“Enough is Enough!”

Achieving the Protection of Māori Freehold Land from Public Works Acquisition

Alice Eager

A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (Honours) at the University of Otago, Te Whare Wānanga o Otāgo

October 2015

Acknowledgments

Firstly, thank you to my supervisor Associate Professor Jacinta Ruru for providing the English girl the opportunities to discover a passion for Māori land law. I have learnt more than just the law, both in your classes and having you as a supervisor. Your constant enthusiasm encourages me to continue to explore this area of law further – and it is reassuring I am not alone in my excitement for reservations!

Thank you also to my family for their unwavering support in everything I decide to do and for loving me regardless. A special thank you to my sister Ellen for coming to check on me and for buying me scones and coffee on my crazy days.

To Jeremy, for enduring a year's worth of my complaining about my dissertation, getting up early to make me study, providing much-needed motivation at the end and those meticulous editing skills.

To Tom, for all the times we spent complaining on Facebook when we could have been writing our dissertations – the pain was shared!

And to all those who had the kindness to look interested when I cornered him or her and tried to share my excitement about public works legislation.

The quote in the title of this dissertation comes from Mrs Grace's submission to the Board of Inquiry regarding the acquisition of her land. *Grace v Minister of Land Information* [2014] NZEnvC 82 at [46]

Te toto o te tangata he kai. Te oranga o te tangata he whenua.

The lifeblood of a person is derived from food; the livelihood of a people depends on land.

*

Toitu he kainga, whatua nga-rongaro he tangata.

The land still remains when people have disappeared.

Contents

Introduction

In 1987, acclaimed Māori author Patricia Grace wrote Potiki[1]*, a story about a coastal community whose land is threatened by a public works acquisition. The novel won the New Zealand Fiction Award. Decades later, in 2014, Mrs Grace once again made headlines with a story about a community whose land was threatened by a public works acquisition, however this time it was not a novel attracting media attention but real life. Mrs Grace's literary achievements raised the profile of the plight of her block of ancestral land on the Kapiti Coast. The proposed public works acquisition of her Māori land became headline news, entering households around New Zealand in the evening broadcasts and stimulating discussion – much like her book, written 30 years prior. Mrs Grace's legal battle in 2014 clarified the law, brought attention to an issue considered for two decades by the Waitangi Tribunal, led to proposed law reform and was the motivation for this dissertation.*

In early 2010, people on the Kapiti Coast began to protest against the construction of the MacKays to Peka Peka Expressway[2]. The Expressway, part of the Wellington Northern Corridor upgrade of SH1, intends to provide "safe, efficient and reliable access" to the capital[3]. The Kapiti Coast residents were less convinced of the merits of the "Road of National Significance"[4]. The plight of Mrs Grace to save her ancestral land became the story of choice for media outlets reporting on the protests against acquisition of land for the Expressway. Mrs Grace was already a household name as a result of her acclaimed literary career. She sought to protect the last remaining block of Māori land belonging to her ancestor Wiremu Parata Te Kakakura in the region. The media relished in the David-and-Goliath story of Mrs Grace taking on the New Zealand Transport Agency to save her land, with headlines such as "Writing great in

---

[1] Patricia Grace *Potiki* (Penguin Books (NZ) Ltd, Auckland, 1986)
[2] Seamus Boyer "NZTA feels heat of expressway angst" *The Dominion Post* (online ed, Wellington, 23 August 2010)
[3] New Zealand Transport Agency "Mackays to Peka Peka" (2015) <http://www.nzta.govt.nz/projects/wellington-northern-corridor/mackays-to-peka-peka/>
[4] Roads of National Significance (RoNS) are designated by the Minister under Part 6AA Resource Management Act 1991 – Proposals of National Significance. There are seven roading projects currently underway or planned that carry the designation of RoNS. Ministry of Transport "Roads of National Significance" <http://www.transport.govt.nz/land/roadsofnationalsignificance/>

court fight to stop highway"[5]. Her legal victory was equally sensationalised, for example "Ancestral Land Escapes Bulldozers"[6].

The *Grace* cases were two separate proceedings, in two separate courts. The first proceeding, beginning in November 2013, was an application to the Maori Land Court to set aside the land as a Māori reservation under Te Ture Whenua Māori Act 1993 (TTWMA), s338. The second proceeding, the following April, was the hearing in the Environment Court to determine whether or not the land could be acquired under the Public Works Act 1981 (PWA) for the construction of the Expressway. The consequence of the reservation status was that the land could not be taken; Mrs Grace's ancestral land escaped the bulldozers and a $630M road[7] was moved to accommodate her land title.

The media portrayed the success of the *Grace* cases as a massive victory for Māori land rights, providing definitive proof that they could prevail over a significant government project[8]. Indeed, this is a victory, but analysis of the law and history prior to Mrs Grace's public battle reveals the outcome of the cases was not as astonishing as portrayed. The legacy of these cases will be less the clarification they gave on the law around reservations and more about the prominence they gave to the issue of compulsory acquisition of Māori freehold land.

The issue of acquisition sits within a wider context regarding the persistent alienation of Māori land. European ideas of land tenure have been forced upon Māori since before the Colony of New Zealand was established. The settlers ignored the special relationship of Māori to land, failing to perceive it as anything more than a productive asset[9]. Māori land tenure was based on communal ownership with the underlying title vested in the hapū. Ownership derived from tīpuna (ancestors) and passed to blood

[5] James Ihaka "Writing great in court fight to stop highway" *The New Zealand Herald* (online ed, Auckland, 9 December 2013)
[6] Kay Blundell "Ancestral land escapes bulldozers" (23 March 2014) Stuff.co.nz <http://www.stuff.co.nz/national/9881796/Ancestral-land-escapes-bulldozers>
[7] above, n3
[8] above, n6
[9] R Boast *Buying the Land, Selling the Land* (Victoria University Press, Wellington, 2008) at 4

descendants – permanent alienation outside of this bloodline was unimaginable[10]. The relationship with land extended beyond notions of ownership and was part of their identity. Māori considered themselves as tangata whenua, belonging to the land[11]. They were guardians, rather than the owners, preserving the land for their uri (descendants) as their tīpuna did before them[12]. Land was, and remains, intrinsic to the wellbeing of Māori culture: the greater the amounts that are alienated, the more significant the harm on the community.

The vast alienation of Māori land is troubling given the uniqueness of Māori culture to New Zealand. If Māori culture cannot be preserved in New Zealand it will cease to exist[13]. Since land is an integral part of Māori culture this requires recognising the need to protect Māori land. The Waitangi Tribunal has considered the effect of public works acquisitions of Māori land for almost thirty years. It has produced a comprehensive body of reports outlining the issues of the historic regimes and recommending amendments to the PWA, however it took the *Grace* cases to reignite legislative interest in the topic.

This dissertation will build upon the *Grace* cases, the work of the Waitangi Tribunal and the history of the public works to consider if the law is insufficient to protect Māori land from compulsory acquisition and, if so, why and how the law should change to amend this. The first chapter will demonstrate the origins of the harm in New Zealand's historic Māori land policies, before considering more specifically the historic public works statutes and the current PWA. The second chapter will analyse the protection offered by TTWMA as was demonstrated in the *Grace* cases, then

[10] Edward Taihakurei Durie "Will Settlers Settle? Cultural Conciliation and Law" (1996) 8 Otago LR 449 at 452
[11] HM Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 273
[12] Ibid at 283
[13] This view has been expressed by the Constitutional Advisory Panel, who stated, "A key consideration for the Panel is that Māori are tangata whenua: Māori culture, history and language have no other home. In light of this status, Māori culture, history and language needs to be used and to be able to develop, regardless of the standing of the Treaty within our constitutional arrangements". Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation, He Kōtuinga Kōrero mō Te Kaupapa Ture o Aotearoa* (Ministry of Justice, November 2013) at 33

assess how this protection is insufficient. The third chapter will consider how the law could be amended to offer the necessary protection of Māori land.

The scope of this dissertation has been limited to the compulsory acquisition of land for public works. This is not the sole problem with the acquisition regimes in New Zealand; compensation and offer-back provisions are also the source of grievances for Māori.

I A History of the Public Works Acquisition of Māori Land

In the 19th century the landscape of New Zealand changed dramatically. The influx of settlers from Great Britain required land and the development of infrastructure. The country developed from Māori villages and footpaths into international ports, highways and cities. This chapter considers the role of public works legislation in converting Māori customary land to Crown land for public use.

A Crown Land/Māori Land

In New Zealand, land is classified under one of six classes: Māori customary land; Māori freehold land; General land owned by Māori; General land; Crown land; and Crown land reserved for Māori[14]. The class determines the relevant legislative provisions and in some situations affords additional protections. The inclusion into New Zealand law of Māori customary land and Māori freehold land as distinct classes of land allows, to a limited degree, recognition of tikanga land ownership practices. This recognition is codified in TTWMA[15].

The Treaty of Waitangi enabled the Crown to implement the policies that alienated Māori land. Prior to the signing of the Treaty, Māori were sovereign and held all the land in Aotearoa New Zealand[16]. It simplifies the complexity of the era to state Māori owned all land – using the contemporary European understanding they did – since the concept of title-based, individual ownership did not exist in tikanga[17]. The colonial government developed on the English Treaty text, while the Māori text was overlooked. While it is now known that Māori did not intend to cede sovereignty or relinquish their land to Britain[18], New Zealand developed on this understanding. Thus

[14] Te Ture Whenua Māori Act 1993, s129
[15] The recognition of the special significance of Māori land is acknowledged in the preamble, s2 and s17 of TTWMA
[16] *Ngati Apa v Attorney-General* [2003] 2 NZLR 643
[17] Durie, above n 10, at 452
[18] In the Northland Report the Waitangi Tribunal concluded, "The rangatiratanga who signed te Tiriti o Waitangi in February 1840 did not cede their sovereignty to Britain. That is, they did not cede authority to make and enforce law over their people or their territories." Waitangi Tribunal *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 529

a decades-long process of asserting Crown sovereignty began, bringing Māori under English law and extinguishing native title.

Pre-emption was the first presumption of English land law to be applied to New Zealand. It was enacted in the Land Claims Ordinance 1841[19]. Pre-emption allowed the Crown to acquire from Maori much-needed land to redistribute for European settlement[20]. It also meant that the Crown could give land freehold title and control the rate and price of sale. Land policy was developed to benefit the settlers and motivated by their demands for land[21]. This led to a clash of interests between the Crown and Māori that was compounded by the disparity in the parties' expectations as to the outcome of the sale[22]. Māori became reluctant to sell, much to the frustration of the settlers. Tensions rose, leading to the beginning of the New Zealand Land Wars, which concluded in harsh legislation institutionalising the confiscation of land.

The Land Wars – or the New Zealand Wars – were fought between 1843 and 1872. The early years were isolated conflicts, escalating to intense fighting in the 1860s[23]. Fighting began in Northland with Hōne Heke's infamous attack on the flagpole at Kororāreka, motivated by the Māori belief that the Treaty was the cause of their troubles[24]. The Northland Wars were resolved, but tension had already spread to the Hutt Valley and the Whanganui region resulting in a year of skirmishing[25]. Tensions came to a head when Te Āti Awa chief Wiremu Kingi prevented the sale of land by a minor Te Āti Awa chief to Governor Thomas Gore Brown. Māori fought to defend their mana whenua[26]. The British fought to assert their sovereignty over Māori – to Gore Browne it was about nationality as well as land. In the aftermath of the Taranaki campaign stated "If I had admitted the right of a chief to interfere between me and the lawful proprietors of the soil, I should soon have found further acquisition of territory

[19] Durie, above n 10, at 461
[20] Richard Boast "Māori and the Law, 1840-2000" in Richard Boast, Jeremy Finn and Peter Spiller *A New Zealand Legal History* (2nd ed, Brookers, Wellington 2001) at 143
[21] Danny Keenan *Wars Without End: The Land Wars in Nineteenth Century New Zealand* (Penguin, Auckland, 2009) at 47
[22] See both Durie, above n 10, at 457 and Keenan, above n 21 at 66
[23] Keenan, above n 21, at 129
[24] Ibid at 145
[25] Ibid at 129 and 156
[26] Ibid at 23

impossible in any part of New Zealand" [27]. After months of disruption a truce was reached in Taranaki, yet all the while the Kīngitanga movement was gaining support in the Waikato[28]. The Kīngitanga movement aimed to subvert the Queen's authority and prohibit further alienations[29]. The determination of the Governor to assert the Crown's authority led to the invasion of the Waikato in July 1863. By the end of 1864 the attempt to subdue the Kīngitanga movement had been largely successful. Nevertheless, it took a further 8 years of fighting around the central North Island before the war concluded[30]. The battle was not over, but the fighting moved to a new theatre – the Native Land Court.

In an attempt to assert their sovereignty over Māori during this time, the Government adopted a regime of confiscation under the New Zealand Settlements Act 1863. The preamble of the Act claimed it was to enable,

> the adequate disposition for the security of the well-disposed inhabitants of both races for the prevention of future insurrection or rebellion and for the establishment and maintenance of Her Majesty's authority and Law and Order throughout the colony.

Unofficially, the Act intended to punish those involved in the Land Wars, acquire land and fund the Wars[31]. The New Zealand Settlements Amendment and Continuance Act 1865 extended the Act past its expiration date of December 1865. The confiscation policies arising from the Land Wars were potentially as harmful as the wars themselves[32].

At the same time the confiscation regimes were being created, other Māori land legislation was being developed leading to the establishment of the Native Land Court. The Native Land Court was the only institution of its kind in the English

---

[27] Keenan, above n 21, at 195
[28] Ibid at 204
[29] Alan Ward *"A 'Savage War of Peace'? Motives for Government Polcies Towards the Kingitanga, 1857-1863"* in Richard Boast and Richard S Hill *Raupatu: The Confiscation of Māori Land* (Victoria University Press, Wellington, 2009) at 68
[30] Keenan, above n 21, at 233-261
[31] Bryan Gilling *"Raupatu: the Punitive Confiscation of Māori Land in the 1860s"* at 16 and Richard Boast "*'An Expensive Mistake': Law, Courts, and Confiscation on the New Zealand Colonial Frontier*" at 155 in Richard Boast and Richard S Hill *Raupatu: The Confiscation of Māori Land* (Victoria University Press, Wellington, 2009)
[32] Gilling, above n 31, at 16

colonies and was fundamentally important to the development of land policies[33]. The legislation was interconnected with other statutory regimes and constantly amended. Historian Tom Brooking argues an underlying notion of paternal benevolence resulted in so-called "shows of justice" being included in otherwise disadvantageous legislation[34]. Brooking claims pre-emption, the "tidying' of title[35] and paying money to the Public Trustee[36] was the extent of benevolence in land policy towards Māori[37]. The rest, he argues, was "coercive and punitive"[38].

The Native Land Acts of 1862 and 1865 transformed the policy from pre-emption to free trade[39]. Once Maori customary land had received freehold title from the Land Court it could be easily on sold. However, the process of obtaining title was complicated, failed to accommodate Māori land ownership and was expensive[40]. Compulsory acquisition was a feature of this legislation, for example the 1862 Act introduced the 5% rule, allowing the Governor to take 5% of all Māori land sold for public roading purposes[41]. The Native Lands Act 1865 was replaced by the 1867 Act, then again in 1873 and again in 1909.

Further alienation was achieved outside of the Native Land Acts. The abolition of the Native Department in 1892 removed the institutional check on alienation[42]. The Native Land Purchase and Acquisition Act 1893 facilitated sale while limiting opposition by requiring a bare majority to agree to a sale, but requiring a two-thirds majority to block one. It also reduced the age of sale from 21 to 17. Stereotypes that Māori were "lazy, indolent and regressive" and restricting colonisation permeated the

[33] Boast, above n 20, at 151
[34] Tom Brooking "'Busting Up' The Greatest Estate of All: Liberal Land Policy 1891-1911" (1992) NZJH 26 at 83
[35] By this Brooking is referring to the attempts of the Colonial governments to resolve issues of title and ownership, for example the enactment of the Native Lands (Validation of Titles) Act 1892, ibid at 83
[36] Money from the sale of Māori land was given to the Māori Trustee to invest on behalf of the owners, ibid at 83
[37] ibid at 84
[38] ibid at 84
[39] Boast, above n 20, at 152
[40] ibid at 154
[41] Section 27
[42] Brooking, above n34, at 84

thinking behind the enactment of policy in the 1890s[43]. The policies established in this period were to have lasting effect, for example the separate treatment of Māori land and General land continued until 1973. The Native Land Act 1909 was revised by the Māori Affairs Act 1953, which was replaced by the current Te Ture Whenua Māori Act in 1993.

The Crown developed numerous ways of acquiring Māori land leading to significant alienation of customary land. In amongst these regimes was the ability to acquire land for public works projects. The development of public works legislation became a critical issue during the Land Wars. The Kīngitanga leaders believed the legislation threatened their land ownership, while the settlers perceived the statutes as essential to the progress of New Zealand[44]. With this background of the means the colonial government used to alienate Māori land, this chapter will now consider the historic public works regime, leading to the present day statute.

B The History of Public Works Legislation in New Zealand

Unlike the New Zealand Settlements Acts, which allowed the Crown to take land to establish defensive settlements in the regions, the public works legislation enabled the acquisition of land for public works projects – infrastructure such as roads, railways and schools. In practice the operation of the two may have been blurred, however the public works legislation was – and remains – founded on the Crown's eminent domain. The Dutch international law theorist Hugo Grotius first defined eminent domain in 1625, but the power had long before existed in the common law. It grants the state the power to alienate or destroy private property in "cases of extreme necessity" and "for ends of public utility". New Zealand adopted the concept, known here as compulsory acquisition[45].

In New Zealand, the power of compulsory acquisition has always been explicitly provided for in legislation. The first such statute was the Land Clauses Consolidation Act 1863; "An Act to prescribe the mode in which Land shall be taken for Works and

[43] Ibid at 92
[44] Ward, n 29 at 88
[45] *Laws of New Zealand* Compulsory Acquisition and Compensation (online ed.) at [1]

Undertakings of a Public nature". It created general powers to take land. It was revised into the Public Works Act 1876, then 1882, then 1894, again in 1908 and again in 1928. The law surrounding public works was later consolidated and amended leading to the enactment of the current Public Works Act 1981 (PWA).

The Land Clauses Consolidation Act 1863 applied to land generally. It was initially uncertain whether it included Māori land, or if this fell under a separate regime. The many inter-related and often overlapping statutes caused confusion. For example, there was overlap between the early Public Works Acts, which applied to all land in New Zealand, and the more specific Native Land Purchase Acts, which allowed the acquisition of Māori land for reasons beyond the construction of public works projects[46]. The uncertainty whether the Land Clauses Consolidation Act extended to Maori land was clarified in the Public Works Lands Act 1864, which allowed acquisition of both Crown-granted and customary land. The uncertainty in the jurisdiction of the Act demonstrates the confusion arising from the muddled compilation of multiple pieces of legislation and the 5% rule that would define public works policy until the 1928 Act[47]. The Waitangi Tribunal has speculated that this confusion was one factor in promoting Māori land as cheaper and easier to acquire[48].

The Land Wars impacted upon the development of public works policy. Public works were an important feature of the war policy of the 1860s, resulting in cross over in the legislation and its exercise. Under the Public Works Lands Act 1864, s5, compensation for land that had not received a Crown grant was assessed under the New Zealand Settlement Act 1863, unless the land was 'rebel-owned' and excluded from compensation. In some regions the jurisdictions of the Native Settlements Acts and the Public Works legislation were confused, distorting compulsory acquisition into a punitive measure[49]. At the same time, the need for essential wartime infrastructure spurred further takings – for example in Taranaki land was acquired to

[46] Brooking, above n 34, at 87
[47] Waitangi Tribunal *Wairarapa ki Tararua Report* (Wai 863, 2010) at 747
[48] Ibid
[49] *Te Runangi o Ngati Awa v Attorney General* [2004] 2 NZLR 252 at [19-22] See also Boast, above n20 at 158 and Victoria Kingi "The Alienation of Māori Land and Public Works Legislation" (1997) 8 AULR 563 at 569

build roads to access the battle sites[50]. Consequently grievances from wartime confiscation and public works grievances were confused, hindering compensation and increasing the hurt. Meanwhile, the 5% rule introduced in 1862 was extended by Native Land Act 1865 to within 10 years of title determination, allowing land to also be taken for railways and extending the claim to customary land[51]. Unlike general land that was only subject to the claim for 5 years there was no compensation for this acquisition.

The population boom of the 1870s resulted in the rapid development of takings policy. The Public Works Act 1876 gave the power to take all types of Maori land[52]. It administered taking Māori and general land separately, but there appeared to be no intentional negative treatment for Māori[53]. The trajectory of the legislation altered with the enactment of the Public Works Act 1882. The Act was passed after Parihaka and reflected "the more uncompromising attitude that would be applied to the taking of Māori land for public works in the coming decades"[54]. Parihaka is a small town in Taranaki. It became a symbol of the Māori protest against confiscation following the New Zealand Wars. The government initially responded with specifically targetted legislation, culminating in an armed attack on the settlement in 1881. The 1882 Act created separate, "explicitly discriminatory" provisions for taking Maori land, allowing acquisition by gazetting an Order in Council and removing the protections available to general land[55]. The Act made it easier to avoid paying compensation to Māori, causing it to be favoured – a fact "openly acknowledged" by the Minister of Public Works, Edwin Mitchelson, in 1888[56]. The 1894 Act provided for the acquisition of "Native lands", placing all Maori land under a different compensation regime. The definition of "Native Lands" was provided in the 1909 Act[57]. Across the

[50] Cathy Marr *Public Works Takings of Māori Land, 1840-1981, Rangahaua Whanui National Theme G* (First Release, Waitangi Tribunal, May 1997) at 48-49
[51] section 76
[52] above, n 47 at 748
[53] Ibid
[54] above, n 47 at 748
[55] Sections 23-26
[56] Janine Hayward "In Search of Certainty: Local Government Policy and the Treaty of Waitangi" in Veronica Tawhai and Katarina Gray-Sharp (eds.) *Always Speaking: The Treaty of Waitangi and Public Policy* (Huia Publishers, Wellington, 2011) at 81
[57] above, n 47 at 750

entire period the definition of "public works" was expanding in scope, increasing the opportunities for Maori land to be taken[58].

The separate regimes making it easier to acquire Māori land were continued into the 1928 Act. The 5% rule arising from the Native Land legislation was repealed in 1927 removing the ability to acquire Māori land for roads and railways without paying compensation. The 1928 Act maintained the separate process for Maori – or 'Native' – land. The process depended on whether the title to the land was derived from the Crown or otherwise[59]. 'Native land' meant "land held by Natives under their customs or usages"[60]. Māori land was acquired under Part IV of the Act – Native Lands – whereas general land was acquired under Part II of the Act – Taking Lands for Public Works. The power to take 'Native land' was broad. Land that received title from the Crown was acquired in the same way as general land[61]. After an amendment in 1931, land that did not have Crown title could be acquired by survey[62]. The power remained until 1967[63].

The 1928 Act promoted the registration of title, excluding the need to notify owners of customary land of proposed acquisition. Less knowledge of the proposed acquisition meant less time to object. This disadvantage was compounded by poor compensation. All owners – of general and Māori land – were entitled to full compensation, but the use of the Māori trustee as the official negotiation for Māori delayed the process. In many cases Māori were forced to relocated and bear the expense without receiving compensation for years[64]. Significantly for Māori, this Act recognised complexities in Māori land ownership and addressed the consequences for land taken, but not used. The Act remained in force for over 50 years; during which time further legislation enabling acquisition was enacted.

The legislation enacted before 1928 allowed and provided the means for institutionalised and systematic alienation of Māori from their land. Such policy was

[58] Marr, above n 50 at 243
[59] Section 103
[60] Section 2
[61] Section 103(1)
[62] Native Land Act 1931, Section 103(2)
[63] Māori Affairs Amendment Act 1967
[64] Kingi, above n 49 at 569

continued into the 1928 Act, which continued the separate, less fair treatment of Māori land. The Waitangi Tribunal has concluded that between 1882 and 1974 Māori land was subject to "sustained and serious discrimination". Māori were found to have less rights and protections in: notifications of takings; consultation before takings; opportunities to object; consultation about compensation; calculation of compensation; and payment of compensation[65]. The legislative discrimination was compounded by the exercise of the 5% rule. The discriminatory policy was reflected in the exercise of the Acts[66].

Cathy Marr and the Waitangi Tribunal[67] have both speculated whether an opportunity was missed for co-operation in the early colonial period. The argument being there was sufficient consensus on community projects to establish "a mutually acceptable basis for developing community assets"[68]. Tikanga allowed for the granting of rights for a particular resource to a person outside the hapū[69], this practice had developed to the benefit of European sailors. However, the shared land was not alienated meaning the hapū remained the important physical connection with the land[70]. In *He Maunga Rongo*, the Tribunal argued that the customary approach, "in combination with the Māori desire for economic development, ensured a considered and fair response from Māori owners in the period before compulsory powers were introduced", providing the example of roads constructed in Rotorua[71]. It would be anachronistic to suggest a resource-sharing regime could have been implemented, but the common idea of community benefit suggests there would have been value in consultation.

The window of opportunity to cooperate effectively closed when New Zealand reached population equity, creating a need for infrastructure[72]. Instead, legislation was enacted making Māori land easier to acquire, removing the need to consult and

[65] Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims* (Wai 1200, 2008)
[66] Waitangi Tribunal *Te Kahui Maunga: The National Park District Inquiry Report* (Wai 1130, 2013) at 742
[67] Cathy Marr, see too *Wairarapa*, above n 47, at 745 and He Maunga Rongo, above n 65, at 836
[68] *Wairarapa*, above n 47, at 745.
[69] Durie, above n 8, at 452
[70] ibid at 454
[71] He Maunga Rongo, above n 65, at 836
[72] *Wairarapa*, above n 47, at 745

increasing the hurt of alienation[7374]. The mono-cultural legislation was founded on English legislation and reflected their beliefs surrounding land tenure. It did not recognise the significance of land to Māori nor attempt to include Māori values, thus missing the opportunity to create a regime that worked with Māori[75].

The now infamous case of *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) (Supreme Court) 72 illustrates the issues of Māori and public works acquisition so far considered and brings in the protection explored in the next chapter – Māori reservations. The case is renowned for Prendergast J's statement that the Treaty of Waitangi was "a simple nullity". This led to over a century of both native title and the Treaty being denied in New Zealand. More pertinent to this dissertation are the facts; the case arose because land gifted by Ngāti Toa to build a school had not been used. *Wi Parata* demonstrates the 19th century Māori understanding of public works projects and the resulting betrayal arising from Pākehā acting upon their understanding of the law[76]. Wiremu Parata Te Kakakura (Wi Parata) brought the case. A prominent Māori politician, Parata was a significant landowner on the Kapiti Coast and for some time Waikanae carried his name – Parata Township[77]. He was the original owner of the block of land at question in the *Grace* cases, thus providing the link between past and present.

C The Public Works Act 1981

The PWA 1981 is regarded better for owners of Māori land than previous regimes, however it remains flawed. The statute was drafted in a time of change. Māori perspectives were increasingly present in literature, art and movies giving them a voice[78]. In 1975 Dame Whina Cooper led a land march from Te Hapua to Parliament in a protest to end the alienation of Māori land. The 506-day occupation of Bastion

[73] Marr, above n 50, at 203
[74] ibid 142
[75] *Wairarapa*, above n 47, at 799
[76] David Williams *A Simple Nullity? The Wi Parata Case in New Zealand law and History* (Auckland University Press, Auckland, 2011) at 88
[77] See ibid, Chapter 6
[78] Daniel J Sherman "Seizing the cultural and political moment and catching fish: Political development of Māori in New Zealand, the Sealord Fisheries Settlement, and social movement theory" (2006) 43 The Social Science Journal

Point from 5 January 1977 to 25 May 1978 in protest of the decision to sell Ngati Whatua land they alleged had been wrongly taken also highlighted the issue of Māori land alienation. The awareness raised led to changes in the policies of acquiring authorities[79]. The Waitangi Tribunal had been established in 1975[80], steering discourse "away from British conceptions of property"[81]. The National Party's policy supported the retention by Maori of ancestral land. The disaccord between the existing 1928 Act and this policy was demonstrated in the case of *Dannevirke Borough Council v Governor-General* [1981] 1 NZLR 129.

In *Dannevirke,* the Government challenged the local authority's acquisition of Māori land. The Minister of Land, Hon William Young explained to the Court,

> That is addition to the special factors relating to Māori land it is present Government policy, notwithstanding the extent of the powers given in the Public Works Act 1928, to advise the taking of land compulsorily only for particular classes of public works. The fact that Maori land is involved and that the proposed work is a tip site are factors which together as a matter of policy weigh against advising in favour of the compulsory acquisition of the land[82]

Ultimately, the Government lost because the law did not prohibit the acquisition of Māori land Davidson J concluded,

> The Act does not enable particular classes of land or land owned by particular classes of persons to be excluded from the compulsory taking provisions of the Act…Government policy that Māori land should not be compulsorily acquired is contrary to the policy and objects of the Act[83].

The PWA was passed several months later[84], but surprisingly did not reflect the policy the Government has chosen to assert in Court[85].

---

[79] *Wairarapa*, above n 47, both at 742 and 759
[80] Treaty of Waitangi Act 1975, s4
[81] Sherman, above n 78
[82] At 131
[83] At 134
[84] The Public Works Bill was read a third time on 25th September 1980
[85] *Wairarapa*, above n 47, at 759, see also *Dannevirke* at 134 Mr Young explained "it was present Government policy not to allow the compulsory acquisition of Māori land" and referred to the Government election Manifesto which explained intended amendments for the Bill

Instead, the Act, as originally enacted, went beyond and sought to protect all land from acquisition unless the work was considered essential. The different regimes for Māori and general land had been consolidated in 1974[86] and the equal treatment of both categories continued into the PWA. A "major objective" of the Bill was to restrict the acquisition of all private land – general and Māori. This was achieved with the provision land could only be compulsorily acquired if the work was essential, as defined in section 2. The inclusion of the "essential works test" was considered the "most important change" to the legislation and was the focus of Parliamentary discussion prior to the Bill's passing[87]. Despite the attempt to protect all private land, the Act continued to fail to address additional values associated with Māori land. The "essential works" test was repealed by the Public Works Amendment Act (No.2) 1987. Accordingly, while Māori land was no longer subject to discriminatory practices, there was no restriction on the ability to acquire Māori land – this situation endures to the present day.

The PWA is the main piece of legislation, but at least ten other Acts permit the compulsory acquisition of land for a specific purpose[88]. The Act allows the acquisition of private land for the construction of public works[89]. The Minister of Land or the local authority with financial responsibility for a works project is empowered to acquire land in s16. The power is broad, yet the acquiring authority must be able to demonstrate objectively that the land is required for a public work[90]. Public works are defined in s2. Public work means –

> (a) every Government work or local work that the Crown or any local authority is authorised to construct, undertake, establish, manage, operate, or maintain, and every use of land for any Government work or local work which the Crown or any local authority is authorised to construct, undertake, establish, manage, operate, or maintain by or under this or any other Act; and include anything

[86] Māori Purposes Act 1974, s12
[87] (2 September 1980) NZPD 3165-3181
[88] *Heritage New Zealand Pouhere Taonga Act 2014*, s14(1); *Housing Act 1955*, s5: *Local Government Act 1974*, s27F: *Crown Minerals Act 1991*, s66: *New Zealand Railways Corporation Act 1981*, s30: *Reserves Act 1977*, s12: *Resource Management Act 1991*, s186, s197: *River Boards Act 1908*, s74: *Soil Conservation and Rivers Control Act 1941*, s131, s135: *State-Owned Enterprises Act 1986*, s27C.
[89] Appendix
[90] *Te Runanga o Ngati Awa v A-G* 17/7/08, MacKenzie J, HC Wellington CIV-2006-485-1025 at [89]

required directly or indirectly for any such Government work or local work or use.

(b) every Government work or local work constructed, undertaken, established, managed, operated or maintained by any education authority within the meaning of the Education Act 1964…

(c) any Government work or local work that is, or is required, for any university within the meaning of the Education Act 1989

As explained by the New Zealand Law Society, most importantly a public work must benefit the public: a project that benefits a private individual first and the public second is not a public work[91].

Unlike earlier legislation the PWA emphasises acquiring land by agreement. Land must first be sought by agreement following the process stated in s 17. The majority of acquisitions are performed this way[92]. A notice of desire will be served on those with a registered interest in the land and these owners will be invited to sell to the Crown. The Māori Land Court will act on behalf of, or assign an agent, to multiply owned Māori land that is not in trust[93]. The acquiring authority must negotiate in good faith and endeavour to reach an agreement[94]. Once an agreement has been reached ownership passes by transfer or declaration[95] and the original owner is compensated.

Only if an agreement cannot be reached may the land be compulsorily acquired. The process for taking the land is given in s23, however first the taking authority must follow the requirements of s18. Section 18 states that the authority must allow 3 months for an agreement to be made, after this it has one year from the date the owner was notified to being the acquisition process. Section 23 then requires that the land is surveyed, the intended acquisition is Gazetted and that a notice of intention be served to everybody with a registered interest. Any party with a proprietary interest in the land[96] may object to the notice to the Environment Court within 20 days[97]. In the absence of objection the land will be acquired and the owner compensated.

[91] P Merfield and J Smith *Public Works Act Update* (New Zealand Law Society, October 2011) at 3
[92] ibid at 47
[93] Section 17(5)
[94] Section 17(1)(d)
[95] Section 17(7)
[96] *Bird v Nelson CC* [2006] NZRMA 39

The Environment Court, upon receiving an objection, will follow the process in s24. As soon as practicable it will inform the acquiring authority. The Minister or local authority then has one month to respond explaining (a) the authority for acquisition; (b) the nature of the work or the purpose for which the land is sought and; (c) other such matters it considers appropriate. The Court will then organise a hearing where, under s24(7), it shall –

(a) ascertain the objectives of the Minister or local authority, as the case may require:
(b) enquire into the adequacy of the consideration given to alternative sites, routes, or other methods of achieving those objectives:
(c) in its discretion, send the matter back to the Minister or local authority for further consideration in the light of any directions given by the court:
(d) decide whether, in its opinion, it would be fair, sound, and reasonably necessary for achieving the objectives of the Minister or local authority, as the case may require, for the land of the objector to be taken:
(e) prepare a written report on the objection and on the court's findings"
(f) submit its report and findings to the Minister or local authority, as the case may require.

The final decision of the Court is binding on the Minister and may only be appealed on questions of law[98].

Practice reflects the law and there is no longer a preference for acquiring Māori land. Nevertheless, the legislation still allows for Māori land to be taken without regard to Māori spiritual or cultural attachments to the land. The Act potentially violates Article 2 of the Treaty of Waitangi, which promised Māori "full, exclusive and undisturbed possession" of their lands for as long as they wished. These flaws – and those of the Act's predecessors – have been repeatedly considered and reported upon by the Waitangi Tribunal.

D The Waitangi Tribunal and Public Works Legislation

The grievances associated with public works acquisitions are demonstrated in the number of claims brought to the Waitangi Tribunal. The Tribunal has considered the

[97] Section 23(3)
[98] Section 24(10) and Section 24(13)

effect of public works on Māori in at least 11 District Inquiries since 1994[99]. The seminal report was the 1994 *Te Maunga Railways Land Report*, which investigated the public works takings of blocks in Papamoa for the construction of a railway[100]. The *Te Maunga Railways Report* established the underlying issue to be "whether kāwanatanga overrides the guarantee of tino rangatiratanga"[101]. Subsequent Tribunals have grappled with how to reconcile the Crown's sovereignty with their assertion of "the fundamental right of owners of Māori land to keep it until they wish to sell it" – per Article 2 – in the case of compulsory acquisition[102]. The Waitangi Tribunal's most detailed study on compulsory acquisition is in the *Wairarapa ki Tararua Report*.

The Tribunal note the difference between legal and legitimate actions; generally the authorities were acting legally when applying the legislation, but the legislation itself was not legitimate policy given the guarantees made in the Treaty of Waitangi[103]. Consent from Māori could have legitimised the enactment of many policies. Instead, the authorities legislated contrary to the rights of Māori who lacked the political representation to defend the guarantees made. The abuse continued in successive enactments[104].

The findings of the Tribunal demonstrate the systemic failings of the public works regimes for Māori. The development of public works legislation in New Zealand occurred without the inclusion of Māori. The lack of consent in the creation of the public works legislation and policy was "a flagrant breach of the plain meaning of Article 2 of the Treaty"[105]. It was found that multiply owned land was subject to "sustained and serious discrimination"[106]; such treatment breached the plain meaning

[99] *The Mohaka River Report* (Wai 119, 1992); *Te Maunga Railways Land Report* (Wai 315, 1994); *Ngai Tahu Ancillary Claims Report* (Wai 27, 1995); *Turangi Township Report* (Wai 84, 1995); *Te Whanganui A Tara Me Ona Takiwa* (Wai 145, 2003); *The Mohaka Ki Ahuriri Report* (Wai 201, 2004); *Turanga Tangata Turanga Whenua: The Report on the Turannganui Kiwa Claims* (Wai 814, 2004); *The Hauraki Report* (Wai 686, 2006); *He Maunga Rongo: Report on Central North Island Claims* (Wai 1200, 2008); *Wairarapa ki Tararua Report* (Wai 863, 2010); *Te Kahui Maunga: The National Park District Inquiry Report* (Wai 1130, 2013)
[100] (Wai 315, 1994)
[101] ibid at 54
[102] *Wairarapa*, above n 47, at 743
[103] ibid at 787
[104] *Wairarapa*, above n 47, at 782 and *He Maunga Rongo*, above n 65, at 839
[105] Above n 65, at 819
[106] *He Maunga Rongo* in *Te Kahui Maunga*, above n 66, at 741

of article 3[107]. Land was unfairly valued on European understandings[108]. The various statutes breached the Treaty principles of equity, active protection, partnership and reciprocity[109], as well as Article 2 of the Treaty itself[110]. The legislation was monocultural and did not allow for "the special circumstance of land to Māori". Consequently, the statutes failed to acknowledge the special relationship of land to Māori[111]. The effect of these failings was worsened by the failure to address the issues with the enactment of the PWA. The denial of the special relationship and the enormous alienation of Māori land that had already occurred made compulsory acquisition of Māori land especially grievous.

The Tribunal considers it has assessed the public works regimes to the furthest extent possible. It has repeatedly investigated the history, the laws and their administration, providing recommendations for legislative change to amend the wrongs – these will be considered in Chapter Three. In the *Te Kahui Maunga Report,* the Tribunal stated that it would not be considering public works further; instead, the time has come for Crown action to address the problematic legislation and prevent future grievances[112].

Until the Crown chooses to amend the Public Works Act, the failings identified by the Tribunal will continue. The Tribunal acknowledges that taking authorities no longer typically resort to taking Māori land but, even if the modern legislation no longer creates a statutory preference for Māori land, Māori land remains vulnerable[113]. As long as the legislation remains mono-cultural and the power to take Māori land without restraint exists, Māori will continue to unduly suffer when their land is alienated. The sole means of preventing the acquisition of Māori land in the interim is the creation of a Māori reservation under TTWMA, s338. The success of this protection was affirmed in 2014 in the *Grace* cases – the subject of the next chapter.

---

[107] *He Maunga Rongo* above n 65, at 819
[108] Waitangi Tribunal *Te Raupatu o Tauranga Moana* (Wai 215, 2004) in *Te Kahui Maunga*, above n 66, at 742
[109] *He Maunga Rongo*, above n 66, in ibid
[110] *Tauranga Moana*, above n 11, in ibid
[111] *Wairarapa* above n 47, in ibid
[112] *Te Kahui Maunga*, above n 66, at 777
[113] *Wairarapa*, above n 47,at 789

II Māori Reservations and the Grace Cases

Unlike Māori freehold land, which is vulnerable to compulsory acquisition, Māori reservations were thought to be protected by virtue of their inalienability. This chapter will discuss the first Māori reservations and then consider the significance and implications of the *Grace* decisions, before demonstrating how reservations alone are insufficient protection.

The TTWMA offers protection for Māori land through the creation of a Māori reservation: a land status that may be granted to Māori freehold land pursuant to an application made to the Māori Land Court under TTWMA, s338. The status is remarkable because, "it has the effect of denying to the Crown one of its most important rights – the right to take private land for a public work" [114]. Once set aside, Māori reservations become inalienable to anyone, including the Crown. The scope of the protection became uncertain last year when a situation arose that saw the courts simultaneously dealing with the same block of land: in one court whether the land should become a Māori reservation and in the other court whether the land should be taken for public works. The *Grace* cases are significant because they provide the first set of suitable facts to determine that it is possible to protect land from acquisition by setting it aside as a Māori reservation under s338. Yet, even the protection granted by reservations comes with exceptions, as has been tested in subsequent cases.

A Māori Reservations

A reservation is created under s338 TTWMA. A person wishing to have her land set aside as a reservation must make an application to the Māori Land Court. The status may be granted for one of two reasons, set out in s338(1)[115],

> (a) for the purposes of a village site, marae, meeting place, recreation ground, sports ground, bathing place, church site, building site, burial ground, landing place, fishing ground, spring, well, timber reserve, catchment area or other source of

[114] *Gibbs v Te Rūnanga o Ngāti Tama* (2011) 274 Aotea MB 47 (274 AOT 47) at [49]
[115] In *Ngarara West*, the alternatives – (a) and (b) – were found not to be mutually exclusive at [68]

water supply, or place of cultural, historical or scenic interest, or for any other specified purpose; or

(b) that is a wāhi tapu, being a place of special significance according to tikanga Māori.

If the Court is satisfied the land meets the criteria for reservation status it will make a recommendation to the Chief Executive of Te Puni Kokiri. She may then declare the land set aside as a reservation by notice in the Gazette. The reservation is then formally established. A significant consequence of the status is that, once Gazetted, s338(11) states,

> Except as provided in subsection (12) the land comprised within a Māori reservation shall, while the reservation subsists, be inalienable, whether to the Crown or any other person.

The exception in s338(12) states,

> The trustees in whom any Māori reservation is vested may, with the consent of the court, grant a lease or occupation licence of the reservation or of any part of it for any term not exceeding 14 years (including any term or terms of renewal), upon and subject to such terms and conditions as the court thinks fit.

Inalienability ensures that the land will continue to be recognised for the reasons that led to it being set aside – either a particular purpose or because it is wāhi tapu.

The protective value of a reservation is evident from its origins. In colonial New Zealand, restrictions were placed on the alienation of Māori land to ensure the preservation of sufficient land for subsistence and future needs[116]. The reservation status began to develop with the passing of the Native Land Act 1909, which developed the colonial policy of reserving land for subsistence by creating inalienable blocks of Māori land[117]. The Māori Affairs Act 1953 refined the ability to categorise any land occupied by Māori as inalienable to sites with a specific purpose[118]. The current s338 is very similar to the 1953 Act. The early policy of preserving Māori land for future generations' needs is today realised under s338.

[116] JE Murray *Crown Policy on Māori Reserved Lands, 1840 to 1865, and Lands Restricted from Alienation, 1865 to 1900* (First Release, Waitangi Tribunal, February 1997) at 3
[117] Native Land Act 1909, s289
[118] Māori Affairs Act 1953, s439

It is important to remember that while this dissertation focuses on the protection the Māori reservation status offers land from forcible – indeed, any – alienation, this is not a purpose of a reservation. A reservation is intended to recognise the special significance of a piece of land to a particular group and enable them to preserve it for future generations. The protection arising from the status is secondary, to enable the reasons for setting aside the land to be upheld.

B Māori Reservations and the Public Works Act 1981

The restriction on alienation of Māori reservations includes alienations to the Crown. A public works acquisition alienates land to the Crown, or local authority acting on the authority of the Crown. It may be argued that Local Government acts independently of the Crown, in which case it would nevertheless likely be caught under s338(11) as "any other person". Unsurprisingly, there is a conflict between the inalienability of reservations and the broad power given to the Minister of Works or the local authority in s16, PWA to take "any land required" for the works project. The inalienability of an existing reservation was well established: once a block was set aside it could only be alienated as allowed by TTWMA[119]. Thus, the status placed a limitation on one of the Crown's fundamental rights. The question remained whether the intended acquisition could place a fetter on the ability to create Māori reservations or whether, prior to the reservation's existence, the Crown's right should prevail?

The Māori Appellate Court considered the relationship between compulsory acquisition and the creation of Māori reservations in *Mato – Nukutaurua 3C3A and 3C3B* (1987) (APPEAL 1986/4) 32 Gisborne ACMB 217 (32 APGS 217). The case was decided on the PWA 1928 but remains authoritative. The Court found that the Crown held the power to create reservations and that this power could only be fettered by express statutory intention. In the absence of a section limiting their power, the Crown could create a Māori reservation even if it would prevent the acquisition of land[120]. However, ultimately the facts presented an alternative solution that allowed for the same outcome without needing the land to be acquired.

---

[119] *Nukutaurua*, at 13
[120] ibid

The issue was next considered 25 years later in *Gibbs v Te Rūnanga o Ngāti Tama* (2011) 274 Aotea MB 47 (274 AOT 47). Judge Harvey made clear statements about the law, but the facts of the case prevented it from being truly tested. In the absence of case precedent, Judge Harvey relied on the principles of TTWMA to guide his decision, particularly the "fundamental principle" of the retention[121]. He affirmed that the law was "unequivocal"; Māori reservations were the sole exception to the ability of the Crown to take land. He emphasised that the significance of setting aside land as a Māori reservation meant the decision required careful consideration[122]. However, the primary consideration of the Court was the appropriateness of reservation status, with the effects on other parties being of secondary importance[123]. It was held that the block was not suited to be set aside, thus the effect on a possible acquisition did not need to be considered[124].

In both cases the Court gave a statement on the law around reservations and compulsory acquisition, but neither had the facts to truly test whether a proposed acquisition could fetter the creation of a reservation. Furthermore, the facts of the two cases allowed for the parties' intentions to be achieved without compulsory acquisition. In *Nukutaurua* the concern was public access. The Wairoa City Council sought to turn the land into an esplanade under the Reserves Act 1977 for the purpose of providing access to the sea and to preserve the environment. This aligned with the protective nature of a Māori reservation and conditions could be created for public access. In *Gibbs* mere cooperation would prevent acquisition. The New Plymouth District Council was proposing to lodge a notice of desire as Mr. and Mrs. Gibbs were refusing contractors access across their land to maintain the Te Horo Stock Tunnel. Ultimately, the block was unsuited to becoming a reservation so the question of law did not arise. It remained possible that the reason for acquisition could be significant enough to prevent the setting aside of a reservation.

[121] *Gibbs* at [51]
[122] At [48]
[123] At [53]
[124] At [158]

C The Grace Cases

The law remained uncertain in May 2013 when Mrs Grace made her application to set aside her land as a Māori reservation. Unlike in *Nukutaurua* and *Gibbs*, where a variety of reasons existed, the sole reason the suitability of Mrs Grace's land was challenged was because the land was sought under the PWA. The relationship between TTWMA, s338 and the PWA was key to the case. Furthermore, the facts prevented two compelling interests, only one of which could prevail. Mrs Grace was the sole owner and a direct descendant of the original owner, Wi Parata. The land was one of the remaining Parata blocks on the Kapiti Coast and she had spent years preserving it. The opposing interest was the construction of a $630M expressway, designated a 'Road of Nation Significance'[125]. The Māori Land Court first assessed the potential reservation status in *Grace – Ngarara West A25BA* (2014) 317 Aotea MB 268 (317 AOT 268). The Environment Court then assessed the appropriateness of compulsory acquisition in *Grace v Minister for Land Information* [2014] NZEnvC 82. In light of the previous cases' statements the outcome was not unexpected, however it was the first case to truly assert the law. The cases proved that TTWMA would prevail over the PWA regardless of the intended project.

1 Ngarara West – *the Maori Land Court case*

In 2013 the Environment Court postponed its hearing so that application under TTWMA, s338 could first be heard in the Māori Land Court[126]. The hearing was held in late 2013 and early 2014[127]. Mrs Grace sought to set aside her 5770m^2 section as a reservation as a place of cultural and historical significance and/or a wāhi tapu. Mrs Grace was originally joined in her application by the Ngarara West A25B2 Trust who sought to have its adjacent blocks of land (Ngarara West A25B2B and A25B2C) also set aside as a reservation. The trust adjourned its application and the Court proceeded to consider Mrs Grace's application alone. The New Zealand Transport Agency appeared as an interested party because it opposed the status for the 983m^2 it sought for construction of the Expressway. The Chief Judge of the Maori Land Court began

[125] See n 4
[126] *Ngarara West* at [10]
[127] 22 November 2013, 13 February 2014, 13 March 2014

his decision with a summary of the parties' submissions and the law surrounding Māori reservations citing earlier findings about the nature of reservations.

The Chief Judge then moved his consideration to the broader context of the case, before returning to consider the application before the Court. He noted the unusualness of the application, which required the Court to consider the interplay between the PWA and TTWMA[128]. He upheld the Māori Appellate Court's decision in *Nukutaurua* holding that any fetter on the creation of a reservation required an expression statutory provision[129]. Since both the PWA and TTWMA were silent regarding a prohibition on setting aside land intended for acquisition no such fetter existed[130]. The Chief Judge then affirmed the plain meaning of "inalienable", concluding once land has been set aside it cannot be acquired[131].

The Chief Judge considered the consequences of the application on the PWA were only part of the "contextual matrix" and of secondary importance[132]. Thus, he moved to his primary consideration, the s338 application and the suitability of Mrs Grace's land. He held, in agreement with the applicant, that an application could be made under either or both of s338(1)(a) as a place of cultural significance and s338(1)(b) as a wahi tapu[133]. He acknowledged that the evidence supporting the application 'stressed the importance of the relationship of Māori with the land and emphasised traditional Māori values and practices'[134]. Mrs Grace held the last remaining portion land belonging to her tipuna, Wi Parata. She had strong whakapapa connections to the land and intended to preserve it in a culturally appropriate way for the next generation. She was also supported by physical evidence, including bones, 'broken adzes, carvings and bits of greenstone'[135]. Meanwhile, the Transport Agency's attempt to disrepute the evidence for the section it sought was "arbitrary and false"[136]. Satisfied that the land was both a place of cultural significance and a wahi tapu, his

[128] At [61-73]
[129] at [76]
[130] at [77]
[131] at [78]-[79]
[132] at [83]
[133] at [87]
[134] at [94]
[135] at [101]
[136] at [104]

Honour made the recommendation that the land be set aside as a reservation under both s338(1)(a) and (b).

2 Grace v Minister of Land Information – *the Environment Court*

Ngarara West found that the possible acquisition did not prohibit the creation of a reservation and allowed the application. The Environment Court, in April 2014, then had to determine whether the reservation status prevented the acquisition. Thompson J emphasised the Environment Court's different task and the need to draw independent conclusions. In considering *Ngarara West*, Thompson J agreed that the plaining meaning of s338(11) must prevail, meaning that a reservation could not be acquired[137]. Therefore, if the Chief Executive of Te Puni Kokiri did Gazette the reservation, it would not be sound as a matter of law to acquire the land[138].

Nevertheless, at the time it was anticipated that *Ngarara West* would be appealed, thus the Court continued to reach its own conclusions guided by the PWA, s24(7) inquiry[139]. In considering s24(7)(b), it was revealed that a minor realignment of the road was possible which would avoid the Grace land[140]. Most important was the test at s24(7)(d) which states the Court shall,

> (a) decide whether, in its opinion, it would be *fair, sound and reasonably necessary* for achieving the objectives of the Minister or local authority, as the case may require, for the land of the objector to be taken (emphasis added)

Thompson J also noted s24(10), which states

> The report and findings of the Environment Court shall be binding on the Minister or, as the case may be, the local authority.

The Court considered each element of the s24(7) test separately, before assessing the findings cumulatively.

[137] *Grace* at [13]
[138] At [15]
[139] At [16]
[140] At [24]

The majority of the decision assessed whether the taking was "fair, sound and reasonably necessary" pursuant to s24(7)(d). In assessing fairness, the Court found Mrs Grace's appreciation of the land was not financial, nor did she seek to extract value from the property. The evidence presented to demonstrate this was similar to the evidence presented in favour of the MLC application, considering the contemporary, genealogical and archaeological evidence of the land's importance[141]. Thompson J took care to distinguish the decision from *Ngarara West*, reiterating the finding was not binding on them and the need to reach an independent conclusion. In light of the factual background he did not think it fair to acquire the land. The alternative route meant that it was not "reasonably necessary"[142]. The Court concluded that "If it would not be fair to do so, nor reasonably necessary to do so, it cannot possibly be sound to do so"[143]. Mrs Grace's land could not be acquired under the PWA.

3 After the Cases

The Chief Executive placed a notice in the Gazette on 10th April 2014 setting aside the block pursuant to s338(1(a) and s338(1)(b) as a Māori reservation,

> for the benefit of the descendants of Wiremu Parata Te Kakakura (Wi Parata), being a place of cultural and historical significance, as a wāhi tapu, being a place of special significance according to tikanga Māori[144].

The Transport Agency initially challenged the decision to set aside the land, but later withdrew their appeal[145]. Therefore, the two cases determined the inalienability of Mrs Grace's land and the Expressway was rerouted.

The cases clearly assert that compulsory acquisition can neither fetter the creation of a reservation nor override the inalienability of land set aside under s338. Given the jurisprudence the decision is not surprising, but a victory nonetheless. Mrs Grace's

---

[141] At [33-46]
[142] at [48]
[143] at [49]
[144] "Setting Apart Land as a Māori Reservation (10 April 2014) 38 *New Zealand Gazette* 1113
[145] "NZTA drops appeal for Grace land" *The Dominion Post* (online ed, Wellington, 20 June 2014) < http://www.stuff.co.nz/dominion-post/news/kapiti/10179970/NZTA-drops-appeal-for-Grace-land>

land was one of 84 blocks originally intended to be acquired[146], it appears to be the sole block that successfully challenged a taking[147]. However, the scope of the decision for protecting other blocks of Māori land is restricted by the nature of the reservation status. The legacy of the cases may be the attention they brought to the issue of compulsory acquisition of Māori land, rather than the law they created.

D Insufficient Protection

Reservation status has been given to a wide range of Māori land but the test is strict. It is unlikely that every piece of Māori land threatened by acquisition would meet the requirements or be suited to the status. Consequently, the use of the protection confirmed in the *Grace* cases is limited. The decision does not account for Parliamentary action and there are means of intruding upon the reservation.

The s338 test is strict because of the consequences of the status, including inalienability. The status also suspends the rights of the beneficial owners to the legal estate, or to exclusive use and enjoyment of the land. The rationale being that the land may thus be securely held for the collective and future benefit of the specified class of people. Some blocks may be unable to demonstrate the necessary significance of the land to warrant the protection, others may not achieve the necessary administration to receive the status, further blocks may not desire this restriction. While the status achieves the TTWMA goal of retention, it is at the expense of the goal of utilisation[148]. It would be absurd that productive Māori land could only be protected at the expense of its development.

Even if a reservation is suitable for the block, it will not be protected until the status is Gazetted. The Court's function is advisory. It makes a recommendation to the Chief Executive who has the discretion – "may" – to set the land aside. As with all discretions, there remains a negligible risk this discretion may be exercised.

---

[146] New Zealand Transport Agency *Mackays to Peka Peka project: Assessment of Environmental Effects Report* <http://www.nzta.govt.nz/assets/projects/mackays-to-peka-peka-application/docs/aee-section-2.pdf>

[147] The only other s24 (7) application I could find – *Olliver Trustee Ltd v Minister for Land Information* [2015] NZHC 1566 – was unsuccessful.

[148] See Section 17(1)(b)

Ministerial discretion could also be used to overrule the Māori Land Court recommendation if the Environment Court determined the taking acceptable under the PWA, s24(7). The decision is binding on the Minister. Kenneth Palmer argues that the Minister could then take the land by proclamation under s26(1)[149]. Such an approach seems highly unlikely but if Palmer's interpretation is correct, reservations are vulnerable.

The intrusions upon reservations permitted in TTWMA do not permanently alienate the land, but they defeat the intended protection of a reservation's inalienability and could occur without the beneficiaries' consent. Most apparent is s338(12), which allows the creation of a 14-year lease or license, however this requires the consent of the trustees of the reservation. This poses a threat since acquisition is not limited to the title of the block – lesser interests may also be acquired. Poor or ill-advised trusteeship could result in a possible PWA alienation. The Act also gives the Court the ability to make roadway orders over Māori land, including reservations as has been proven in *Trustees of the Tauwhao Te Ngare Trust v Shaw* [2014] Māori Appellate Court MB 394 (APPEAL 2013/8). A roadway is an exception to the inalienability of a reservation because it falls outside the definition of alienation. It is one of the "limited exceptions" referred to by Chief Judge Isaac in *Ngarara West*[150], excluded by TTWMA s4(c)(ii). The Court do not need the consent of the beneficiaries to make such orders[151]. The creation of a roadway without conditions could theoretically make it possible to circumvent the existence of a reservation if it was proclaimed to be a road under TTWMA, s320.

Reservations are a unique status given to Māori land to preserve it for future generations as a result of a particular special circumstance. Once land is set aside it becomes inalienable to the Crown; the sole exception for private land to the Crown's eminent domain. The *Grace* cases were significant because they proved that reservations were inalienable for public works purposes and that no fetter could be placed on their creation. However, the application of this protection is limited, not

[149] Kenneth Palmer "Can a proclamation over-ride an inalienable Māori land reservation?" (2014) 10 BRMB 175 at 176
[150] at [79]
[151] *Trustees of Tawhao Te Ngare Trust* at [78], albeit only in the rarest of cases

necessarily a suitable solution and may be ineffective. The legacy of the cases may be for stimulating discussion on the issue, rather than for the law they clarified.

III Chapter Three: Achieving the Protection

The Grace cases raised the profile of the issue of compulsory acquisition of Māori land leading to the introduction of a Parliamentary Bill. The Waitangi Tribunal has also recommended improvements to the legislation that will protect Māori interests. This chapter will consider some of the suggested changes to offer protection to Māori land.

In light of the *Grace* cases and the attention they garnered, the Public Works (Prohibition of Compulsory Acquisition of Māori Land Amendment) Bill was drafted. The reform of Te Ture Whenua Māori Act has proposed changes to Māori reservations. In addition there are the repeated suggestions of reform from the Waitangi Tribunal, which range from valuation reform to the introduction of a new test. All proposals offer redress to the continuing harms identified by the Waitangi Tribunal in the current PWA, however some may be more plausible and appropriate than others.

A Te Ture Whenua Māori Bill

The draft exposure Te Ture Whenua Māori Bill (Bill) is a proposed significant overhaul of the current TTWMA. An exposure draft of the Bill was released for submissions in June 2015; these submissions are now before the Ministerial Advisory Group. It is intended a draft Bill will be introduced to Parliament in early 2016[152]. The draft Bill aims to "recognise the significance of Māori land and to create a more workable set of rules and practical supports". The draft Bill proposes a new Part for creating reservations that will be renamed whenua tāpui. Continued alienation of Māori land is inconsistent with the underlying policies of both the current TTWMA[153] and the principles underpinning the reform, hence it is surprising that the draft appears to reduce the protection of Māori land from acquisition, rather than increase it.

[152] Te Puni Kokiri "Te Ture Whenua Māori Reform" <http://www.tpk.govt.nz/en/a-matou-kaupapa/crown-iwi-hapu-whanau-maori-relations/consultation/review-of-te-ture-whenua-maori-act-1993/>
[153] See the preamble, section 2 and section 17

The draft Bill has placed significant emphasis on whenua tāpui – currently Māori reservations – moving the section from the end of the Act, to the beginning. The position, after explanations of Māori freehold and customary land, suggests they are becoming a status of land, rather than a status over land. New to the Bill, the process and administration for applying for and creating the whenua tāpui has been codified. The required purposes for reserving land are almost the same as in the Act, however "wāhi tapu" has been removed; the Bill simply requires a "place of special significance according to tikanga Māori". This will allow a wider range of places to be considered whenua tāpui. Significantly, a whenua tāpui may be created either by Court order or by declaration of the Minister – the Court's function is no longer technically advisory[154].

Whenua tāpui generally – unlike s338 reservations – will be able to be held over Crown lands[155]. This is a departure from the current s341, which only allows reservations over Crown lands for the purpose of a marae or wāhi tapu. The recognition that Crown-owned land may bear special significance outside these two purposes is significant and creates an interesting relationship with the PWA. It would appear the status could be given to land held by the Crown for public works, provided the Minister responsible for Crown land gave their approval[156]. The land could then be reserved, subject to any conditions placed by the Minister[157]. It is extremely unlikely this power would be exercised to prohibit the construction of a work, but it has the potential to be used as an attempt at reconciliation, or as a bargaining tool, to protect the margins of land not required for the work. The new ability could account for *Nukutaurua*-type situations, where both parties sought a reservation – the Crown could create conditions– in the case of *Nukutaurua* public access – while simultaneously recognising the cultural value of the land.

The Bill explains the consequences of creating a whenua tāpui on the ownership of the land. Such provision is absent from TTWMA, which only explains the land shall

[154] Clause 30
[155] Clause 32
[156] Clause 33
[157] Clause 32(3)(c)(ii)

be held for the common use and benefit of the intended class of beneficiaries[158]. The Court was consequently left to fill in the gaps. The statements made in *Tuatini Township*[159] about the rights of the beneficial owners and succession is codified in cl35 (3), (4) and (5). The language of the draft Bill continually repeats the idea of "common use and benefit" reinforcing the communal nature of the associated benefits – a point stressed by Judge Harvey in *Gibbs.*

Clause 38 appears to be a "Patricia Grace" clause. First, cl 38(1) states,

> Sections 28 to 35 override any other provision of this Act or another enactment about the disposition or administration of land.

This would appear to codify the decision in *Ngarara West* that there can be no fetter on the creation of reservations unless specifically provided. The second part of the clause, cl 38(2) provides for the disposition of reservations. It would appear the draft Bill reduces the protection given to reservations. The current Act makes reservations "inalienable, whether to the Crown or any other person". The Bill has replaced this with "Land reserved as whenua tāpui must not be disposed of" before providing three exceptions. Disposition is defined as "any transaction affecting the legal or equitable ownership of an estate or interest in land". The definition of 'alienation' in TTWMA is "every form of disposition of Māori land", thus the meanings are very similar. But "inalienable" is much stronger language and the Act specifically applies this to the Crown – the meaning is "unequivocal"[160].

When questioned in the *Repeal on Te Ture Whenua Māori Act 1993 Claim*[161], the Crown witness John Grant explained the removal of the inalienability "wasn't actually an unintended consequence in drafting". Mr Grant then explained the provision should read equivalent to the restriction on disposition of Māori customary land in cl 13[162]. There is speculation, however, that the drafting of cl 38 was an attempt by the Crown to remove an unhelpful restriction on their compulsory acquisition powers. Uncertainty has once again emerged; the inalienability – or

---

[158] Section 338
[159] See *Marangairoa Trust – Section 4C1 Block II, Tuatini Township* (2002) 151 Gisborne MB 250 (151 GIS 250) in Grace at [58](c)
[160] *Gibbs* at [16] in *Ngarara West* at [78]
[161] Waitangi Tribunal *The Repeal on Te Ture Whenua Māori Act 1993 Claim Judicial Conference* (Wai 2478, 2015)
[162] ibid at 45

disposition – of reservations/whenua tāpui is likely to be a significant issue in the substantive hearing on the draft Bill in November[163].

The effect of the changes can be demonstrated by applying the proposed law to the Grace facts. In the Māori Land Court, the Bill would have removed the significant questions of law. Mrs Grace applied for the reservation both as a place of cultural and historical significance and/or as a wāhi tapu. The Bill does not require selection of a specific purpose hence the interpretation question in *Ngarara West* would be avoided[164]. The supremacy of the sections creating the reservations would have prevented the need to consider if the potential acquisition was a fetter. The greater effect of the Bill would be in the Environment Court. The *Grace* decision turned on the inalienability of the reservation. The Court was unable to find any meaning other than the plain meaning[165]. It demonstrated the extent of inalienability by the fact the Act prevented the creation of easements or licenses over the land – the creation of a license is explained in cl 37 and both are permitted in cl 38 as exceptions to disposition. While disposition carries the same definition as inalienable, it does not specifically refer to the Crown. Initially it was thought there was no feasible alternative route, if that had not changed, with such a significant project it could be argued that the Crown's eminent domain prevails over the Bill. The statutory language allows the possibility of Mrs Grace's land being acquired – something not possible under TTWMA.

The Bill does not address any other means of protection Māori land from acquisition. It makes no explicit reference to compulsory acquisition, although acquisition by agreement is considered a 'disposition'. It may appear to be a missed opportunity, but the draft Bill exists within the jurisdiction of the Māori Land Court. The PWA falls under the Environment Court's jurisdiction and it is this Court that determines whether or not land will be alienated. It would inappropriate to address an Environment Court issue in the Māori Land Court legislation. While the Bill fails to

[163] Email from Leo Watson (Barrister and Solicitor) to Alice Eager regarding the draft Te Ture Whenua Māori Act Reform Bill (2 October 2015)
[164] Counsel for the New Zealand Transport Agency argued Mrs Grace must elect either s338(1)(a) or (b), Chief Judge Isaac held this was not necessary at [85]-[88]
[165] *Grace* at [13]

maintain the same level of protection for reservations, it is not a failing that it goes no further than this. The appropriate forum is the PWA.

B Public Works (Prohibition of Compulsory Acquisition of Māori Land Amendment) Bill

The Amendment Bill was introduced to the House by Green MP Catherine Delahunty and is currently in the Members' Bills ballot. Its presence in the ballot means that eventually the issue will be before the House; while it is rare that Members' bills become law, if they are well supported they may influence Government[166]. Unfortunately, despite being well intended and justified, the Bill is misinformed and poorly drafted[167].

The drafting errors result in the intention of the Bill becoming unclear. First, the definition of Māori land references the wrong section of TTWMA; it should reference s4 rather than s2. Second, the Bill removes the mechanism to facilitate the acquisition by agreement of Māori land with multiple owners, but not in trust. The effect of the section as it is currently drafted would be to remove the ability of groups to reach an agreement if they desired, preventing the goal in the reformed TTWMA of autonomy. It is strange this mechanism has been removed; yet the references to Māori land in the later sections relating to compulsory acquisition remain. This error should be corrected to repeal instead, ss18(5),(6) and s23(2) of the current Act, or the scope of the Bill be amended to prohibit also acquisition by agreement.

Substantively, the complete prohibition of compulsory acquisition of Māori land is inappropriate. It is well intended, but runs contrary to the findings of the Waitangi Tribunal and neglects to consider the potential benefits of public works. The Tribunal has never recommended a blanket ban on acquiring Māori land, recognising that the Crown's kāwanatanga means it has responsibilities to all New Zealanders. Indeed, public works acquisition does result in alienation of land, which is unfavourable to Māori; however, it may result in a greater advantage that warrants the acquisition. In

[166] New Zealand Parlimanet "How laws are made" < http://www.parliament.nz/en-nz/about-parliament/how-parliament-works/laws/00CLOOCHowPWorksLawsTypes1/types-of-bill>
[167] See Appendix 4

these situations, if there was only Māori land to acquire, a blanket ban on acquisition could be detrimental. Therefore, there needs to be a range of solutions to protect Māori interests so the harm of acquisition is limited and they are not disadvantaged.

A better approach would be to propose protective measure in line with the Tribunal's suggestions, as will be explored in the rest of this chapter. In theory these measures would prevent complete alienation of Māori land while allowing the Crown to exercise sovereignty.

C The Waitangi Tribunal Proposals

The Waitangi Tribunal is mandated to both inquire into and make recommendations about claims of the Crown acting inconsistently with the principles of the Treaty of Waitangi[168]. The findings of the Tribunal in relation to the claims made regarding public works were summarised in Chapter One. As a consequence of finding compulsory acquisition was, and remains, in breach of article 2 and the principles of good faith, partnership and active protection, it has proposed amendments to the Public Works Act 1981. Ultimately, the Tribunal believes compulsory acquisition can only be justified in "exceptional circumstances and as a last resort in the national interest"[169] – in all other instances it would breach the Crown's responsibilities under the Treaty of Waitangi. However, the Tribunal has also suggested a number of measures that would have the effect of protecting – or reducing the likelihood of – Māori land being taken.

1 Inclusion of the Treaty of Waitangi

The Tribunal has recommended that the PWA be amended to require a consideration of the Treaty of Waitangi. It describes the current absence of any requirement to consider it "the most significant omission of the Act" [170]. The Treaty has been incorporated, through its principles, into other pieces of legislation relating to land use. It could be included to limit the powers and functions exercised under the Act, as

[168] Treaty of Waitangi Act, sections 4, 5 and 6
[169] Waitangi Tribunal *Turangi Township Report* (Wai 84, 1995) at 286
[170] ibid at 301

occurs in the State Owned Enterprises Act 1986 (SOE Act). It is counter intuitive to not include the Treaty in the contemporary legislation when the Crown is offering redress for historic Treaty breaches under prior statutes.

The SOE Act, s9, restricts any Crown actions that are inconsistent with the principles of the Treaty. It is more onerous than mere consideration of the Treaty – as is required by the Resource Management Act 1991, s8. Section 9 is powerful and has been litigated – most famously in the *Lands* case[171] – proving that the legislation creates an enforceable duty to act in a Treaty-compliant manner. A similar section could be added to the PWA. If acquiring authorities acted contrary to the principles their decisions could be judicially reviewed. The principles would feature into the s24(7)(d) "fair, sound and reasonably necessary" considerations. The litigation means that the meaning of "inconsistent with the principles of the Treaty of Waitangi" is understood. The goal of protecting Māori land would be aided by the requirement that the acquiring body act reasonably and in good faith and actively protect Māori interests.

The principles are a good foundation for the Māori-Crown relationship; the consequence of using them will address some of the criticisms of the Tribunal about historic public works regimes. For example, active protection would make it unfair to acquire the remaining block of Māori land in a particular area. But, the principles do not prevent Māori land from being selected if it the most suited block of land Furthermore, an often over-looked principle arising from the *Lands* case is the Crown's right to govern. Thus, requiring Treaty-compliant actions would not necessarily prohibit the acquisition of Māori land meaning other measures are needed to complement them.

2 Amendments to Valuation

The aim of all these proposals is to reduce the amount of the Māori land being acquired. One approach is to make the land less desirable. Amending the process of valuing Māori land would make it more expensive and less desirable. It would also

[171] *New Zealand Māori Council v Attorney-General* NZLR 1 (1987) 643

acknowledge the special value of the land to the owners, something overlooked in the current legislation.

The PWA values land for the purpose of compensation. The assessment of compensation is provided by s62, with the basic principle at s62(b)

> The value of land shall, except as otherwise provided, be taken to be that amount which the land if sold in the open market by a willing seller to a willing buyer on the specified date might be expected to realise.

The two exceptions to the rule are provided in s62(b)(i) and (ii). It is economically sensible to choose blocks requiring less compensation. This creates a preference for Māori land, which is typically cheaper than the adjacent General land. Māori were often left with less desirable blocks of land meaning, irrespective of the status, the land is less valuable. The restrictions placed on owners make it less desirable on the open market and can leave the land underdeveloped or vacant[172]. Cathy Marr suggests that the low cost of Māori land was one of the main reasons it was historically favoured.

The "open market" method of valuation exacerbates the harm of acquisition because it fails to acknowledge the intangible value the owners may place on the land. The mono-cultural approach to valuation has been criticised by the Waitangi Tribunal. It proposes an approach that also considers the value of the Māori interests in the land[173]. The imbalance between the value of Māori land and General land could be corrected by reforming the method of valuation. It may not dis-incentivise the taking but nor would it incentivise the acquisition.

Māori land could be removed from the open market approach to valuation by inserting an additional exception to the s62 rule. The challenge is determining how the value would instead be quantified. The spiritual value of Māori land does not have a readily available standard for valuation. It would also need to be clarified whether the increased sum was intended to serve as economic redress or as an alternative rule for valuation. The former would be contrary to the compensation regime of the PWA,

[172] Crown Forestry Rental Trust "Northland Asset Audit" <http://www.cfrt.org.nz/doclibrary/public/thestorehouse/publications/ASSETAUD.PDF>
[173] *Wairarapa* above n47 at 796

whereas the later is contrary to tikanga principles of land ownership. Assuming an appropriate method of valuation could be found it would need to be carefully worded to prevent the application of a more favourable system becoming detrimental. In other situations a more valuable block would be disadvantageous, for example in assessing rates.

An alternative valuation rule for Māori land would begin to address the criticism of monocultural legislation failing to account for Māori values. Depending on the rule it would either offer redress or quantify the spiritual value of land. The means of such valuation are problematic, however the consequence would be to put Māori land on an equal platform to General land. But, valuation does not address the biggest problem of acquisition – the permanent alienation of land.

3 Last Resort in the National Interest

The Tribunal does not endorse a blanket-ban on compulsory acquisition of Māori land. Instead, it supports a high threshold that would allow acquisition only in "exceptional circumstances and as a last resort in the national interest". The threshold appears to originate in the Ngāi Tahu Ancillary Claims Report[174]. It has support from Māori claimants who, accepting total prohibition is unrealistic consider it,

> Essential that the bar be set as such a level that the Crown is required to actively pursue all other possible alternatives to compulsorily acquiring Māori land[175]

Ideally this threshold would be incorporated into the PWA allowing protection of Māori land, but retaining the Crown's ability to acquire land when absolutely necessary.

The threshold is a three-stage test. The first stage is whether the project is in the 'national interest'. The Crown sought to borrow from Canadian litigation and define this as "objectives of compelling and substantial importance"[176]. More recently, in the *Wairarapa Report*, the Tribunal defined 'national interest' as requiring

---

[174] (Wai 27, 1995)
[175] *Te Kahui Maunga*, above n 66, at 723
[176] *He Maunga Rongo*, above n 65, at 868

"circumstances of exigency"[177] – a standard seems to remove the need for the second requirement of the test, that there are "exceptional circumstances"[178]. "Exceptional circumstances" has been interpreted as a "national interest of such a magnitude that the Crown would be justified in overriding its Treaty guarantees to Māori". Therefore, a better meaning of "national interest" is probably something more than "substantial importance" but less than "circumstances of exigency". A weak standard of "national significance" would not necessarily be fatal to providing protection because of the second and third requirements of the test. The final requirement is that the compulsory acquisition is a last resort, meaning there is no viable alternative.

It is interesting to consider the *Grace* cases on this threshold, had the reservation status been appealed. The Expressway would have easily met the requirement of national interest. At the time the case went to Court there was no viable alternative – it was only during the trial that the alternative route was realised – hence a taking was the last resort. The decision would have turned on "extraordinary circumstances" or, should the preservation of a culturally and historically significant block of Māori land prevail over the construction of an arterial route? The scale of the expressway and anticipated benefit to the region make the decision difficult. Judge Thompson's reasoning appears sympathetic with Mrs Grace but ultimately the alternative route saved him from such a decision.

The threshold is not without challenges but would offer the best protection short of complete prohibition. A significant concern for both Māori and the Crown would be the eventual scope of the test – undoubtedly this would require the involvement of the Courts. Māori often lack the resources to take claims to Court[179], meaning it could be some time before the limits of the threshold were established. In the interim borderline cases would elude protection. The judicial sentiment appears to be in favour of Māori thus a strict interpretation is probable.

---

[177] *Wairarapa*, above n 47 at 787
[178] *Te Maunga Railways Report* (Wai 315, 1994) at 81
[179] Anna Turvey "Te Ao Māori in a "Sympathetic" Legal Regime: The Use of Māori Concepts in Legislation" (2009) 40 VUWLR 531 at 546

Unsurprisingly, the Crown has rejected this threshold claiming it would "unreasonably fetter legitimate policy concerns" [180]. The Crown is concerned the threshold would prevent its exercise of sovereignty. The Tribunal rejects the argument because the standard applies solely to the compulsory acquisition of land, does not prohibit the creation of other arrangements and allows the takings in cases of true necessity[181]. The Tribunal has maintained consistently across its reports that the "national interest" test is the only reasonable – and Treaty compliant – exercise of its power[182]. Even in these situations of "national interest", taking the leasehold would be more compliant than the full title.

4 Limited Title

The "national interest" threshold would still result in the acquisition of some Māori land, for example for geothermal power plants where location is unavoidable. In these situations, the Tribunal he promoted the taking of a limited title. Limited title by grant of lease, license or easement would prevent total alienation of the land from the owners. The approach allows a compromise. Importantly, the land remains in Māori ownership; the connection to the land is not extinguished. They continue to exercise some control and have some power over the land. It also means if the land is not used, or is no longer needed, it is much easier to return.

The PWA does provide, in s28(b), for the acquisition of less than the full title. It gives the power,

> (b) to acquire or take and to hold separately –
>
> (i) any particular estate or interest in land, whether for the time being subsisting separately or not; or
>
> (ii) any easement of *profit a prendre* over the land, whether for the time being subsisting separately or not.

Further provision is made in s31, which separates the surface, subsoil and airspace allowing just one component to be taken. Section 24(7)(b) asks the Environment Court, when considering the necessity of a proposed taking, to consider "other

[180] *Te Kahui Maunga*, above n 66 at 721
[181] ibid at 868
[182] for example, Waitangi Tribunal *Turangi Township Report* (Wai 84, 1995) at 286 and *Te Kahui Maunga*, above n 66, at 868

methods of achieving those [the Minister's] objectives"; presumably this includes acquiring a leasehold title to the land. The Crown conceded that acquiring the leasehold serves the same purpose as acquiring the freehold for a public work[183] and that it is obliged to consider alternative tenures[184].

The problem is that while the option to acquire limited title exists, it is often overlooked[185]. Instead, policy – rather than practicality – has favoured taking the full title[186]. The Tribunal seek to clarify the law, clearly asserting the option of acquiring less than freehold. The law could be clarified by amending s16 – the empowering provision – to read,

> (3) The Crown and local authorities are expressly authorised to acquire a lease, license or easement over Māori land required for public purposes, instead of acquiring the freehold title of such land[187].

The same option would remain for general land in s28(b), but a preference for leasing Māori land would be demonstrated by the amendment to s16. It would mean that even if there was no alternative to acquiring Māori land, the harm would be somewhat reduced by not permanently alienating the land.

D Conclusion

In response to identified problems with the current PWA and the ongoing harm from acquisition of Māori land numerous solutions have been offered to protect Māori land. Ms Delahunty's Bill is too restrictive. The TTWMA reform has failed to clarify or expand upon the current law, but nor is it the appropriate forum. The suggestions of the Waitangi Tribunal offer better solutions to address the issue. Any of the considered protections could be effective in reducing the incidence of Māori land acquired. The most effective would be to implement them all; even then the Crown would not be greatly restricted in its exercise of compulsory acquisition. Māori land makes up a mere 5% of New Zealand. However, in protecting this remaining

---

[183] *Wairarapa*, above n 47 at 795
[184] *He Maunga Rongo*, above n 65 at 832
[185] *Merfield*, above n 91
[186] *Wairarapa*, above n 47 at 795
[187] Wording taken from the Waitangi Tribunal's draft amendments in the Wairarapa Report these were adapted from the Waitangi Tribunal *Ngai Tahu Ancillary Claims Report* (Wai 27, 1995)

fragment of Māori land the Crown will address its obligations to Māori who were once the owners of all of Aotearoa.

Conclusion

The issue of compulsory acquisition of Māori land has existed as long as New Zealand. The harms have been perpetuated and compounded through systematic legal discrimination that unfortunately continues to be completely resolved even today. Analysis of the early New Zealand land policy demonstrates that early legislation was initially based on differing ideological beliefs on land usages and became increasingly punitive before reaching a more equal regime under the current PWA. The harm of public works has not gone unnoticed, but nevertheless the impact of compulsory acquisition remained largely unaddressed in the enactment of the PWA. The Waitangi Tribunal has provided invaluable research and commentary into these harms, but has now exhausted the scope of their investigations on the compulsory acquisition in general. The *Grace* cases have raised the profile on the issue and reignited discussion on the issue, leading to conversations about how to prevent further acquisition of Māori land. The decisions of the two cases clarified the law on the sole protection to acquisition – s338 reservations – but this protection now risks being weakened with the draft Bill.

The harms of compulsory acquisition will continue to be perpetuated if not properly addressed through legislative amendments. The best proposals currently being suggested are the amendments to the PWA recommended by the Waitangi Tribunal. However, a legislative response to the issue of public works is limited because it neglects to address the underlying causes for the harm inflicted upon Māori. No New Zealander wants their land to be compulsorily acquired, but Māori cultural and spiritual relations with land that underpins their very identity means that the taking of their lands demands exceptional treatment. Māori are the indigenous population and once had rights to all the land in New Zealand. They were promised the right to remain in possession of their land, which they valued for non-commercial reasons, yet instead it was systematically taken through successive statutes. The Treaty of Waitangi guarantees and subsequent discriminatory land policies towards Maori created responsibilities of the Crown that they do not have to other New Zealanders. Ultimately, the limited protections currently in place do not ensure that Māori land will receive the guaranteed protection of the Treaty.

A mechanism is required that will influence the Courts' interpretation of law, provide continuity, give consideration to minority interests in Parliament, and address the underlying reasons of harm. Such a mechanism needs to provide a higher source of guidance that can hold the branches of government to account and enable the protection of Māori interests broader than in relation to compulsory acquistion. New Zealand already has a document setting out the parameters for the Crown-Māori relationship – the Treaty of Waitangi. It makes sense to first turn to our own domestic mechanism. In the alternative the doctrine of Native title, the fiduciary duty of the Crown and ratification of the United Nations Declaration on the Rights of Indigenous Peoples, are all possible mechanisms that have been successfully used in other jurisdictions.

Amending harmful legislation and attempting to provide redress for the past is a beneficial first step towards achieving the partnership between the Crown and Maori anticipated in 1840. Yet these actions are insufficient if no mechanism is put in place to prevent them from being overturned and the harms being once again enacted. Protecting Māori land from acquisition is a necessary step towards recognising their position as tangata whenua and allowing the rightful treatment of New Zealand's indigenous population. Hopefully, the awareness the *Grace* cases have created may lead to this occurring in the near future.

Bibliography

A Cases

Bird v Nelson CC [2006] NZRMA 39
Dannevirke Borough Council v Governor-General [1981] 1 NZLR 129
Gibbs v Te Rūnanga o Ngāti Tama (2011) 274 Aotea MB 47 (274 AOT 47)
Grace – Ngarara West A25BA (2014) 317 Aotea MB 268 (317 AOT 268)
Grace v Minister for Land Information [2014] NZEnvC 82
Mato – Nukutaurua 3C3A and 3C3B (1987) (APPEAL 1986/4) 32 Gisborne ACMB 217 (32 APGS 217)
New Zealand Māori Council v Attorney-General NZLR 1 (1987) 643
Ngati Apa v Attorney-General [2003] 2 NZLR 643
Olliver Trustee Ltd v Minister for Land Information [2015] NZHC 1566
Te Runanga o Ngati Awa v Attorney-General [2004] 2 NZLR 252
Te Runanga o Ngati Awa v A-G 17/7/08, MacKenzie J, HC Wellington CIV-2006-485-1025
Trustees of the Tauwhao Te Ngare Trust v Shaw [2014] Māori Appellate Court MB 394 (APPEAL 2013/8)
Wi Parata v Bishop of Wellington (1877) 3 NZ Jur (NS) (Supreme Court) 72

B Legislation

Crown Minerals Act 1991
Heritage New Zealand Pouhere Taonga Act 2014
Housing Act 1955
Land Claims Ordinance 1841
Land Clauses Consolidation Act 1863
Local Government Act 1974
Native Land Act 1862
Native Land Act 1865
Native Land Act 1867
Native Land Act 1873
Native Land Act 1909
Native Land Amendment Act 1931
Native Land Purchase Act
Native Land Purchase and Acquisition Act 1893
Native Lands (Validation of Titles) Act 1892
New Zealand Railways Corporation Act 1981
New Zealand Settlements Act 1863
New Zealand Settlements Amendment and Continuance Act 1865
Māori Affairs Act 1953
Māori Affairs Amendment Act 1967
Māori Purposes Act 1974
Public Works Lands Act 1864
Public Works Act 1876
Public Works Act 1882
Public Works Act 1894
Public Works Act 1908
Public Works Act 1928
Public Works Act 1981
Reserves Act 1977
Resource Management Act 1991
River Boards Act 1908
Soil Conversation and Rivers Control Act 1941

State-Owned Enterprises Act 1986
Te Ture Whenua Māori Act 1993
Treaty of Waitangi Act 1975

Draft for Consultation Te Ture Whenua Māori Act Bill 2015
Public Works (Prohibition of Compulsory Acquisition) Amendment Bill 2015

C Books and Chapters in Books

R Boast *Buying the Land, Selling the Land* (Victoria University Press, Wellington, 2008)
Patricia Grace *Potiki* (Penguin Books (NZ) Ltd, Auckland, 1986)
Richard Boast "Māori and the Law, 1840-2000" in Richard Boast, Jeremy Finn and Peter Spiller *A New Zealand Legal History* (2nd ed, Brookers, Wellington 2001)
Richard Boast and Richard S Hill (eds) *Raupatu: The Confiscation of Māori Land* (Victoria University Press, Wellington, 2009)
D Brown *Land Acquisition: an examination of the principles of law governing the compulsory acquisition of land in Australia and New Zealand* (4th ed.) (Butterworths, Sydney, 1996)
Giselle Byrnes *The Waitangi Tribunal and New Zealand History* (Oxford University Press, Auckland, 2004)
Janine Hayward "In Search of Certainty: Local Government Policy and the Treaty of Waitangi" in Veronica Tawhai and Katarina Gray-Sharp (eds.) *Always Speaking: The Treaty of Waitangi and Public Policy* (Huia Publishers, Wellington, 2011)
Janine Hayward and Nicola R Wheen (eds.) *The Waitangi Tribunal: Te Roopu Whakamana, te Tiriti o Waitangi* (Bridget Williams Books, Wellington, 2004)
Danny Keenan *Wars Without End: The Land Wars in Nineteenth Century New Zealand* (Penguin, Auckland, 2009)
HM Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 273
P Merfield and J Smith *Public Works Act Update* (New Zealand Law Society, October 2011)
David Williams *A Simple Nullity? The Wi Parata Case in New Zealand law and History* (Auckland University Press, Auckland, 2011

D Journal Articles

RP Boast "Property Rights and Public Law Traditions in New Zealand" (2013) 11 NZJPIL 161
Tom Brooking "'Busting Up' The Greatest Estate of All: Liberal Land Policy 1891-1911" (1992) NZJH 26
Edward Taihakurei Durie "Will Settlers Settle? Cultural Conciliation and Law" (1996) 8 Otago LR 449 at 452
Kerensa Johnston "Treaty of Waitangi" [2011] NZ L Rev 211
Victoria Kingi "The Alienation of Māori Land and Public Works Legislation" (1997) 8 AULR 563
Kenneth Palmer "Can a proclamation over-ride an inalienable Māori land reservation?" (2014) 10 BRMB 175
Daniel J Sherman "Seizing the cultural and political moment and catching fish: Political development of Māori in New Zealand, the Sealord Fisheries Settlement, and social movement theory" (2006) 43 The Social Science Journal
Evelyn Stokes "Tauponui a Tia: an interpretation of Māori landscape and land tenure" (1999) 40 Asia Pacific Viewpoint 137
Linda Te Aho "Contemporary Issues in Māori Law and Society *Crown Forests, Climate Change, and Consultation – Towards More Meaningful Relationships*" (2007) 15 WLR 138
Elizabeth Toomey "The "Offer Back" Provisions in the Public Works Act 1981: Former Owners Chase Potential Spoils" [2007] NZ L Rev 659

Anna Turvey "Te Ao Māori in a "Sympathetic" Legal Regime: The Use of Māori Concepts in Legislation" (2009) 40 VUWLR 531

E Waitangi Tribunal Reports

Waitangi Tribunal *The Hauraki Report* (Wai 686, 2006)
Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims* (Wai 1200, 2008)
Waitangi Tribunal *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014)
Waitangi Tribunal *Te Kahui Maunga: The National Park District Inquiry Report* (Wai 1130, 2013)
Waitangi Tribunal *Te Maunga Railways Land Report* (Wai 315, 1994)
Waitangi Tribunal *The Mohaka Ki Ahuriri Report* (Wai 201, 2004)
Waitangi Tribunal *The Mohaka River Report* (Wai 119, 1992)
Waitangi Tribunal *Ngai Tahu Ancillary Claims Report* (Wai 27, 1995)
Waitangi Tribunal *Te Raupatu o Tauranga Moana* (Wai 215, 2004)
Waitangi Tribunal *The Repeal on Te Ture Whenua Māori Act 1993 Claim Judicial Conference* (Wai 2478, 2015)
Waitangi Tribunal *Turanga Tangata Turanga Whenua: The Report on the Turannganui Kiwa Claims* (Wai 814, 2004)
Waitangi Tribunal *Turangi Township Report* (Wai 84, 1995)
Waitangi Tribunal *Te Whanganui A Tara Me Ona Takiwa* (Wai 145, 2003)
Waitangi Tribunal *Wairarapa ki Tararua Report* (Wai 863, 2010)

F Parliamentary and Government Reports

Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation, He Kōtuinga Kōrero mō Te Kaupapa Ture o Aotearoa* (Ministry of Justice, November 2013) at 33
Kevin Guerin *Protection against Government Takings: Compensation for Regulation* (New Zealand Treasury, Working Paper 02/18, September 2002)
Cathy Marr *Public Works Takings of Māori Land, 1840-1981, Rangahaua Whanui National Theme G* (First Release, Waitangi Tribunal, May 1997) at 48-49
JE Murray *Crown Policy on Māori Reserved Lands, 1840 to 1865, and Lands Restricted from Alienation, 1865 to 1900, Rangahaua Whanui National Theme L* (First Release, Waitangi Tribunal, February 1997)
Guideline for the acquisition of land under the Public Works Act 1981 (Land Information New Zealand, LINZG15703, February 2014)
Landowner's rights: When the Crown requires your land for a public work (Land Information New Zealand, April 2010)
Review of the Public Works Act: Issues and Opinions, Public Discussion Paper (Land Information New Zealand, December 2000)
Standard for the acquisition of land under the Public Works Act 1981(Land Information New Zealand, LINZS15005, February 2014)

G Newspaper Articles

"NZTA drops appeal for Grace land" *The Dominion Post* (online ed, Wellington, 20 June 2014) < http://www.stuff.co.nz/dominion-post/news/kapiti/10179970/NZTA-drops-appeal-for-Grace-land>
Kay Blundell "Ancestral land escapes bulldozers" (23 March 2014) Stuff.co.nz <http://www.stuff.co.nz/national/9881796/Ancestral-land-escapes-bulldozers>
Seamus Boyer "NZTA feels heat of expressway angst" *The Dominion Post* (online ed, Wellington, 23 August 2010)

James Ihaka “Writing great in court fight to stop highway” *The New Zealand Herald* (online ed, Auckland, 9 December 2013)

H Internet Resources

Crown Forestry Rental Trust “Northland Asset Audit” <http://www.cfrt.org.nz/doclibrary/public/thestorehouse/publications/ASSETAUD.PDF>
Ministry of Transport “Roads of National Significance” <http://www.transport.govt.nz/land/roadsofnationalsignificance/>
New Zealand Parlimament “How laws are made” < http://www.parliament.nz/en-nz/about-parliament/how-parliament-works/laws/00CLOOCHowPWorksLawsTypes1/types-of-bill>
New Zealand Transport Agency “Mackays to Peka Peka” (2015) <http://www.nzta.govt.nz/projects/wellington-northern-corridor/mackays-to-peka-peka/>
New Zealand Transport Agency *Mackays to Peka Peka project: Assessment of Environmental Effects Report* <http://www.nzta.govt.nz/assets/projects/mackays-to-peka-peka-application/docs/aee-section-2.pdf>
Te Puni Kokiri “Te Ture Whenua Māori Reform” <http://www.tpk.govt.nz/en/a-matou-kaupapa/crown-iwi-hapu-whanau-maori-relations/consultation/review-of-te-ture-whenua-maori-act-1993/>

Part 2
Acquisition of land for public works

15A Interpretation

In this Part, unless the context otherwise requires, **Minister** means the Minister of Lands.
Section 15A: inserted, on 1 April 1988, by section 6 of the Public Works Amendment Act 1988 (1988 No 43).

16 Empowering acquisition of land

(1)The Minister is hereby empowered to acquire under this Act any land required for a Government work.

(2)Every local authority is hereby empowered to acquire under this Act any land required for a local work for which it has financial responsibility.

Compare: 1928 No 21 s 11

Acquisition by agreement

17 Acquisition by agreement

(1)The Minister or a local authority may enter into an agreement to purchase any land for any public work for which the Crown or local authority, as the case may be, is responsible.

(2)Any agreement to sell land to the Crown or a local authority for public work under this section may be implemented by a declaration under section 20 or by a memorandum of transfer under the Land Transfer Act 1952for the stated public work.

(3)*[Repealed]*

(4)If the land sought is—

(a)Maori freehold land as defined in section 2 of Te Ture Whenua Maori Act 1993; and

(b)beneficially owned by more than 4 persons; and

(c)not vested in any trustee or trustees—

the Minister, or any person authorised generally or particularly in writing by him, or the local authority, as the case may be, may apply to the Maori Land Court for the district in which the land is situated for an order under the provisions of Part 9 of the Maori Affairs Amendment Act 1974. The Maori Land Court shall deal with the application as if a notice under an enactment had been issued to the owners.

(5)If an agent is appointed by the Maori Land Court, he shall, subject to the terms of the appointment, be deemed to be the owner of the land for the purposes of entering into an agreement under this section and of executing any transfer or conveyance.

(6)Where Public Trust is authorised by virtue of an order under section 81 to represent the owner, Public Trust may agree to so represent the owner for the purposes of this section and may execute any transfer or conveyance.

(7)Any agreement to sell the land to the Crown or to a local authority under this section may—

(a)specify the method of acquiring title to the land; and

(b)*[Repealed]*

18 Prior negotiations required for acquisition of land for essential works

(1)Where any land is required for any public work the Minister or local authority, as the case may be, shall, before proceeding to take the land under this Act—

(a)serve notice of his or its desire to acquire the land on every person having a registered interest in the land; and

(b)lodge a notice of desire to acquire the land with the District Land Registrar who shall register it, without fee, against the certificate of title affected; and

(c)invite the owner to sell the land to him or it, and, following a valuation carried out by a registered valuer, advise the owner of the estimated amount of compensation to which he would be entitled under this Act or the betterment that he may be liable to pay; and

(d)make every endeavour to negotiate in good faith with the owner in an attempt to reach an agreement for the acquisition of the land.

(2)If, after a period of 3 months,—

(a)the owner fails to respond to any invitation issued under subsection (1); or

(b)the owner refuses to negotiate with the Minister or the local authority, as the case may be; or

(c)an agreement for the sale and purchase of the land is not made with the owner under section 17,—

the Minister or local authority may, within 1 year after notifying the owner under subsection (1), proceed to take the land under this Act.

(3)Any notice under subsection (1)—

(a)may be withdrawn by the Minister or local authority at any time; and

(b)shall, in relation to any person and his interest in the land, be deemed to have been withdrawn at the expiration of the period of 1 year beginning on the day after the date on which the notice was served on that person unless, before the expiration of that period,—

(i)proceedings have been commenced under subsection (2); and

(ii)notice of the commencement of those proceedings has been given to that person.

(4)Where any notice under subsection (1)—

(a)has been withdrawn by the Minister or local authority under subsection (3)(a); or

(b)has been deemed to be withdrawn by virtue of subsection (3)(b)—

the Minister or local authority, as the case may require, shall give notice to that effect to the District Land Registrar who shall register it, without fee, against the title to the land.

(5)If the land required is—

(a)Maori freehold land as defined in section 4 of Te Ture Whenua Maori Act 1993; and

(b)beneficially owned by more than 4 persons; and

(c)not vested in any trustee or trustees—

the Minister, or any person authorised generally or particularly in writing by him, or the local authority, as the case may be, before complying with the provisions of subsection (1), may apply to the Maori Land Court for the district in which the land is situated for an order under the provisions of Part 10 of Te Ture Whenua Maori Act 1993. The Maori Land Court shall deal with the application as if a notice under an enactment had been issued to the owners.

(6)If an agent is appointed by the Maori Land Court, he shall, subject to the terms of the appointment, be deemed to be the owner of the land for the purposes of this section.

(7)Where—

(a)after reasonable inquiry the owner of the land cannot be found or is absent from New Zealand without appearing to have appointed an attorney with power to act on his behalf, and a period of 3 months has elapsed since notification was attempted to be given under subsection (1); or

(b)in the case of land to which subsection (5) relates, an order has not been made within 6 months after the application to the court under that subsection; or

(c)the owner of the land has indicated that he does not object to the acquisition but he has no power to sell the land; or

(d)the owner of the land is under a legal disability and he has no person to represent him; or

(e)the land is subject to a right of way by virtue of section 168 of the Land Transfer Act 1952 and the owner of the land has consented to the acquisition—

the Minister or local authority, as the case may be, may, without complying with the provisions of subsection (1) or subsection (2), proceed to take the land under this Act.

(8)Where Public Trust is authorised by virtue of an order under section 81 to represent the owner, Public Trust may agree to represent the owner for the purposes of this section.

19 Compensation certificate may be registered to protect agreement

…

20 Declaration may give effect to agreement

(1)Where under this or any other Act, power is given to acquire land under this Act, the Minister, upon being satisfied—

(a)that the owner of the land has agreed to his land being acquired; and

(b)that no private injury will be done by the acquisition, or that compensation is provided by this Act for any private injury that will be done by the acquisition—

may issue a declaration in writing that, an agreement to that effect having been entered into, the land is thereby acquired for the purpose for which it is authorised to be acquired.

(2)Every declaration issued under subsection (1) shall have the effect of and be deemed to be a Proclamation undersection 26, and the provisions of this or any other Act relating to Proclamations shall apply to any such declaration as if it were a Proclamation issued under that section, except that it shall not be necessary to publicly notify the declaration.

(3)Where an agreement for the purchase of any land has been entered into, title to the land, if not otherwise acquired, shall be transferred or surrendered to the Crown or to the local authority, as the case may be.

(4)Any land purchased and transferred or surrendered under this section shall be deemed to be land acquired under the authority of this Act.

21 Land may be purchased or improved for granting as compensation

…

Compulsory acquisition of land

22 Only land required for essential works may be compulsorily taken

[Repealed]

23 Notice of intention to take land

(1)When land (other than land owned by the Crown) is required to be taken for any public work, the Minister in the case of a Government work, and the local authority in the case of a local work, shall—

(a)cause a survey to be made and a plan to be prepared, and lodged with the Chief Surveyor, showing the land required to be taken and the names of the owners of the land so far as they can be ascertained; and

(b)cause a notice to be published in the *Gazette* and twice publicly notified giving—

(i)a general description of the land required to be taken (including the name of and number in the road or some other readily identifiable description of the place where the land is situated); and

(ii)a description of the purpose for which the land is to be used; and

(iii)the reasons why the taking of the land is considered reasonably necessary; and

(iv)a period within which objections, other than objections by persons who are served with a copy of the notice under subsection (1)(c), may be made; and

(c)serve a notice on the owner of, and persons with a registered interest in, the land of the intention to take the land in the form set out in Schedule 1.

(2)The provisions of this section requiring the names of the owners of the land to be shown on the plan of the land shall have no application in respect of any Maori land unless title to the land is registered under the Land Transfer Act 1952, but instead the plan shall be endorsed with the advice that the names of the owners may be obtained at the appropriate Maori Land Court. Entry on the Provisional Register shall not be deemed to be registration within the meaning of this subsection.

(3)Every person having any estate or interest in the land intended to be taken may object to the taking of the land to the Environment Court in accordance with the provisions of the notice.

(4)Every notice of intention to take land given under this section shall, on the expiration of 1 year after the date of the publication in the *Gazette* of the notice, cease to have effect unless, on or before the expiration of that year,—

(a)a Proclamation taking the land has been published in the *Gazette*; or

(b)the Minister or the local authority has, by a further notice in writing served on the owner of the land, and persons with a registered interest in the land, intended to be taken, so far as they have been ascertained, confirmed the intention, subject to the provisions of this Act, of taking the land; or

(c)the intention to take is the subject of any inquiry by the Environment Court or an Ombudsman, or of any application for a judicial review, in which case the notice of intention shall remain valid for 3 months after the date of the Environment Court's report or the date on which the Environment Court received written notice of the withdrawal of the objection, or the date of the completion of any inquiry by an Ombudsman, or the judicial decision, as the case may be.

(5)Where the Minister or local authority has confirmed the intention of taking the land, the notice of intention so confirmed shall cease to have effect unless, on or before the expiration of 2 years after the date of such confirmation, a Proclamation taking the land has been published in the *Gazette*.

(6)Where any such notice of intention given by the Minister or a local authority has so ceased to have effect, the notice shall not be repeated until at least 6 months after the date on which the original notice or the confirming notice, as the case may require, ceased to have effect.

(7)A copy of the notice under subsection (1)(b) shall be lodged with the District Land Registrar and he shall register it without fee against the certificate of title affected.
(8)Any notice under this section may be withdrawn by the Minister or local authority and, if it is withdrawn, a notice to that effect shall be lodged with the District Land Registrar who shall register it without fee against the title to the land.

24 Objection to be heard by Environment Court

(1)On receiving a written objection under section 23, the Environment Court shall, as soon as practicable, send a copy of the objection to the Minister or local authority, as the case may require.
(2)Within 1 month after receiving a copy of the objection or within such further period as the Environment Court may allow, the Minister or local authority, as the case may require, shall send to the Environment Court and serve on the objector a reply to the objection containing the following information:

(a)the statutory or other authority under which it is proposed to take the land; and
(b)the nature of the work to be constructed or the purpose for which the land is required; and
(c)such other matters as may be appropriate having regard to the objections made and to any practice directions issued by the Environment Court.

(3)The Environment Court shall inquire into the objection and the intended taking and for that purpose shall conduct a hearing at such time and place as it may appoint.
(4)Not less than 15 working days' notice of the time and place so appointed shall be given to the objector and to the Minister or local authority, as the case may require.
(5)Every such hearing shall be held in public unless the objector gives written notice to the Environment Court before the date of the hearing that he requires the hearing to be held in private.
(6)At every such hearing the Minister or the local authority may be represented by counsel or by an officer of the Minister's department or local authority, as the case may require, and the objector may appear and act personally or by counsel or any duly authorised representative.
(7)The Environment Court shall—

(a)ascertain the objectives of the Minister or local authority, as the case may require:
(b)enquire into the adequacy of the consideration given to alternative sites, routes, or other methods of achieving those objectives:
(c)in its discretion, send the matter back to the Minister or local authority for further consideration in the light of any directions given by the court:
(d)decide whether, in its opinion, it would be fair, sound, and reasonably necessary for achieving the objectives of the Minister or local authority, as the case may require, for the land of the objector to be taken:
(e)prepare a written report on the objection and on the court's findings:
(f)submit its report and findings to the Minister or local authority, as the case may require.

(8)*[Repealed]*
(9)At the same time as the Environment Court submits its report and findings to the Minister or local authority, it shall send a copy of the report and findings to the objector, and make copies of them available to the public.

(10)The report and findings of the Environment Court shall be binding on the Minister or, as the case may be, the local authority.
(11)Any objection filed under section 23 may be withdrawn by the objector at any time before the court makes its report and findings under this section.
(12)Where the objection is withdrawn by the objector pursuant to subsection (11), the court shall not be obliged to make a report and findings under this section.
(13)The Environment Court may award such costs as it considers just either in favour of or against the objector, the Crown, or the local authority.
(14)Subject to sections 299 and 308 of the Resource Management Act 1991, no appeal shall lie from any report or recommendation of the Environment Court under this section.

25 Environment Judge may conduct inquiry alone by agreement

…

26 When Proclamation may issue

(1)If no objection is made within the time allowed under this Act or, if made, is withdrawn by the objector or is disallowed by the Environment Court, and the Minister or, as the case may be, the local authority, is of the opinion that the land should be taken for the public work specified in the notice given under section 23, and that no private injury will be done for which due compensation is not provided in this Act, the land intended to be taken may be taken in the following manner:

(a)subject to the provisions of section 32—

(i)a survey plan shall be prepared, in duplicate, showing accurately the position and extent of the land proposed to be taken; and

(ii)such plan shall be signed by the Chief Surveyor as evidence of its accuracy; and

(iii)a duplicate print of the title plan shall be prepared; and

- (b)in the case of any Government work, the Minister shall recommend the Governor-General to issue a Proclamation taking the land:
- (c)in the case of any local work—

(i)the local authority shall submit to the Governor-General a request to take the land proposed to be taken, together with the plan in duplicate unless the provisions of section 32 apply:

(ii)every such request shall be signed by the chief executive of the local authority, and need not be under seal:

(iii)a statutory declaration by the chairperson or mayor or the chief executive of the local authority, in the form set out in Schedule 2, may be accepted by the Governor-General as sufficient without making further inquiry:

(iv)every such declaration shall be accompanied, where applicable, by the relevant report of the Environment Court.

(2)The Governor-General may, if he thinks fit, by Proclamation declare that the land described in it is taken for the public work. Every such Proclamation shall be gazetted and publicly notified within 1 month after the date of its making; and every such public notification shall contain some readily identifiable description of the land taken, but a Proclamation shall not be invalidated by any error, defect, or delay in its gazetting or public notification.
(3)The land specified in the Proclamation shall, unless otherwise provided in the Proclamation or in this Act or in any other Act, become absolutely vested in fee simple in

the Crown or in the local authority, as the case may require, freed and discharged from all mortgages, charges, claims, estates, or interests of whatever kind for the public work named in the Proclamation on the 14th day after the day on which the Proclamation is published in the *Gazette*.

27 Natural material on land may be acquired or taken for public work

…

Extending estates in land that may be acquired or taken

28 Particular estates in land may be acquired or taken

The power conferred by this or any other Act to acquire or take land for a public work shall include the power—

(a)to acquire or take and to hold the land subject to any particular estate, interest, easement, *profit à prendre*, covenant, or encumbrance, whether for the time being subsisting or not:

(b)to acquire or take and to hold separately—

(i)any particular estate or interest in the land, whether for the time being subsisting separately or not; or

(ii)any easement or *profit à prendre* over the land, whether for the time being subsisting or not.

29 Acquisition of certain public land

Where there is power to acquire or take any land for a public work under this or any other Act, that power, unless otherwise specially provided,—

(a)shall not include the power to acquire or take any part of a road:

(b)shall include the power to acquire or take any land vested in any local authority or any land vested in trustees for any local or general public purpose.

30 Subsisting licence may be acquired or taken for public work

...

31 Surface, subsoil, or air space may be acquired separately

(1)The Minister or local authority may, in acquiring or taking land for a public work, acquire only the surface, together with such part of the subsoil or of the air space above the surface as is deemed necessary, or may acquire or take all or only such part of the subsoil or of the air space above the surface as is deemed necessary excluding the surface.

(2)Where any land is so acquired or taken and any or all of the subsoil beneath that land is not so acquired or taken, the land shall, except pursuant to any agreement to the contrary, have no right of support from the subjacent soil.

(3)Where any land is so acquired or taken and any or all of the subsoil beneath that land is not acquired or taken it shall not be lawful for any person to extract minerals or otherwise interfere with the subjacent land until 6 months' notice of his intention to do so has been given in writing to the Minister in the case of a Government work, or to the local authority in the case of a local work.

(4)Where any land is so acquired or taken and any or all of the subsoil beneath that land is not acquired or taken, the Crown or the local authority, as the case may be, may at any time thereafter acquire or take in accordance with this Act any part of the subsoil underlying the

land so acquired or taken, where the acquisition or taking is necessary for the support or protection of the work on the surface or in the air space above that subsoil.

338 Maori reservations for communal purposes

(1)The chief executive may, by notice in the *Gazette* issued on the recommendation of the court, set apart as Maori reservation any Maori freehold land or any General land—

(a)for the purposes of a village site, marae, meeting place, recreation ground, sports ground, bathing place, church site, building site, burial ground, landing place, fishing ground, spring, well, timber reserve, catchment area or other source of water supply, or place of cultural, historical, or scenic interest, or for any other specified purpose; or

(b)that is a wahi tapu, being a place of special significance according to tikanga Maori.

(2)The chief executive may, by notice in the *Gazette* issued on the recommendation of the court, declare any other Maori freehold land or General land to be included in any Maori reservation, and thereupon the land shall form part of that reservation accordingly.

(3)Except as provided in section 340, every Maori reservation under this section shall be held for the common use or benefit of the owners or of Maori of the class or classes specified in the notice.

(4)Land may be so set apart as or included in a Maori reservation although it is vested in an incorporated body of owners or in the Māori Trustee or in any other trustees, and notwithstanding any provisions of this Act or any other Act as to the disposition or administration of that land.

(5)On the recommendation of the court, the chief executive, by notice in the *Gazette*, may, in respect of any Maori reservation made under this section, do any 1 or more of the following things:

(a)exclude from the reservation any part of the land comprised in it:

(b)cancel the reservation:

(c)redefine the purposes for which the reservation is made:

(d)redefine the persons or class of persons for whose use or benefit the reservation is made.

(6)No notice under this section shall affect any lease or licence, but no land shall be set apart as a Maori reservation while it is subject to any mortgage or charge.

(7)The court may, by order, vest any Maori reservation in any body corporate or in any 2 or more persons in trust to hold and administer it for the benefit of the persons or class of persons for whose benefit the reservation is made, and may from time to time, as and when it thinks fit, appoint a new trustee or new trustees or additional trustees.

(8)The court may, on the appointment of trustees under subsection (7), or on application at any time thereafter, set out the terms of the trust, and subject to any such terms, the Maori reservation shall be administered in accordance with, and be subject to, any regulations made under subsection (15).

(9)Upon the exclusion of any land from a reservation under this section or the cancellation of any such reservation, the land excluded or the land formerly comprised in the cancelled reservation shall vest, as of its former estate, in the persons in whom it was vested immediately before it was constituted as or included in the Maori reservation, or in their successors.

(10)In any case to which subsection (9) applies, the court may make an order vesting the land or any interest in the land in the person or persons found by the court to be entitled to the land or interest.

(11)Except as provided in subsection (12), the land comprised within a Maori reservation shall, while the reservation subsists, be inalienable, whether to the Crown or to any other person.

(12)The trustees in whom any Maori reservation is vested may, with the consent of the court, grant a lease or occupation licence of the reservation or of any part of it for any term not exceeding 14 years (including any term or terms of renewal), upon and subject to such terms and conditions as the court thinks fit.

(13)The revenue derived from any such lease or occupation licence shall be expended by the trustees as the court directs.

(14)Any lease granted pursuant to subsection (12) for the purposes of education or health may, notwithstanding anything in that subsection, be for a term exceeding 7 years (including any term or terms of renewal) and may confer on the lessee or licensee a right of renewal for 1 or more terms.

(15)The Governor-General may from time to time, by Order in Council, make all such regulations as, in the Governor-General's opinion, may be necessary or expedient for giving full effect to the provisions of this section.

(16)Any such regulations may apply to any specified Maori reservation or to any specified class of Maori reservations, or to Maori reservations generally.

(17)Where any Maori reservation (set apart under any Act repealed by this Act or the corresponding provisions of any former Act) is subsisting at the commencement of this Act, this Act, and any regulations made under this Act, have effect,—

(a)in relation to the Maori reservation, as if it were a Maori reservation set apart under this section; and

(b)in relation to any vesting order made in respect of the Maori reservation (under any Act repealed by this Act or the corresponding provisions of any former Act), as if that vesting order were a vesting order made under this section.

Subpart 2 – Whenua tāpui

28 Meaning of certain purposes

In **sections 30 and 32,** the **certain purposes** for which whenua tāpui may be reserved are ---

(a) a papakainga housing site:
(b) a marae
(c) a meeting place
(d) a recreation or sports ground
(e) a bathing place
(f) a church site
(g) a building site
(h) a burial ground
(i) a landing place
(j) a fishing ground
(k) a spring, well, catchment area, or other source of water supply
(l) a timber reserve
(m) a place of cultural or historical interest
(n) a place of scenic interest
(o) a place of special significance according to tikanga Māori
(p) any other particular purposes state in the declaration

29 Application for court order declaring private land reserved as whenua tā- pui

(1) A person may apply to the court for an order under **section 30** declaring a new whenua tāpui or the addition of land to an existing whenua tāpui.

(2) The application may be made by—

(a) an administrative kaiwhakarite appointed for the land, for a declaration relating to Māori customary land; or

(b) 1 or more owners of the land, for a declaration relating to Māori freehold land or other private land.

(3) For the declaration of a new whenua tāpui, the application must specify—

(a) the name of the administering body to be appointed for the whenua tā- pui; and

(b) the names of the persons who are to be the members of the administering body.

(4) For the declaration of a new whenua tāpui for the purpose of a marae, the per- sons specified as members of the administering body must be the members of the marae committee appointed by the persons who, in accordance with tikanga Māori, affiliate with the marae.

30 Court order declaring private land reserved as whenua tāpui

(1) The court may, on application and in accordance with this section and **section 31**, make an order declaring that—

(a) any private land is reserved as a **new whenua tāpui**; or

(b) any additional private land is reserved and included in an **existing whe- nua tāpui** declared over private land.

(2) However, the declaration must not apply to—

(a) Māori freehold land that is managed under a governance agreement (*see* **section 181** for how owners may revoke a governance body's appointment to manage Māori freehold land so that it qualifies for reservation as a whenua tāpui); or

(b) land that is subject to a mortgage or other charge; or

(c) land that is subject to a lease or licence that is inconsistent with the pur- pose for which the land is to be reserved.

(3) The declaration of a new whenua tāpui must reserve the land—

(a) for the 1 or more certain purposes specified in the declaration; and

(b) for the common use and benefit of 1 of the following classes of benefi- ciaries:

(i) the owners of the land; or

(ii) Māori who belong to a class of persons specified in the declar- ation; or

(iii) the people of New Zealand; and

(c) to be held and managed—

(i) by the administering body appointed in the declaration and com- prising the members specified in the declaration, which must match the administering body and members specified in the appli- cation; and

(ii) subject to any conditions or restrictions that the court, at its discre- tion, specifies in the declaration.

(4)The declaration of additional land for an existing whenua tāpui must reserve the land—

(a) for the same purposes, and for the common use and benefit of the same class of beneficiaries, as for the existing whenua tāpui; and

(b) to be held and managed by the same administering body, and subject to the same conditions or restrictions (if any), as for the existing whenua tāpui.

(5) The declaration of a new whenua tāpui for the purpose of a marae or burial ground must reserve the land for the common use and benefit of Māori who belong to a class of persons specified in the declaration.

(6) The chief executive must give notice in the *Gazette* of the reservation of land for the common use and benefit of the people of New Zealand, on being provi- ded under **section 247** with a sealed copy of the order declaring the reserva- tion (whether as a new whenua tāpui or as additional land for an existing whe- nua tāpui).

31 Court must be satisfied of matters and consider submissions for whenua tāpui on private land

(1) The court must comply with this section before making an order under **sec- tion 30** declaring a new whenua tāpui or the addition of land to an existing whenua tāpui. *Court must be satisfied of matters*

(2) The court must be satisfied that the application complies with **section 29**.

(3) The court must be satisfied that,—

(a) for a declaration relating to Māori customary land,— (i) the chief executive, at

the court's direction, notified and held a meeting of the owners of the land in accordance with **Schedule 2** to consider the application (and that schedule applies to the appli- cation with any necessary modifications); and (ii) the application is agreed to by a simple majority of the owners of the land who attended the meeting; or

(b) for a declaration relating to Māori freehold land, the application is agreed to by a simple majority of the owners of the land who participate in making the decision, with owners' votes having equal weight; or

(c) for a declaration relating to other private land, the application is agreed to by the owners of the land.

(4) The court must be satisfied that the land to be reserved comprises a parcel or parcels defined in compliance with the applicable survey standards, unless the land is Māori customary land.

(5) For the reservation of land for the common use and benefit of the people of New Zealand (whether as a new whenua tāpui or as additional land for an existing whenua tāpui), the court must be satisfied that—

(a) the relevant territorial authority consents to the reservation; and

(b) the land does not contain a wāhi tapu or wāhi tūpuna.

Court must seek and consider submissions

(6) The court must give notice of the order it proposes to make—

(a) directly to the applicants; and

(b) directly to any other person whose address for notices is provided in the application; and

(c) for the declaration of additional land for an existing whenua tāpui, di- rectly to the administering body of the existing whenua tāpui; and

(d) in the pānui of the court or any publication that replaces it.

(7) The notice must—

(a) provide details of the application; and

(b) set out the court's proposed order; and

(c) invite submissions on the proposed order; and

(d) specify the deadline by which submissions must be received.

(8) The court must consider any submissions received by the deadline specified in the notice before finalising and making its order.

32 Minister declares Crown land or other specified land reserved as whenua tāpui

(1) The Minister responsible for Crown land or other specified land may, in ac- cordance with this section and **section 33**, make a declaration that—

(a) any Crown land or other specified land is reserved as a **new whenua tā- pui**; or

(b) any additional Crown land or other specified land is reserved and inclu- ded in an

existing whenua tāpui declared over Crown land or other spe- cified land.

(2) However, the declaration must not apply to—

(a) land that is subject to a mortgage or other charge; or

(b) land that is subject to a lease or licence that is inconsistent with the pur- pose for which the land is to be reserved; or

(c) Crown forest land unless the reservation will not cause the Crown to breach any Crown forestry licence that affects the land.

(3) The declaration of a new whenua tāpui over Crown land must reserve the land—

(a) for the 1 or more certain purposes specified in the declaration; and

(b) for the common use and benefit of Māori who belong to a class of per- sons specified in the declaration; and

(c) to be held and managed—

(i) by the administering body appointed in the declaration and com- prising the members specified in the declaration; and

(ii) subject to any conditions or restrictions that the Minister, at his or her discretion, specifies in the declaration.

(4) The declaration of a new whenua tāpui over other specified land must reserve the land—

(a) for the purposes of a place of cultural or historical interest or of a place of special significance according to tikanga Māori; and

(b)for the common use and benefit of Māori who belong to a class of per- sons specified in the notice; and

(c) to be held and managed—

(i) by the administering body appointed in the declaration and com- prising the members specified in the declaration; and

(ii) subject to any conditions or restrictions that the Minister, at his or her discretion, specifies in the declaration.

(5) The declaration of additional Crown land or other specified land for an existing whenua tāpui must reserve the land—

(a) for the same purposes, and for the common use and benefit of the same class of beneficiaries, as for the existing whenua tāpui; and

(b) to be held and managed by the same administering body, and subject to the same conditions or restrictions (if any), as for the existing whenua tāpui.

(6) Before making a declaration in relation to other specified land, the Minister must be satisfied that the land is a place of cultural or historical interest or a place of special significance according to tikanga Māori (as the case may be).

(7) The Minister need not make a declaration after obtaining the court's recom- mendation under **section 33**, but if the Minister does make a declaration, the declaration must comply with the court's recommendation of—

(a) the name and membership of the administering body to be appointed for the whenua tāpui; and

(b) an appropriate class of Māori persons for whose use and benefit the whe- nua tāpui should be reserved.

(8) A declaration under this section must be made by *Gazette* notice.

(9) The *Gazette* notice is not a disallowable instrument for the purposes of the Le- gislation Act 2012 and does not have to be presented to the House of Represen- tatives under section 41 of that Act.

(10) In this section, **other specified land** means—

(a) Crown forest land (as defined by section 2(1) of the Crown Forest Assets Act 1989):

(b) land or an interest in land that is subject to resumption under section 27B of the State-Owned Enterprises Act 1986 and is held by a State enter- prise (as defined by section 2 of that Act):

(c) land or an interest in land that is subject to resumption under section 212 of the Education Act 1989 and is held by an institution (as defined by section 159 of that Act):

(d) land or an interest in land that is subject to resumption under section 39 of the New Zealand Railways Corporation Restructuring Act 1990 and is held by a Crown transferee company (as defined by section 2 of that Act).

33 Minister must apply for court recommendation for new whenua tāpui on Crown land or other specified land

(1) The Minister must comply with this section before declaring a new whenua tā- pui under **section 32**.

(2) The Minister must be satisfied that the land to be reserved comprises a parcel or parcels defined in compliance with the applicable survey standards.

(3) The Minister—

(a) must apply to the court for a recommendation of the name and member- ship of the administering body to be appointed for the new whenua tā- pui; and

(b) may also apply to the court for a recommendation of an appropriate class of Māori persons for whose use and benefit the new whenua tāpui should be reserved.

(4) The application may, but need not, specify—

(a) a proposed name for the administering body to be appointed for the whe- nua tāpui:

(b) the names of persons proposed to be members of the administering body.

(5) The court must, on application by the Minister, make a recommendation of the matters for which the recommendation was sought (and the name of the admin- istering body and the members may differ from any proposals in the applica- tion).

(6) For the declaration of a new whenua tāpui over Crown land for the purpose of a marae, the persons recommended as members of the administering body must be the members of the

marae committee appointed by the persons who, in ac- cordance with tikanga Māori, affiliate with the marae.

(7) Before making its recommendation under this section, the court must—

(a) obtain evidence of people's ancestral or cultural connections with the land, and give all those who claim such connections an opportunity to be heard, in order to determine an appropriate class of Māori persons for whose use and benefit the whenua tāpui should be reserved; and

(b) having determined the appropriate class, give its members an opportun- ity to be heard on the name and membership of the administering body.

34 Court order of declaration for existing whenua tāpui

(1) The court may, on application and in accordance with this section, make an order declaring the following in relation to any existing whenua tāpui over any land:

(a) the reservation as whenua tāpui is cancelled for some or all of the land; or
(b)the whenua tāpui is reserved for a different purpose; or
(c)the whenua tāpui is reserved for the common use or benefit of a different class of beneficiaries; or

(d) a person becomes, ceases to be, or replaces a member of the administer- ing body appointed for the whenua tāpui; or

(e) the conditions or restrictions imposed on how the administering body holds and manages the whenua tāpui are changed.

(2) The application may be made—

(a) by the administering body of the whenua tāpui; or

(b) for a declaration under **subsection (1)(d) or (e)**, by—

(i) the administering body of the whenua tāpui; or

(ii) a beneficiary of the whenua tāpui; or

(iii) the Minister responsible for the land, if the whenua tāpui is over Crown land or other specified land.

(3) For a declaration about the membership of an administering body, the applica- tion must specify—

(a) the name of the person who is to become a member; or

(b) the name of the person who is to cease to be a member; or

(c) the name of the person who is to replace a member and the name of the member who is to be replaced.

(4) If the court makes an order of declaration about the membership of an adminis- tering body, the order must appoint or remove members in accordance with the application.

(5) The court must not make an order of declaration under this section unless it is satisfied that—

(a) the declaration would have been permitted by the provision under which the whenua tāpui was first declared; and

(b) the administering body notified and held a meeting of the beneficiaries of the whenua tāpui in accordance with **Schedule 2** to consider the ap- plication (and that schedule applies to the application with any necessary modifications); and

(c) at least 10 beneficiaries attended the meeting; and

(d) the application is agreed to by a simple majority of the beneficiaries who attended the meeting.

(6) The administering body must notify and hold a meeting for the purposes of **subsection (5)** if an application is made under this section.

(7) The chief executive must give notice in the *Gazette* of an existing whenua tāpui becoming reserved for the common use and benefit of the people of New Zea- land, on being provided under **section 247** with a sealed copy of the order de- claring the change of beneficiaries.

35 Effect of declarations about whenua tāpui

(1) A declaration about a whenua tāpui by a court order takes effect when the order takes effect.

(2) A declaration about a whenua tāpui by the Minister takes effect on the date on which the *Gazette* notice is published or any later date specified in the *Gazette* notice. *Reservation of land*

(3) When land is reserved as a whenua tāpui,—

(a) the legal ownership of the land vests in the administering body appoin- ted in the declaration; and

(b) the administering body holds the land in trust for the purposes for which it is reserved, for the common use and benefit of the beneficiaries, and subject to any conditions or restrictions specified in the declaration; and

(c) a person for whose common use and benefit the land is reserved may en- ter and use the land subject to—

(i) the purposes for which the land is reserved; and

(ii) any lease, licence, or easement over the land; and

(iii) any reasonable conditions or restrictions imposed by the adminis- tering body; and

(d) the land remains affected by any lease, licence, or easement that affected it immediately before the reservation; and

(e) to avoid doubt, the land remains affected by any status or statutory re- gime (for example, as Crown forest land or land subject to resumption by the Crown) that affected it immediately before the reservation.

(4) When land is reserved as a whenua tāpui for purposes other than a marae or burial ground, the beneficial ownership of the land—

(a) is unaffected and is distinct from the interests of the persons for whose common use and benefit the land is reserved; and

(b) may continue to change by succession or otherwise.

(5) When land is reserved as a whenua tāpui for the purposes of a marae or burial ground, the beneficial ownership of the land vests in the Māori who belong to the class of persons specified in the declaration (who become the class of col- lective owners of the land).

Cancellation of reservation of land

(6) When the reservation of land as whenua tāpui is cancelled, the legal ownership of the land vests in the beneficial owners of the land.

36 Administering bodies

(1) The administering body appointed for a whenua tāpui is a body corporate.

(2) An administering body must have a board of at least 3 members, all of whom must ordinarily reside in New Zealand.

(3) A person appointed to the board remains a member until he or she dies or is removed or replaced.

(4) The function of an administering body is to hold and manage the whenua tāpui for the purposes for which it is reserved, for the common use and benefit of the beneficiaries, and subject to any conditions or restrictions imposed on the ad- ministering body.

(5) An administering body may do anything authorised by this Act, or anything else that a natural person may do, for the purpose of performing its function.

(6) A person appointed as a member of an administering body is protected from civil liability, however it may arise, for any act that the person does or omits to do in fulfilment or intended fulfilment of the purpose for which the person is appointed, unless—

(a) the terms of the person's appointment provide otherwise; or

(b) the act or omission is done in bad faith or without reasonable care.

37 Administering body may grant lease or licence

(1) The administering body of a whenua tāpui may grant a lease or an occupation lease or licence to any person over all or part of the land or any building on the land for the purpose of carrying out any activity, trade, business, or occupation.

(2) The lease or licence must include the following terms and conditions:

(a) the lease or licence is granted for 14 years or less, including any further terms that may be granted under rights of renewal:

(b) the grantee has no right to buy or acquire the freehold estate in the land:

(c) the land or building subject to the lease or licence must be used solely for the purpose for which the lease or licence is granted:

(d) if the land or building is not used solely for that purpose, the grantor may terminate the lease or licence in accordance with the process (if any) specified in the lease or, if there is no such process, in any reasona- ble way:

(e) on termination under **paragraph (d)**, the land and all improvements on the land revert to the grantor, and no compensation is payable to the grantee.

(3) The lease or licence may include any other terms and conditions that the ad- ministering body thinks fit.

(4) The grant of the lease or licence must be conditional on the court, on applica- tion by the administering body, making an order of confirmation that the grant—

(a) complies with the requirements of this Act; and

(b) is consistent with the purposes for which the whenua tāpui is reserved; and

(c) is consistent with any conditions or restrictions imposed on how the administering body holds and manages the whenua tāpui.

(5) This section applies despite **section 13** (for Māori customary land) and in- stead of **sections 108, 109, and 111** (for Māori freehold land).

(6) If a lease or occupation lease or licence is varied to apply to additional or dif- ferent land in a whenua tāpui, the variation—

(a) is a further grant of such an interest; and

(b) must therefore comply with this provision.

38 Reservation and disposition of whenua tāpui

Reservation

(1) **Sections 28 to 35** override any other provision of this Act or another enact- ment about the disposition or administration of land. *Disposition*

(2) Land reserved as whenua tāpui must not be disposed of, but this section does not prevent—

(a) the grant of an easement over the land or for the benefit of the land, or the variation or cancellation of such an easement; or

(b) the grant of a lease or an occupation lease or licence over the land under **section 37**; or

(c) a disposition of an individual freehold interest in the land separately from the other individual freehold interests in the land.

Appendix 4: Public Works (Prohibition of Compulsory Acquisition of Māori Land) Amendment Bill

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Public Works (Prohibition of Compulsory Ac- quisition of Māori Land) Amendment Act 2015.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

3 Principal Act

This Act amends the Public Works Act 1981 (the **principal Act**)

4 Section 16 amended (Empowering acquisition of land)

After section 16(2), insert:
(3) Subsections (1) and (2) do not apply to Māori land as defined
in section 2 of Te Ture Whenua Māori Act 1993, except by agreement."

5 Section 17 amended (Acquisition by agreement)

Repeal section 17 (4) and (5).