean–Ormond, AGG-HB 1/1, ANZ.
[122] The 'returned' blocks were Tangoio ke te tongo (i.e. Tangoio South), (35 names), Pakuratahi (13 names), Arapaoanui (37 names), Tutira (40 names), Tatara o te Rauhina (14 names), Purahotangihia (27 names), Awa o Totara (39 names), Waikare (37 names), Tataraakina (22 names), Tarawera (24 names), Kaiwaka (1 name, Tareha), Heru a Turei (36 names) and Te Kuta (36 names).
[123] Mohaka and Waikare Districts Act 1870, s 4.
[124] Mohaka and Waikare Districts Act 1870, s 5.
[125] See AJHR, 1939, G-6A, p 6.

But it was over Kaiwaka that the first round of litigation and petition was to ensue, and in this Ngati Hineuru were not involved. After Tareha's death his heirs insisted that Kaiwaka was just family property. Other Maori of the region argued that under the second Mohaka deed – which did actually use the words 'on trust' – and under the 1870 Act Tareha was merely a trustee for the people of the region, which seems in fact to have been Tareha's own opinion.[126] It was over that issue that trouble flared after Tareha's death in 1880. In 1889 a petition or memorial in the Maori language and signed by Toha Rahurahu, Hemi Puna and other local Maori leaders and addressed to the Native Minister was lodged with the government, arguing that Tareha had been and had seen himself as a Trustee and the block should now be reinvestigated and returned.[127] The Native Affairs Committee inquired into the petition, and heard evidence. Powerful politicians became involved in the Kaiwaka affair. James Carroll took up the cause of the petitioners, whereas the Tareha family attracted the support of Sir Robert Stout. The catalyst for the ensuing litigation was the issue of a Crown grant to the Tareha family on 13 November 1895. Civil proceedings followed immediately, the local community being represented by Te Teira Te Paea of Petane, who sued Te Roera Tareha (Tareha's son) and Airini Donnelly (his formidable grand-niece) as defendants.[128] This case went by consent first to the Court of Appeal – which found against the plaintiffs and for the Tareha family, awarding costs on the highest scale against the local Maori community[129] – and then to the Privy Council in London, one of only two occasions on which litigation relating to confiscated lands in New Zealand made it as far as the Judicial Committee. An English barrister, Haldane K C, was instructed, and Morison travelled to London and appeared as junior counsel. Argument was heard on 26 July 1901. Haldane's main point was that to not treat Tareha as a trustee would be inconsistent with the overall objective of the confiscation proclamation of 1867, which was to safeguard the interests of loyal Maori. To grant Tareha full beneficial ownership would serve not to protect but to dispossess. If the trust referred to in the 1870 agreement was not 'not

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[126] The critical piece of evidence is the petition of Toha Rahurahu, Hemi Puna, and Haoni Ruru, in which petitioners argued Tareha had no rights at all in Kaiwaka, although he was 'a relative of rank' to them, and Tareha had himself admitted this. According to the petitioners, rental income from Kaiwaka was redistributed by Tareha to two leading rangatira who had customary interests in Tangoio, Hemi Puna and Waha Pango, who in turn paid the money out to their people. Tareha apparently planned to return the land to its rightful owners. The true owners of Kaiwaka were mainly Ngati Tu, a section of Ngati Kahungunu.

[127] Petition of Toha Rahurahu, Hemi Puna and Haoni Ruru.

[128] A copy of the printed *Record of Proceedings* for the use of the Judicial Committee of the Privy Council was found in the Hawke's Bay Museum Library. This contains a large quantity of documents not found on the Native Department files.

[129] *Teira Te Paea and others v. Roera Tareha and another*, [1896] 15 NZLR 91. C B Morison acted for the plaintiffs and Sir Robert Stout for the defendants. After hearing legal argument from Morison, the Court of Appeal advised Stout that they did not need to hear from him and proceeded to judgment immediately. The Court of Appeal found that Tareha held Kaiwaka as a beneficial owner and not as a trustee. The basis for this finding was that the circumstances surrounding the 1870 agreement did not point to an intention on the part of the parties to the agreement to create a trust. Prendergast CJ pointed out that the agreement completely failed to identify who the supposed beneficiaries of any trust might be (see pp 105-6). One major difficulty confronting the plaintiffs was, of course, that posed by the *other* Mohaka-Waikare blocks. If Tareha was a to be regarded as a trustee for Kaiwaka, were not the named owners of the other 13 'returned' blocks *also* to be regarded as trustees. Could such a contention be sustained? Denniston J, who particularly focused on this aspect, thought not.

declared and enforced, the intention of the proclamation will be defeated; and the property of many of the loyal inhabitants will be confiscated'.[130] Exactly so.

Judgment was given by Lord Lindley on 9 November and once again the plaintiffs were unsuccessful. The Judicial Committee agreed with the New Zealand Court of Appeal that there was nothing to show that there had been any intention to create a trust. The Privy Council had 'not been furnished with any materials' to support such a conclusion.[131] Who exactly was Tareha a trustee for? The contention that he was a trustee for the loyal natives or for those who submitted in a reasonable time was rejected as fanciful. That would mean that Tareha was to be trustee 'for an unascertained and practically unascertainable class of natives'; such a proposition was 'too extravagant to require serious comment'.[132] The grantees were to take as tenants in common, and 'to an English lawyer' that would be 'conclusive' in itself that there was no intention to create a trust. The appeal was dismissed with costs.

That, apart from a number of doomed petitions – one of which was to King Edward VII in person – was the end of the Kaiwaka litigation. The petition to the King was placed before Edward VII, but naturally he was advised by his Ministers that the matter was one for the government of New Zealand. The petition, inevitably, was referred by the Colonial Secretary, Joseph Chamberlain, to Lord Ranfurly, the Governor of New Zealand, who was of course bound by constitutional convention to take the advice of *his* ministers. The New Zealand government for its part could not see how it could intervene. The block stayed in the hands of the family and was eventually sold to the government by Maud Perry, Airini Donnelly's daughter, for the fabulous sum of around £100,000. Thus although Kaiwaka was nominally 'returned' to Maori ownership, it might as well have been confiscated permanently for all the difference it would have made.

But the legal aftermath of the Mohaka–Waikare confiscation still had two major phases of elaborate confusion and heartbreak still to go. Firstly there was a round of massive Crown purchasing and partitioning of the 'returned' blocks in the period from around 1910–20, a process which required further statutory intervention in 1914 following a legal opinion on the status of the blocks from the Attorney-General, Sir John Salmond.[133] These blocks included Tutira, scene of Herbert Guthrie-Smith's environmental history classic *Tutira,* first published in 1921 (Guthrie-Smith leased his sheep station from those regranted title to Tutira, part of the confiscated area, as a result of the 1870 agreement). There were the usual confusions over survey liens and survey costs, partitions, mistakes in lists of owners, reserve boundaries and all the other complexities of the Crown purchasing process. The third step was yet a further round of special complexities, which would require a paper by itself to describe, over the Tarawera

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[130] *Te Teira Te Paea and others v. Te Roera Tareha and another*, [1902] AC 56, pp 59-60.
[131] *Te Teira Te Paea and others v. Te Roera Tareha and another*, [1902] AC 56, p 66.
[132] *Te Teira Te Paea and others v. Te Roera Tareha and another*, [1902] AC 56, p 67.
[133] Native Land Claims Adjustment Act 1914, s 4.

and Tataraakina blocks, two of the largest 'returned' blocks, which were still requiring legislative intervention in the 1950s. Nor is the story yet over. There has as yet been no negotiated settlement of the Mohaka–Waikare confiscation. Many rather angry ghosts need to be laid to rest.

Returning to the theme of confiscation and the law, this confiscation illustrates a number of the general themes running through this essay. Any hope of completely rearranging the tenurial map in Hawke's Bay had to be abandoned under the pressure of circumstances. McLean had lost faith in the confiscation project; it had turned into a mire from which the country had to extricate itself as best it could: and he put this belief into practice with this confiscation. The Mohaka and Waikare Districts Act is part of the legal framework of statutory confiscation law generally, but it is the perfect example of the statutory ratification of a local deal. This is not to say that there were not losers and winners, and great injustices with this confiscation; just that the story is not a simple one, and that some on the winning side were Maori.

Confiscation as Tenurial Revolution

Statutory confiscation obviously revolutionises land ownership: it takes land off people, vests it in the Crown, and the Crown then grants it to others. But in New Zealand confiscation was part of a tenurial revolution as well, in that even the land that was *not* confiscated and ended up being 'returned' to local Maori became held under a radically different type of tenure. Confiscation was but one aspect of the colossal tenurial transformation of Maori land that occurred in 19th century New Zealand, the main vehicle of this process being of course the Native Lands Acts and the Native Land Court. (That the Compensation Court essentially *was* the Native Land Court exercising a special jurisdiction is a point I have made already.)

The Mohaka–Waikare blocks are one example. Most of the confiscated area was 'returned', but it came back under a new tenurial structure quite different from the former customary tenure. The blocks were returned to named individuals, an arrangement later confirmed in the Native Land Court, and from that point onwards the blocks were essentially Maori freehold land. For various reasons the final step of issuing Crown grants to the named owners was never done – except, significantly, to Kaiwaka – with the result that when the government commenced its purchasing programme in the region around 1910, strictly speaking, the blocks were still Crown land. Following a legal opinion in 1914 from John Salmond, the Solicitor-General, the blocks were made into Maori freehold land by statute[134] so that, ironically, the standard Crown purchasing methods could proceed without complicated jurisdictional problems surfacing in the Native Land Court. It is with returned lands that the differences between confiscation and the ordinary process of title investigation and Crown grant in the Native Land Court become very blurred. In no case were returned confiscated lands returned

[134] Salmond, Opinion, 18 April 1914, MA 1/5/13/132, ANZ, Wellington.

under the former Maori customary tenure. They came back, rather, under Crown grant and evolved into a category of what today is called Maori freehold land. There is in fact no sharp line between 'confiscation' and 'title investigation'; the former was land-taking, certainly, but it was also a fast-track version of the latter.

Although the New Zealand colonial state abandoned the confiscation project in the narrow sense (taking land under a special statutory regime as punishment for 'rebellion'), the larger project itself – individualisation through the Native Land Court, combined with Crown and private purchasing – of course, never was abandoned. In the period 1870–1900, and again in the decade 1910–20, Crown purchasing was pushed ahead with great vigour and determination, especially in the first decade of the Liberal regime. Confiscation was not so much abandoned or jettisoned, as redirected into a different channel. Maori lost their land anyway. In the end, it made no difference whether one was a rebel or not. Ngati Manawa, for example, who fought in the wars mainly as allies of the government, lost nearly all of their once extensive lands in the Rangitaiki valley and the Kaingaroa plateau.[135] McLean's opposition to confiscation, for all his empathy and close relations with Maori, was essentially a concern about means, rather than ends. The ends were, and remained, Maori land alienation and close settlement. McLean, like all prominent 19th century politicians, like Fox, Ballance, Seddon, McKenzie – even Stout – was a true believer in 'close settlement', which of course became the mantra of the Liberals after 1891. Soldier-settlement, or 'close' settlement: in many ways they are just variants of the same idea. In New Zealand, the tenurial revolution was completed.

New Zealand can be contrasted with Mexico and the United States during the 1930s. In Mexico there was the *ejido* system developed during the government of President Lázaro Cárdenas; in the United States the enactment of the Indian Reorganisation Act 1934, designed by Roosevelt's Commissioner of Indian Affairs, John Collier (a committed socialist and admirer both of Cárdenas and of Indian collectivist lifestyles).[136] In New Zealand Maori land tenure was never deindividualised. There may be some parallels between the *ejidos* in Mexico, Indian reorganisation under Collier and Felix Cohen, and Ngata's land development schemes after 1928, but certainly the tenurial structure was never changed. Compared to the Indian

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[135] See Peter McBurney, *Ngāti Manawa and the Crown 1840-1927*, report commissioned by the CFRT, 2004.

[136] On Collier see especially Lawrence Kelly, *The Assault on Assimilation: John Collier and the Origins of Indian Policy Reform*, University of New Mexico Press, Albuquerque, 1983; David Daily, *Battle for the BIA: G E E Lindquist and the Missionary Crusade against John Collier*, University of Arizona Press, Tucson, 2004; Stephen Kunitz, 'The Social Philosophy of John Collier', *Ethnohistory*, 18 (1971); Elmer Rusco, 'John Collier: Architect of Sovereignty or Assimilation?', *American Indian Quarterly*, 15 (1991); E A Schwartz, 'Red Atlantis Revisited: Community and Culture in the Writings of John Collier', *American Indian Quarterly*, 18 (1994); on the Indian Reorganisation Act see Lawrence Kelly, 'The Indian Reorganization Act: The Dream and the Reality', *Pacific Historical Review*, 44 (1975); Kenneth Philp, 'Termination: A Legacy of the New Deal', *The Western Historical Quarterly*, 14 (1983); Wilcomb Washburn, 'A Fifty-Year Perspective on the Indian Reorganisation Act', *American Anthropologist*, New Series, 86 (1984).

Reorganisation Act, our major 20th century statute, the Native Lands Act 1909, is a boring, tepid and technical consolidation carried out on the most unimaginative of lines.[137]

Confiscation and Law: Some Reflections

Statutory confiscation, it seems to me, reveals little of importance or interest about the relationships between law and political action, except perhaps the banal observation that in a settler state such as colonial New Zealand, lacking as it did either effective constitutional guarantees or effective imperial oversight from the centre, 'politics' all too readily becomes 'law' in an entirely unmediated way by means of the enactment of statutes. To return to a point made earlier, statutes could be, and were, casually enacted, casually repealed and ignored or overlooked when necessary. New Zealand legal history is littered with bad statute law ('bad' in the sense of poorly conceived, hasty, incomprehensible, and sometimes of bad content as well). The confiscation statutes are just one example (and the Foreshore and Seabed Act 2003 is another, proving that the tradition has by no means come to an end). Of course the various statutes work through certain legal concepts and categories: Crown grants, proclamations, awards, and so forth, but it seems to me that any attempt to analyse the core underpinning legal concepts of the confiscation statutes would be unfruitful to the point of revealing nothing whatever of any significance or interest. What is interesting about the legislation is what it sets out to do on its face. The legislature that enacted the legislation I have been considering, reflected settler opinion; this community wanted to get its hands on coveted Maori-owned land in Taranaki and the Waikato, and passed 'laws' to facilitate that aspiration. When it all turned out to be too difficult to carry through, other approaches were utilised instead – although the general goals, acquisition of Maori land and its settlement by British Isles immigrants (or, possibly, select numbers of reasonably compatible immigrants from other not-too-foreign European countries, such as Norway and Denmark: no southern Europeans need apply) were never lost sight of.

The confiscation project was abandoned, mainly, because it turned out to be more trouble than it was worth. Hazel Riseborough made the point some years ago that the confiscation legislation created a situation that the government was unable to manage:

> Having confiscated on paper a huge area of land in Taranaki, the government found it had neither the means to enforce confiscation on the ground or the finance to pay compensation to those who had not been 'in rebellion' or to those who had come in and submitted to the Queen's laws. [138]

The experiment ground to a halt. No doubt the withdrawal of British army regiments played a role too. The last New Zealand Settlements Act proclamation was in 1867 and probably the last

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[137] In my view, the same is true of most subsequent Maori land legislation this century as well, with the possible exception of Matiu Rata's 1974 amending Act. This Act, and Rata's Treaty of Waitangi Act 1975, stand out as two beacons of imaginative reform and change in a long history of otherwise dreary tinkering.

[138] Riseborough, *Background Papers for the Taranaki Raupatu Claim*, Massey University, 1989, p 12, cited Sole, p 251.

true confiscation was Richmond's Poverty Bay cession of 1869. McLean had by that time concluded that confiscation was an 'expensive mistake', and with the accession of the Fox-Vogel-McLean ministry to office in 1869, the project was stopped and never revived. But by then the programme could not be jettisoned either. Having confiscated land and having embarked on an impossibly complicated and convoluted process of tenurial rearrangement that was in fact beyond the resources of the colonial state to carry out, there was no option but to persevere and to bring the matter to an end by whatever means possible. If confiscation could be made to go away by means of a local agreement, as happened in the case of Mohaka–Waikare, so much the better, but as that example shows, carelessness and haste could store up very thorny problems for the future. In any case, with the return of the government to large-scale land purchasing in 1869 and the gradual reintroduction of a pre-emptive regime, confiscation was not necessary.

What is surprising is how few were the voices raised locally in protest. It is significant that even Martin's protest was couched not in the rhetoric of Whig constitutionalism – a rhetoric that the settler community could certainly deploy when it wanted to in order to counter the alleged tyrannical propensities of colonial governors – but on a pragmatic level: instead of becoming a Greater Britain, or even a Better Britain,[139] confiscation might instead convert New Zealand into Another Ireland. Brooding Maori might feel inclined to turn to Fenian outrages. But if there was no widespread constitutional opposition locally, of course there were plenty of people in London who had their doubts about the project. Cardwell's wariness, acid comments in *The Times* and the clear opposition of such bodies as the Aborigines Protection Society must have had a significant impact in New Zealand. But in my judgment, what counted more in the end were the confused realities and complex loyalties locally, on the ground, not in Wellington but rather at Waiuku, Tauranga, Opotiki, New Plymouth, Taupo, Gisborne, and Napier.

Large-scale, region-wide efforts to wipe the tenurial slate clean by confiscatory legislation and remodel tenure and ownership through special courts and commissioners creates only expense, confusion, resentment and bitterness. A 'brooding sense of wrong' in fact. Those who have worked with Taranaki iwi in particular, will know that the brooding sense of wrong has not gone away – although the current round of settlements, if properly managed, may go some way towards ameliorating this.[140]

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[139] James Belich, *Making Peoples: A History of New Zealanders, From Polynesian Settlement to the End of the Nineteenth Century*, Auckland, Allen Lane/Penguin Press, 1996.

[140] But why are we doing these 'settlements'? What is their objective? The wrongs cannot be redressed, since full redress is not fiscally possible. Are they then part of a programme of tribal restoration? Should the current settlement process be seen as a belated equivalent of the great John Collier's Indian Reorganization Act of 1934? But who can say? There has been no real public policy debate of any depth and sophistication over the matter. 'Let's do it, and move on' seems to be the main vision. Typically, New Zealand lurches along from statutory pragmatic deal to statutory pragmatic deal in its time-honoured way. However as Karl Popper says, if history has no meaning nevertheless we can give it a meaning.

The conference at which an earlier version of this paper was presented was, as far as I am aware, the first full academic conference that has ever been held specifically on raupatu, and this is an auspicious step in itself. Hopefully the papers presented there and the forthcoming published proceedings will serve as a useful start. But much more needs to be known. I hope that it will not be taken amiss if I take it upon myself to propose a research programme, or at any rate a personal wish list. Firstly, the vast and complex Waikato confiscation is a historiographical void, and it needs to be studied thoroughly. Secondly, in my view, future research ought to adopt a broader and more expansive view of the confiscation programme, and consider fully the successes and failures of the policy of military settlement which was an indispensable aspect of it. Third, much more needs to known about the Compensation Court and its activities. Some dauntless soul needs to take on the task of coming to grips with what exactly happened in Taranaki and (especially) the Waikato. The true history of the confiscation is to be found not in analysing legal discourses but rather in wading through grants, surveys, sketch plans, petitions, decisions of the Compensation Court and Native Land Court, appeals, rehearings and so forth. An unpalatable and irksome task, but vital. Fourth, some conceptual consideration and discussion nevertheless seems overdue. There needs to be some reflection about what 'confiscation' actually is, and consideration of the possibility – I put it no stronger than that – that the fortunes of some iwi in the years before the enactment of the New Zealand Settlements Act 1863 amount to confiscation *de facto,* as well as the experiences of many iwi afterwards. What, exactly, is 'confiscation'? Is it really worse than other forms of land-taking by governments? Were Taranaki iwi really more wronged by government in the 1860s than were Ngati Toa in the 1840s, Ngai Tahu in the 1850s or Tuhoe in the 1920s?[141] There is in fact, no clear boundary between confiscation and other techniques of Maori land alienation – especially between confiscation and Native Land Court investigation and Crown purchase: they shade into one another. Finally, to complete my personal wish list, we need a full monograph or book of essays on *each* of the confiscations, perhaps with a few full-scale studies of the East Coast thrown in, before it can be said that we really understand the process thoroughly.

Outside these islands, no doubt work will continue to be done on surrender and regrant and on confiscation in Ireland, adding to an already rich and varied historiography. One hopes that some day soon South African historians will have the time and resources to unravel the full history of confiscation in that country, including the evolution of the statute law in the Cape

[141] Having raised this painful question, and while not meaning to downplay Taranaki's experiences in the 1860s and 1870s, and permanent dispossession from those days to this, I feel that I must state my own answer to this question – which is, no. In fact, I am not convinced that the current Office of Treaty Settlements policy of basically ranking raupatu as the most serious and punitive of government actions is actually justifiable.

and Natal. If the experience of Ireland and New Zealand is any guide, it is bound to be a complex story and full of surprises.

1863

The New Zealand Settlements Act 1863 (27 Vict No 27) (parent statute, which allows Governor to proclaim districts that had been 'in rebellion' and then to set apart within such districts 'eligible sites for colonization'; persons owning such land entitled to compensation except those engaged in levying or making war or carrying arms against the Crown (s.5); establishes Compensation Courts (s.8)).

The New Zealand Loan Act 1863 (27 Vict No 11) (authorises raising a loan in England of £3 million).

The Loan Appropriation Act 1863 (27 Vict. No. 12) (authorises allocation to North Island provinces of £300,000 for introduction of settlers; £900,000 for the 'cost of Surveys and other expenses incident to the location of Settlers'; £1 million to General government for costs of suppressing the rebellion, introduction of settlers, costs of surveys and payment of compensation under the New Zealand Settlements Act 1863; advances to provinces to be repaid by sale of land under the New Zealand Settlements Act 1863).

1864

The New Zealand Settlements Amendment Act 1864 (28 Vict No 4, 13 December 1864) (Governor in Council may pay compensation where refused by Compensation Court or additional compensation; continues parent Act until 3 December 1865).

1865

Outlying Districts Police Act 1865 (29 Vict No 23) (Governor may demand by proclamation criminals – including those guilty of 'armed resistance' – to be given up; in the event of a failure to do so the district may be proclaimed (s 3); lands can then be taken within the proclaimed district (s 4); '[i]n taking any such land regard shall be had so far as possible to the several degrees in which the owners thereof shall have been implicated in the said crimes' (s 5)).

New Zealand Settlements Amendment and Continuance Act 1865 (29 Vict No 66, 10 November 1865) (makes 1863 Act perpetual, except powers of taking and reserving land for settlement which are extended to 3 Feb 1867 (s 2); power to make regulations for Compensation Court (s 3); Crown may abandon land in respect of which compensation has been claimed (s 6); Crown can elect to pay compensation in land rather than in money (s 10); Governor may grant land subject to conditions of military service (s 17)).

1866

East Coast Land Titles Investigation Act 1866 (30 Vict No. 27) (East Coast confiscation: gives power to Native Land Court to issue grants to Maori within the East Coast proclaimed area 'who shall be found entitled thereto as shall not have been engaged in the rebellion' [s 3]).

Friendly Natives' Contracts Confirmation Act 1866 (30 Vict No 16, 4 October 1866) (validating Crown Grants to 'friendly Natives' made pursuant to the 1863 Act).

New Zealand Settlements Act Amendment Act 1886 (30 Vict No 31, 8 October 1866) (technical amendments; validates all orders, proclamations, grants, awards etc made by the Governor or the Compensation Court).

1867

Confiscated Lands Act 1867 (31 Vict No 44, 10 October 1867) (Governor may make reserves in confiscated lands from which grants can be made to persons to whom the Compensation Court has not awarded compensation or sufficient compensation (s 2); power to make reserves for Maori who have assisted in suppressing the rebellion (s 3); power to make reserves for surrendered rebels (s 4) ('this was the first mention of so-called 'rebels' getting any land on which to live'[142]); power to make reserves for Native Schools etc. out of confiscated lands (s 7); confiscated lands not granted or reserved etc. to form Waste Lands of the Crown [i.e. ordinary Crown land]; Tuakau Block made subject to 1863 Act (s 9)).

East Coast Land Titles Amendment Act 1867 (31 Vict No 45) (East Coast Confiscation: amends s 2 of East Coast Land Titles Investigation Act 1866; amends Schedule)).

Tauranga District Lands Act 1867 (31 Vict No 46) (Tauranga Confiscation: validates Tauranga Order in Council relating to return of Tauranga Confiscated Block).

1868

Confiscated Land Revenue Appropriation Act 1868 (32 Vict No 79) (authorising various departmental expenditures relating to the administration of confiscated lands).

East Coast Act 1868 (32 Vict No 56) (East Coast confiscation: repeals East Coast Land Titles Act 1866 and 1867 Amendment; requires Native Land Court to refuse to make a title order in favour of any person in a state of rebellion as defined in NZSA 1863 s 5).

Tauranga District Lands Act 1868 (32 Vict No 35) (Tauranga Confiscation: amends schedule to Tauranga District Lands Act 1867).

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[142] Bauchop, p 23.

1869

Poverty Bay Grants Act 1869 (32 and 33 Vict No 31) (Poverty Bay confiscation: Governor may make grants out of Poverty Bay ceded block).

1870

Mohaka and Waikare Districts Act 1870 (33 and 34 Vict No 40) (Mohaka–Waikare Confiscation: validates agreement of 13 June 1870).

1871

Poverty Bay Grants Act Amendment Act 1871 (35 Vict No 59) (Poverty Bay confiscation: amends Poverty Bay Grants Act 1869; deems legal title to have ante vested in numerous blocks and individuals).

1874

Poverty Bay Lands Titles Act 1874 (38 Vict No 76) (Poverty Bay confiscation: restores ordinary jurisdiction of Native Land Court to ungranted sections of Poverty Bay ceded block notwithstanding certain awards of the Poverty Bay Commission; validates existing grants).

1879

Confiscated Lands Inquiry and Maori Prisoners' Trials Act 1879 (43 Vict No 25) (Taranaki Confiscation: establishes West Coast Commission; allows Governor to postpone the date of trial of the Taranaki Maori prisoners).

1880

West Coast Settlement (North Island) Act 1880 (44 Vict No 39) (Taranaki Confiscation: gives power to Governor to settle claims and grievances in the West Coast [i.e. Taranaki] confiscated area).

Waikato Confiscated Lands Act 1880 (44 Vict No 41) (Waikato Confiscation: gives Governor power to make grants to Waikato Maori formerly in rebellion but who have 'subsequently submitted to the Queen's authority [s 4]).