RANGAHAUA WHANUI NATIONAL THEME D

THE CROWN'S RIGHT OF PRE-EMPTION AND FITZROY'S WAIVER PURCHASES

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LIST OF ABBREVIATIONS

AIM	Auckland Institute and Museum Library
AJHR	*Appendices to the Journals of the House of Representatives*
AJLC	*Appendices to the Journals of the Legislative Council*
APL	Auckland Public Library
app	appendix
ATL	Alexander Turnbull Library
BPP	*British Parliamentary Papers: Colonies New Zealand* (17 vols, Shannon, Irish University Press, 1968–69
cf	compare with (confer)
ch	chapter
CCJWP	Crown Congress Joint Working Party
CMS	Church Missionary Society
CO	Colonial Office series, National Archives, Wellington
DNZB	*Dictionary of New Zealand Biography*
doc	document
ed	edition, editor
encl	enclosure
fn	footnote
G	Governor's series, National Archives, Wellington
IA	Department of Internal Affairs
MS, MSS	manuscript(s)
NA	National Archives
no	number
NZJH	*New Zealand Journal of History*
NZPD	*New Zealand Parliamentary Debates*
OLC	old land claim series
p, pp	page, pages
para	paragraph
pt	part
rod	record of documents
s, ss	section, sections (of an Act)
sec	section (of this report, or of an article, book, etc)
sess	session
vol	volume
Wai	Waitangi Tribunal claim

INTRODUCTION

Article 2 of the Treaty of Waitangi vested the right of pre-emption in the British Crown. To the British officials, this meant that Maori gave up the right to sell their land directly to settlers or to private companies dealing in land settlement. Instead, the Crown alone now had a monopoly on the purchase of Maori land.

Maori agreement to Crown pre-emption, as it had been explained to them, was not without reason. The key to this agreement was the assurance by British officials that pre-emption was necessary to protect Maori interests in land dealings. Protecting Maori interests meant obligations for the Crown. In the Muriwhenua land claim, the Tribunal held that the Crown's acquisition of the substantial right of pre-emption required an equally substantial fiduciary duty on the Crown's part 'to stand as a protector of the Maori people and as a guardian of their interests'. In that tribunal's opinion, such was the importance of this role that it 'could not have been overstated'.[1]

My report constitutes the National Theme D report for the Waitangi Tribunal's Rangahaua Whanui Series. It very briefly surveys the reasons for the use of pre-emption in British colonies and looks in more depth at the intentions of the British Crown in implementing pre-emption in New Zealand. It then examines how pre-emption was portrayed to Maori in the Treaty debates and why Maori may have accepted these arguments. My report moves on to look at how the legal theory behind pre-emption was subsequently expressed in the early colonial legislation, and what Maori (and settler) responses to this were. It then documents Governor FitzRoy's subsequent decision to waive pre-emption in New Zealand, focusing specifically on his general waivers of March and October 1844. My report questions whether FitzRoy's pre-emption waiver proclamations kept the Crown's role as active protector to the fore, and it suggests that, in practice, the Crown neglected its protective obligations.

I only briefly touch on pre-emption waivers in favour of the New Zealand Company up to this period. The Crown's actions in dealing with the Company's transactions with Maori are the subject of a separate report by Duncan Moore. In his section in the *Old Land Claims* (National Theme A) Rangahaua Whanui Series report, Moore discusses pre-emption waivers in favour of the Company, and the relationship which subsequently developed between the Crown and the Company around these transactions.[2] The parallel development of the Crown's policies in relation to Company waivers should be considered in conjunction with my report. Crown purchases of Maori land during the pre-emptive period, and their effectiveness in 'protecting' Maori land interests, are also not covered in my report.

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1. Waitangi Tribunal, *The Muriwhenua Land Report 1997*, Wellington, GP Publications, 1997, p 5
2. See D Moore, B Rigby, and M Russell, *Old Land Claims*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release) July 1997

My report concludes with a brief account of the decision to return to Crown pre-emption in 1846, and the effect subsequent inquiries into the pre-emption waiver purchases (by Henry Matson and Francis Dillon Bell) had on Maori who made use of the waiver provisions. The framework for this chapter (chapter 7) is a summary of a report written by John Hutton to look at the way Grey dealt with the pre-emption waiver purchases made under FitzRoy. I had taken ill and was not able to complete my work on pre-emption waiver purchases for Alan Ward's Rangahaua Whanui Series *National Overview*. John was given an early draft of my report, and my tables detailing the pre-emption waiver purchases, which he used in the early part of his report in particular. This chapter, while initially relying on John's framework, includes some additional information and, in parts, a change in interpretation based on knowledge gained through my research for the earlier chapters of this report.

Pre-emption was one of the earliest practical expressions of British sovereignty. One of the key aspects of the study of pre-emption here is its importance in clarifying the British understanding of sovereignty to Maori who saw the Treaty instead as an alliance of equals. The story of pre-emption could equally be that of the increasing awareness amongst Maori of the British perception of sovereignty, and its overlap with what rangatiratanga meant to Maori. To the Maori people, as the Tribunal has noted, land, power, and authority were inextricably linked.[3] Pre-emption involved all three of these elements. Its implementation expressed Crown power and authority – its sovereignty – over the land. As will be seen below, pre-emption was also a means of enhancing colonial control over Maori. By allowing Maori to sell land only to the Crown, pre-emption facilitated the transfer of that land from indigenous land tenure controlled by customary law, to British land title controlled by British law.

In New Zealand, pre-emption prescribed that Maori land could only be sold to the Crown (and subsequent legislation restricted the leasing of it to the Crown alone) from the inception of the colony to the enactment of the Native Lands Act 1862, with the waivers of pre-emption in the mid-1840s forming a brief – and partial – reprieve.[4] Throughout the pre-emptive period Maori were dependent on the fairness of the Crown in its land purchases, and the integrity of the Crown in its promise to protect Maori interests.

The imbalance of experience of the Crown and of Maori in such transactions, in particular the imbalance of their knowledge of the likely outcome of British settlement at this time, added, in the Muriwhenua Tribunal's view, to the Crown's fiduciary obligations to ensure the protection of Maori lands.[5] I argue that during the brief and partial waivers of Crown pre-emption in favour of private purchasers in the 1840s, the administration of land purchase was not exempt from these obligations. The duty of protection owed during the pre-emptive period was equally as relevant

3. *Muriwhenua Land Report*, pp 21–30
4. An 1858 Bill to waive the Crown's right of pre-emption was disallowed (D V Williams, 'Te Tiriti o Waitangi – Unique Relationship Between Crown and Tangata Whenua', in *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi (Waitangi)*, I H Kawharu (ed), Auckland, Oxford University Press, 1989, p 86).
5. *Muriwhenua Land Report*, p 389

during the relaxation of the 'protective' pre-emption provision in the mid-1840s (as it also was in the New Zealand Company waivers).

In this light, as a point of reference, it is relevant to summarize the Tribunal's findings with regard to the duties of the Crown in giving effect to article 2 of the Treaty, which includes the pre-emption clause. The Tribunal stated in its *Orakei Report* that the instructions given by the Colonial Office, and the oral assurances of the British negotiators at the Treaty debates, indicate that article 2, read as a whole, imposed on the Crown two key duties when negotiating the purchase of Maori lands. It imposed a duty to: (a) ensure Maori people in fact wished to sell; and (b) ensure they were left with sufficient land for their maintenance and support or livelihood.[6] Or, as previously put in the *Waiheke Report*, to (b) ensure that each tribe maintained a sufficient endowment for its foreseen needs.[7] More recently, the Tribunal has elaborated on these points. The Muriwhenua Tribunal has stated that the instructions of the British Government indicate it had in mind, protection by: (a) an audit of the Government's policies and practices through the appointment of an independent Protector of Aborigines; and (b) the assurance of adequate reserves. That tribunal held that the apparent principle behind the reserves was that 'Maori would retain sufficient resources to be full participants in the projected new economy, and would have sufficient land to provide an economic base for the future'.[8]

A key question addressed here is whether the Crown's actions in relation to private pre-emptive waiver purchases were consistent with its Treaty obligations in this period. Was there an independent audit of the Government's policies and practices by the Protector of Aborigines with regard to the pre-emption waiver purchases? Did the waiver proclamations leave Maori (largely of Auckland) in a position to participate fully in the new economy, with sufficient land for the future? Of particular relevance is the 'tenths' clause (one tenth of the land purchased was intended to be set aside 'for public purposes, especially the future benefit of the aborigines') in FitzRoy's pre-emption waiver proclamations.[9]

While the abandonment of pre-emption in 1862 (effectively 1865) may suggest it ceased to be of importance following the introduction of the Native Lands Acts, that is not the case. An aspect of its purpose – facilitating the transfer of land from customary to British land title, controlled by the Crown – continued in a modified form through the land Acts. Nor was the restriction of alienability of Maori land, to the Crown alone, wholly abandoned after 1862. The Crown reasserted this aspect of pre-emption by proclamation, whenever it deemed it necessary, to again monopolize the purchase of particular areas of (and for a brief period all) Maori land, well into the twentieth century. This later period is not covered by my report, although I note the continuing effect this British colonial policy has had for Maori in New Zealand.

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6. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1987, pp 137–147
7. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Waiheke Island Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1987, p 38. See also Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, pp 237–238.
8. *Muriwhenua Land Report*, pp 389–390
9. Proclamation, 26 March 1844, in encl P in FitzRoy to Stanley, 15 April 1844, BPP, vol 4, p 202

At the time of the Treaty, British officials professed that their intentions with regard to pre-emption were clearly linked with the protection of Maori interests in land. But it was also intended as an effective tool of colonisation and of extinguishing native title to introduce cheaply the British systems of land tenure and serve the interests of the colonising power. The waivers of pre-emption (again despite professed intentions being to 'benefit' Maori and ensure the expression of their rights) were also a means of achieving British colonisation. Hence, pre-emption served both as an expression of article 2 of the Treaty – as a 'protective' qualification on rangatiratanga – and an expression of article 1 – as an expression of sovereignty.

CHAPTER 1

THE ORIGINS OF PRE-EMPTION IN BRITISH COLONIAL POLICY

1.1 INTRODUCTION

Keith Sorrenson has commented that the Treaty, at least in its English text, contained very little that had not already been expressed in earlier treaties or statements of British colonial policy.[1] Crown pre-emption was not new to British colonial officials when they contemplated the annexation of New Zealand.[2] But neither had they employed it universally in British colonies.[3] It was adopted by the British in some instances, notably in colonial North America, Australia and New Zealand. Its adoption in these instances was by choice, not law.[4]

British common law did not require that the Crown alone could purchase land from indigenous landholders.[5] But where British officials chose to implement pre-emption as a matter of colonial policy, it was generally later backed by legislation. Its use was not a consequence of the application of British law. It was instead a catalyst for the creation of legislation enforcing it.[6]

Paul McHugh, who has written extensively on the nature of aboriginal title, noted that limiting the alienation of native land to the Crown became an 'invariable theme' of Indian-settler relations in colonial North America. From as early as 1609, it was evident in Virginia. The New England colonies of Massachusetts, Rhode Island, Connecticut and New Hampshire all adopted this practice during the mid-seventeenth century. Other North American colonies followed suit.[7]

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1. M P K Sorrenson, 'Treaties in British Colonial Policy Precedents for Waitangi', in *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts*, W Renwick (ed), Wellington, Victoria University Press, 1991, p 15. See also D V Williams, 'Te Tiriti o Waitangi – Unique Relationship Between Crown and Tangata Whenua', in *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Waitangi), I H Kawharu (ed), Auckland, Oxford University Press, 1989, pp 64–65
2. See E Hertslet, *Commercial Treaties* and *The Map of Africa by Treaty*, London, 1967, vol 1
3. For example, Kent McNeil, *Common Law Aboriginal Title*, Oxford, Clarendon Press, 1989, p 227, notes that lands in British India could apparently be purchased from the native inhabitants by aliens as well as subjects, 'to the extent that such purchases were not prohibited by legislation', and in the Gold Coast colony private purchases of native lands were generally accepted.
4. McNeil, p 224; P G McHugh, 'The Aboriginal Rights of the New Zealand Maori at Common Law', PhD thesis, University of Cambridge, 1987, p 200
5. McNeil, p 300; Frederika Hackshaw, 'Nineteenth Century Notions of Aboriginal Title and Their Influence on the Interpretation of the Treaty of Waitangi', in *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, I H Kawharu (ed), Auckland, Oxford University Press, 1989, p 99. Nor did it require that all subjects must derive title to land from the Crown. McNeil refers to this idea as a 'legally invented fiction'.
6. McNeil, p 227
7. McHugh, pp 200–202

By the end of that century, colonists were referring to the limitation on alienation of native land to the Crown alone as the Crown's 'pre-emptive right'.[8] By the middle of the eighteenth century this practice of the Crown's pre-emptive right had become 'a settled basis of colonial relations with the Indian tribes'.[9]

1.2 PEACE AND PROTECTION

Legislation implementing the Crown's pre-emptive right, including some of the reasons for its legal recognition, followed. As early as 1660, the colony of Virginia passed an Act which held that:

> Whereas the mutuall discontents, complaints, jealousies and ffeares of English and Indians proceed chiefly from the violent intrusions of diverse English made into their lands, The governor ... councell and burgesses ... enact, ordaine, and confirme that for the future noe Indian king or other shall upon any pretence alien and sell, nor noe English for any cause or consideration whatsoever purchase or buy any tract or parcell of land now justly claymed or actually possest by an Indian or Indians whatsoever; all such bargaines and sales hereafter made or pretended to be made being hereby declared to be invalid, voyd and null any acknowledgement, surrender, law or custome formerly used to the contrary notwithstanding.[10]

Over a hundred years later, on 7 October 1763, a royal proclamation gave the principle of pre-emption uniformity throughout British North America. It held that:

> whereas great Frauds and Abuses have been committed in the purchasing lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; in order therefore to prevent such Irregularities for the future, and to the End that the Indians may be convinced of Our Justice, and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of Our Privy Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies where We have thought proper to allow Settlement but that if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies respectively, within which they shall lie ...[11]

McHugh noted that the restriction on alienability of Indian title was 'connected with the control of the settlement of the colony and maintenance of peaceful relations with the tribes'. Certainly the reasons stated in the statutes – protection of the

8. Ibid, p 205
9. Ibid, p 202
10. McHugh, p 201, cites W W Hening (ed), *The Statutes at Large; Being a Collection of All the Laws of Virginia from ... the Year 1619*, New York, R & W & E Barrow, 1823, vol 2, p 34. By 1675, it was a recognized principle of colonial law.
11. McHugh, pp 202–203, cites C S Brigham (ed), 'British Royal Proclamations Relating to America', *Transactions and Collections of the American Antiquarian Society*, 1911, vol 12, pp 212, 216–217

Indians, nurturing Indian-Crown relations, creating order in Indian-settler land transactions and providing a just system between the two –imply these motives. Kent McNeil, another prominent legal writer on the nature of aboriginal title, placed more emphasis on the legislation's purpose being that of 'pacifying and protecting the Indians' although, as the 1660 Virginian Act indicates, discontent, complaints, jealousies, and fears were mutual to both the English and the Indians.[12]

The Crown's role appears then, from the explanations given in the legislation by its drafters, to have been intended to be one of an 'impartial' keeper of peace, intermediary between the races and protector of native peoples' rights to their land. Of course, a paternalistic colonial power in favour of expansion could not be 'impartial'.

1.3 THE LEGAL QUESTION: LAND TITLE AND ADMINISTRATION

Legislation prohibiting or regulating private purchases, such as that above, made it unnecessary for the judiciary to formulate a common law basis for pre-emption. But despite this, colonial judiciaries sought to provide a common law explanation for this practice.[13] This may have been because the existence of the legislation indicated that such transactions would otherwise be valid under the common law of those colonies. Or maybe there was some doubt about it.[14] But it also served to answer a legal question which had emerged regarding native land title and administration.

By at least the beginning of the nineteenth century, a distinction had developed in British colonial practice between sovereign title to territory and private title to land.[15] These had formerly been blended in British law. The legal effect of the sovereign's acquisition of territory, on private property rights previously held under local law, had become a fundamental legal debate.

McNeil identified two common law approaches to this question: (i) the 'recognition doctrine',[16] where 'it is said that only such rights as the Crown deigned to recognize would be enforceable under the new regime'; and (ii) the 'doctrine of continuity',[17] where 'there is said to be a presumption that in the absence of express confiscation or expropriatory legislation, those rights would continue after the change in sovereignty'.[18]

McNeil viewed the doctrine of continuity as the 'historically correct' approach.[19] His conclusions are helpful here. He first describes the recognition doctrine, then the doctrine of continuity:

12. McNeil, p 224
13. Ibid, p 235
14. Ibid, p 222
15. McHugh, p 186
16. McNeil, p 162, cites Geoffrey S Lester, 'The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument', DJur dissertation, York University, 1981, pp 57–58
17. McNeil, p 162, cites Brian Slattery, 'The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of their Territories', DPhil thesis, Oxford University, 1979, pp 50–59
18. McNeil, pp 161–162
19. Ibid, pp 162, 175–179

> In the course of acquiring sovereignty over a territory the Crown could seize private property by act of state. If the Crown chose to do so, the rights of the previous owners would come to an end unless it appeared that the Crown did not intend the seizure to have that effect. Such an intention might be expressed directly in the form of an act of recognition of pre-existing rights to that property, or might be implied from a mode of dealing amounting to acknowledgement that those rights were unaffected by the seizure. It was in this situation – and this situation alone – that the so-called recognition doctrine applied.
>
> Where, however, the Crown left the inhabitants in possession of their private property, recognition of their rights thereto would be unnecessary. Whether the acquisition was by conquest, cession, or settlement, private property rights under local laws or customs would be presumed to continue. This presumption, known as the doctrine of continuity, would apply equally to chattels and lands. In the case of the latter, the Crown might acquire a paramount lordship (and possibly a right of pre-emption), but its interests would be subject to whatever private rights the inhabitants might have. The public lands of the former sovereign in a cession or conquest, and lands that were unoccupied and unowned in a settlement, would vest in the Crown as a consequence of the act of state by which the territory was acquired, but other lands would remain unaffected. If the Crown wanted to acquire other lands after the territory had been brought into its dominions, it would have to either purchase them or enact confiscatory legislation.[20]

Where a colonial court denied an indigenous peoples' right to alienate land, without legislative backing, it usually argued that the indigenous people in question did not have title, and therefore had nothing to sell. McNeil reasoned that if it could be shown that indigenes did have title, either on the basis of customary law, or due to occupation, 'then, in the absence of legislative restrictions (or, in the case of customary title, restrictions in their own laws), one would expect their interest to be alienable'.[21]

But this unfettered right of alienation was not actually what resulted. Instead, as McHugh notes, following contact within a colony between tribal societies (with a customary code of tenure) and English settlers (anxious to colonise tribal land), there developed a 'dual system of tenure'. The aboriginal inhabitants held a 'Crown-recognised' title, governed by their customary law. The settlers, however, required a 'Crown-derived' title, subject to British law. The Crown's 'exclusive right to silence the tribal title' (usually, but not always, by purchase), facilitated the operation of these two systems side by side.[22] This exclusive right to 'extinguish' native title came to be known then as a presumption of the 'modified continuity' of the aboriginal title.[23] The native title 'continued', as in the doctrine of continuity, but was modified by a restriction in the extinguishment of native title to the Crown alone.

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20. McNeil, pp 191–192. McHugh has not drawn a distinction between the two approaches. He recognized a 'presumption of continuity' of native title alone (see McHugh, pp 189–190, 199).
21. McNeil, p 227
22. Possibly also, as noted above, by enacting confiscatory legislation.
23. McHugh, p 200. This phrase was adopted from B Slattery, *Ancestral Lands, Alien Law: Judicial Perspectives on Aboriginal Title*, No 2 Studies in Aboriginal Rights, Saskatoon Native Law Centre, 1983.

This 'modified continuity' of native title was recognized in the 1823 case *Johnson v M'Intosh.*[24] McHugh succinctly summarised the case as concerning:

> the title to large tracts of land formerly within the colony of Virginia and later ceded to the United States as part of the Northwest Territories. In 1773 and 1775 the Illinois and Piankeshaw tribes sold land directly to a group of land speculators. The tribes subsequently ceded these lands by treaty to the United States, which granted the title to a portion of the land to a William M'Intosh. An action of ejection was brought against M'Intosh by the devisees of the speculators' company. They sought to establish title to the lands by right of the earlier sale of the Indians. At issue, then, was the nature of Indian title and the capacity of the Indians to pass a title which could be sustained at law.[25]

Johnson v M'Intosh became the leading account of the legal character of aboriginal title. Chief Justice Marshall held that colonial courts were to recognize continuity of Indian title to land, its regulation by the customary law and enforcement by tribal authorities. But, because of what the judge described as the 'uncivilised' character of this tenure, a modification of the normal presumption of the continuity was necessary when British sovereignty was assumed. This modification was to be through the recognition of the Crown's exclusive right to extinguish Indian title.[26] Limiting alienation to the Crown ensured that British law applied to the title of the settlers, whose title could only be recognized and enforced in the colonial courts if supported by a Crown grant.[27]

McNeil commented that 'what Marshall did was invent a body of law which was virtually without precedent'. The Crown's acquisition of territories inhabited by indigenous people presented an exceptional situation which gave rise to judicial innovation.[28] Pre-emption, seen from a common law viewpoint, had provided an answer to the question of the legal effect of sovereign acquisition of territory on private property held by native peoples. It had become a means of facilitating the eventual phasing out of the aboriginal title and the gradual imposition of the British system of tenure. It smoothed the transition to control of all land by the new sovereign. Continuity of tribal title was recognized, but only in so far as it remained in tribal hands. After the Crown had exercised its 'exclusive right to silence' that title, the laws of British land tenure applied. The rule was justified by the judiciary's dubious claim that the 'uncivilized' character of tribal tenure made it necessary.

The justification for this legal leap is important to understanding the framework of pre-emption. It is also important to understand that underlying this 'justification' were common Eurocentric assumptions of superiority. These assumptions failed to give due weight to indigenous traditional uses of land, describing them as

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24. *Johnson v M'Intosh* (1823) 8 Wheat 543, 595–596
25. McHugh, p 205
26. Ibid, p 208
27. Ibid, p 210
28. McNeil, pp 301–303. Williams in Kawharu (ed), p 87, refers to the adeptness of colonial judges at reaching 'decisions convenient for colonial Governments'.

'uncivilized', and saw colonisation as beneficial to indigenous peoples as well as the colonisers.

1.4 OTHER EXPLANATIONS: HUMANITARIAN ARGUMENTS AND ECONOMIC MOTIVES

The policy of pre-emption, as practised in North American colonies, was implemented subsequently in Australia – at least insofar as it prevented settlers from buying land from indigenous peoples. In August 1835, Governor Bourke, of New South Wales, issued a proclamation declaring purchases of 'vacant' lands within the colony to be void. The proclamation was approved by the British Colonial Secretary, Lord Glenelg. Glenelg believed that allowing direct purchase of 'vacant' lands 'would subvert the foundation on which all Proprietary rights in New South Wales at present rest'. This foundation was based on the common law justification as explained above. He also claimed, in his approval, to be anxious that the Aboriginal people be protected and their rights defended. In his view Aboriginal welfare would not be promoted 'by recognising in them any right to alienate to private adventurers the Land of the Colony'.[29]

Concern for the welfare of aboriginal peoples was at its height in Britain in the 1830s. British settlers, traders and speculators were continuing to venture to other lands in increasing numbers. The humanitarian movement sought to protect native peoples from the worst effects of such uncontrolled European contact. But it did not view the controlled expansion of the British Empire as uncomplementary to its aims. Humanitarians – who commonly sought to spread British civilization and Christianity – believed not so much in preserving traditional societies, but in amalgamating them with well-governed European settler communities.[30]

One of the movement's successes, a few years prior to Bourke's proclamation, was the formation of a House of Commons Committee on Aborigines in British Settlements. Its brief was to consider what practices should be adopted toward native inhabitants of British colonies. It was to secure to native peoples 'the due observance of justice, and the protection of their rights', and promote British civilisation and Christianity. The committee issued its report in June 1837.[31]

This report recognized that the native inhabitants of any land had an 'incontrovertible right' to their own soil. It also recognized that this was not generally understood by European settlers. The committee suggested a number of policies that the Crown might enforce in its colonies to protect native peoples in this right. Two are particularly relevant here.

First, it believed that the duty of protecting native peoples belonged solely (and appropriately) to the executive government, with its administration either in Britain

29. McNeil, p 225, cites Glenelg to Bourke, 13 April 1836, *Historical Records of Australia*, vol 18, series 1, p 379 and J Bonwick, *Port Phillip Settlement*, London, Sampson Low, Marston, Searle and Rivington, 1883, p 348
30. Claudia Orange, *The Treaty of Waitangi*, Wellington, Allen & Unwin and Port Nicholson Press, 1987, p 2
31. BPP, 1836, vol 1; BPP, 1837, vol 2

or by the governor of the colony. Its reasoning for this, was that settler disputes with native tribes could not in fairness be judged by a local legislature comprised of settlers. Secondly, the committee suggested that private purchases, by Her Majesty's subjects, of native land in, or in immediate contiguity to, the Crown's dominion, should be declared 'illegal and void'. While it was 'impracticable' to prevent the acquisition of land by British subjects in lands outside of these categories, the committee felt:

> it should be distinctly understood, that all persons who embark in such undertakings must do so at their own peril, and have no claim on Her Majesty for support in vindicating the titles which they may so acquire, or for protecting them against any injury to which they may be exposed in the prosecution of any such undertakings.[32]

Lord Glenelg's remarks reflect this contemporary view. But the Colonial Office's decision to intervene and implement pre-emption in New Zealand was influenced by other considerations as well, relating to the increasing numbers of settlers and speculators, and the like, on these shores.

Europeans had been active in purchasing Maori land for some years prior to the Treaty. This had increased markedly in the late 1830s. Critical accounts of the extent of land purchasing occurring at this time, forwarded to Britain by missionaries and others (including the British Resident, Busby, himself), were given in the hope that Britain would intervene, and the ill-effects they heard had occurred elsewhere might be avoided. If the Colonial Office believed that 'the speculative market for land in New Zealand was out of control, with dire consequences for Maori', as Michael Belgrave argues they had every reason to believe, they may also have feared, as he further surmises, that 'Britain could be drawn into costly military intervention if that market could not be contained'.[33] Such an expense is one that the Colonial Office would have actively avoided.[34] The implication in Belgrave's argument is that this may have induced the urgent measures later taken by colonial officials to implement pre-emption. Intervention via the immediate imposition of pre-emption, was necessary to prevent both dire consequences for Maori (feared by the Aborigines Committee and others) and the possibility of the costly involvement of the British military.

A further factor, in line with fiscal considerations generally, was current social and economic theories of 'organized immigration', or 'systematic colonisation'. These theories had spawned the growth of colonisation companies, hoping to put the theories into practice. They believed that exporting British labour and capital (overproduced following the Industrial Revolution) to new colonies, would improve the emigrants' lot, strengthen imperial power, and relieve the domestic situation.[35] Such schemes relied upon the purchase of land from native peoples at a cheap price

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32. Ibid
33. Michael Belgrave, 'Pre-emption, the Treaty of Waitangi and the Politics of Crown Purchase', NZJH, vol 31, no 1, 1997, p 26
34. James Belich, *Making Peoples. A History of New Zealanders From Polynesian Settlement to the End of the Nineteenth Century*, Auckland, Allen Lane and The Penguin Press, 1996, p 182
35. Belich, p 183

and its on-sale to new settlers at a high profit. The difference between the purchase and resale price was to finance the whole colonisation project.

Edward Gibbon Wakefield was a key advocate of these theories. He and his supporters had attempted such a model colony in South Australia. But it had not been successful. Eager to prove the theory, and determined that its failure in Australia was through factors outside his control, he had formed the New Zealand Association in the late 1830s, which subsequently became the New Zealand Company, to colonise New Zealand according to his prescribed scheme.

The proponents of buying cheaply and selling dearly convinced themselves that this was justified. They claimed that Maori land was 'really of no value', but that it could only become valuable 'by means of a great outlay of capital on emigration and settlement'.[36] This is what they would provide with the proceeds from the sales. They argued that while the money and goods paid for the land were nominal, the 'principal payment' to the Maori vendors would be the reservation of one tenth of the land purchased 'for the chief families of the tribe'. These 'tenths' were to be pepperpotted amidst settler properties, and would at first be rented to provide a fund for the benefit of Maori. When Maori 'learned to value' the land, they would be able to live there in British style, amongst British neighbours. Such paternalistic 'protective' provisions were clearly a sweetener (although not an entirely convincing one, as it turned out) for those humanitarians (and missionary societies) who opposed the plan. The dual goals of 'civilizing' and 'Christianizing' the Maori were more easily achieved through the amalgamation inherent in the tenths scheme.

But the New Zealand Company also intended to establish its own government for the new settlement. It was perhaps this aspect of the scheme which troubled the British Government the most. A number of members of the British Parliament were also advocates of 'organized immigration' (some simultaneously members of the New Zealand Company), but they could not be expected to agree with immediate self-government for New Zealand.

The implementation of pre-emption in New Zealand was decided independently of these current colonisation theories, and may have occurred even if the British Crown had merely decided to create a protectorate. But the fact that the Company took steps to carry out its scheme, despite the opposition of British Government officials, and that the Crown then chose to colonise New Zealand, made the protective potential of pre-emption in New Zealand even more significant than it may otherwise have been. Systematic colonisation theories were in effect adopted by the Colonial Office in its decision to annex New Zealand. And gaining the valuable monopoly pre-emption provided, ensured that there were no competitors in creating such a colony in New Zealand. This provided an additional advantage in creating a (theoretically) self-financing colony. While the Company had no such monopoly over land purchase, the British Crown were to seek this right from Maori, at the same time arguing that pre-emption would provide the protection from land speculators which the Aborigines Committee and many others had seen to be so necessary for

36. Patricia Burns, *Fatal Success: A History of the New Zealand Company*, Auckland, Heinemann Reed, 1989, pp 85–89

Maori (aboriginal) welfare. It could then choose to come to an arrangement with the Company, to waive pre-emption in the Company's favour, if it wanted to, as a vehicle with which to use pre-emption, while maintaining the essential control of colonisation. The decision to both control the colonisation of New Zealand, and to use pre-emption to finance it, added to the importance of pre-emption in New Zealand.

CHAPTER 2

THE INTRODUCTION OF PRE-EMPTION TO NEW ZEALAND

2.1 Introduction

The Colonial Office dallied with the idea of entering into some arrangement with the New Zealand Company, or its precursors, for some years prior to 1839. At one stage it proposed a charter, but no actual agreement resulted. Finally, in March 1839, the Company caught wind of the fact that the then Colonial Secretary, Lord Normanby, was not interested in supporting colonisation by a company. It immediately set in motion plans to travel to New Zealand, fearing that it may otherwise have to purchase land through the Crown. The Company barque, the *Tory*, set sail on 12 May 1839. On board were Company officials specifically sent to buy land before it could be 'pre-empted' by the Crown.[1]

The Company was taking a calculated risk. The ship set sail despite the British Government's refusal to give any direct or indirect sanction of the Company's actions. The British Parliamentary Under-Secretary, Henry Labouchere, had warned it that no guarantee could be given of titles to land bought – land which he thought would 'probably' be liable to repurchase by the Crown.[2]

The Company's attempt to pre-empt the Crown provoked a pre-emptive response. Normanby's final instructions to the proposed new Governor, Captain William Hobson, issued following the *Tory*'s departure, differed in important aspects from those of the first draft.

In the first draft, written by the Permanent Under-Secretary, Sir James Stephen, in January 1839, Normanby had required Hobson to choose a 'few districts', where British settlement had already been established, and see if the chiefs would cede their sovereignty over these. British institutions would then be established in those districts 'for the good government of the existing settlers, for the promotion of Trade and for the protection of the Natives'.[3] Colonisation was not the focus.

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1. Patricia Burns, *Fatal Success: A History of the New Zealand Company*, Auckland, Heinemann Reed, 1989, pp 72–92
2. Ibid, p 92
3. Ibid, pp 81–82. The Colonial Office had looked at other forms of indirect rule, such as a Protectorate, but at this stage the British Government had, as Belich puts it, 'decided to try to acquire sovereignty over existing Pakeha settlement and to attempt a benign indirect influence over the rest' (James Belich, *Making Peoples: A History of New Zealanders From Polynesian Settlement to the End of the Nineteenth Century*, Auckland, Allen Lane and The Penguin Press, 1996, pp 180–182, 196, 200).

Had the content of Stephen's draft instructions remained intact, the purpose of British intervention may have been limited, as Peter Adams argues, to 'the provision of impartial protection for both races' – in as much as the inherent paternalism and aims of the policy makers would allow.[4] Without the focus on colonisation, the imposition of pre-emption may have weighed more towards effecting this 'protection'. But the purpose of British intervention soon shifted.

The *Tory* sailed to New Zealand. And Normanby's final instructions, of 14 August 1839, incorporated plans for state-controlled colonisation, aided by the Crown's right of pre-emption. Both were justified, he felt, by their 'beneficial' or 'protective' advantages for Maori.[5] Hobson was to announce pre-emption by proclamation immediately on his arrival in New Zealand.

2.2 LORD NORMANBY'S INSTRUCTIONS TO HOBSON

The need for a detailed examination of Normanby's instructions has been emphasized by the Tribunal on many occasions. The Muriwhenua Tribunal has recently elaborated on the value of Normanby's instructions in explaining the intentions of the British officials. Normanby's instructions, the Tribunal has stated, 'flesh out and give meaning to the Treaty's bland promise of protection. They so illuminate the Treaty's goals that, in our view, the Treaty and the instructions should be read together'.[6] The relevant parts of Normanby's instructions are set out here.

Normanby initially outlined the official rationale for Britain's decision to intervene. The considerable body of British subjects resident in New Zealand, the extent of land already purchased, the existence and intentions of the New Zealand Company, and the importance of New Zealand's resources and geographical position to British interests, were all reasons cited for British intervention. Furthermore, there were the fears that 'unless protected and restrained by necessary laws and institutions', settlers would repeat 'the same process of war and spoliation under which uncivilized tribes have almost invariably disappeared' when 'brought into the immediate vicinity of emigrations from the nations of Christendom'. Unless the Queen was acknowledged as New Zealand's sovereign 'or at least of those districts within or adjacent to which Her Majesty's subjects may acquire lands or habitations', Normanby claimed, protection of Maori would be an 'impossibility'.[7]

Hobson was charged, therefore, with obtaining the 'free and intelligent consent' of the Maori people for the recognition of the Queen's authority over the whole, or any parts, of New Zealand which Maori were willing to place under the Crown's dominion.[8]

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4. Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830–1847*, Auckland, Auckland University Press and Oxford University Press, 1977, p 175
5. Burns notes, p 81, that in early 1839, 'most politicians and officials' assumed that any intervention would gradually evolve into colonisation, although 'the immediate needs were control of lawless British subjects and justice for the Maori people'. The first draft aimed to cater to these more immediate needs.
6. Waitangi Tribunal, *Muriwhenua Land Report 1997*, Wellington, GP Publications, 1997, p 117
7. Normanby to Hobson, 14 August 1839, BPP, vol 3, pp 85–86
8. Ibid

But attaining Maori agreement to British sovereignty was not to be Hobson's sole task. Normanby had recognized that Maori 'title to the soil and to the sovereignty of New Zealand' was indisputable, and that this had 'been solemnly recognized by the British Government'.[9] He instructed Hobson:

> It is further necessary that the chiefs should be induced, if possible, to contract with you, as representing Her Majesty, that henceforward no lands shall be ceded, either gratuitously or otherwise, except to the Crown of Great Britain. Contemplating the future growth and extension of a British colony in New Zealand, it is an object of the first importance that the alienation of the unsettled lands within its limits should be conducted, from its commencement, upon that system of sale of which experience has proved the wisdom, and the disregard of which has been so fatal to the prosperity of other British settlements.[10]

Normanby sought to 'guard' New Zealand specifically against land speculators; arguing that the speculators may have based their purchases on inequitable transactions, or that the transactions may be 'on a scale prejudicial to community interests'. He thought that grants derivative from the Crown, alternatively, would provide 'at least some kind of system, with some degree of responsibility, subject to some conditions and recorded for general information'.[11] Such a system could not operate where purchases had been made directly from Maori. Where this had occurred 'securities against abuse' would not be available and 'none [no securities] could be substituted for them'.

Instead, Normanby instructed Hobson that:

- It would be the new Governor's duty to 'obtain, by fair and equal contracts with the natives, the cession to the Crown of such waste lands as may be progressively required for the occupation of settlers resorting to NZ'.
- All such contracts were to be made by himself 'through the intervention of an officer expressly appointed to watch over the interests of the aborigines as their protector'.[12]

It was envisaged that:

- The resales of the first purchases would provide the funds necessary for future acquisitions, so that 'beyond the original investment of a comparatively small sum of money', no further resources would be necessary for this purpose.
- The price to be paid to Maori was to 'bear an exceedingly small proportion to the price for which the same lands will be re-sold by the Government to the settlers'. Normanby saw no real injustice in this, claiming that to Maori 'much of

9. This was later qualified by an acknowledgement that New Zealand was a sovereign and independent state only in 'so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed, and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert'. Normanby described Maori rights as being 'precarious and little more than nominal'. The benefits of British protection, and of laws administered by British judges would 'far more than compensate for the sacrifice of a national independence, which they are no longer able to maintain'.
10. Normanby to Hobson, 14 August 1839, BPP, vol 3, p 86
11. Ibid
12. Ibid, p 87

the land of the country is of no actual use, and, in their hands, it possesses scarcely any exchangeable value'.

- The land's 'value in exchange will be first created, and then progressively increased, by the introduction of capital and of settlers from this country'. Maori themselves were to 'gradually participate' in the benefits of that increase.[13]

The nature of the proposed Crown dealings with Maori for their lands was further elaborated:

- They were to be conducted with 'sincerity, justice, and good faith'.
- Maori 'must not be permitted to enter into any contracts in which they might be the ignorant and unintentional authors of injuries to themselves'. Hobson was not, for example, to 'purchase from them any territory, the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence'.
- Acquisitions by the Crown of land for future British settlement were to be 'confined to such districts as the natives can alienate, without distress or serious inconvenience to themselves'.
- To ensure the observance of this was to be 'one of the first duties of their official protector'.
- In all future dealings with Maori, the Crown (in this case, the Governor) would provide for and protect Maori interests.[14]

Hobson was to issue a proclamation, immediately on arrival, claiming that any title to land not derived from or confirmed by a Crown grant, would be invalid.[15] If existing settlers' property was 'acquired on equitable conditions' and 'not upon a scale which must be prejudicial to the latent interests of the community' they would not be dispossessed. Purchases made prior to the proclamation would be investigated by a commission appointed by the Governor of New South Wales. The commission was to determine 'how far such grants were lawfully acquired, and ought to be respected, and what may have been the price or other valuable considerations given for them'. It would be up to the Governor to decide how far the claimants may be entitled to confirmatory grants.[16]

By the time Hobson arrived in Sydney, in early January 1840, many settlers and speculators were wary of an imminent prohibition on private land purchase in New Zealand. Purchasing of New Zealand land was showing no sign of decreasing. Gipps, the Governor of New South Wales, effectively stopped a Sydney auction of Bay of Islands land early in January, by issuing a warning that any such purchasers were acting at their own risk.[17] Hobson had then met with Sydney-based land claimants, on 10 January, and told them that Maori were as unfit 'to treat with Europeans for the

13. Ibid. This, of course, was in line with current New Zealand Company concepts.
14. Ibid, p 87
15. Ibid, pp 86–87
16. Ibid, p 87
17. Gipps to Russell, 9 February 1840, BPP, vol 3, p 123. Explanations of the British Government's intentions, sought from Hobson following this incident were then reported in Sydney papers (Donald Loveridge, 'The New Zealand Land Claims Act of 1840', report commissioned by the Crown, 18 June 1993 (Wai 45 ROD, doc I2), pp 24–27).

sale of their lands' as 'minors'.[18] He implied that pre-emption was necessary for the Crown to act as a dutiful guardian. On 14 January, in Sydney, Gipps proclaimed the Crown's right of pre-emption in New Zealand. The proclamation held that 'for the information and guidance' of all interested parties:

> all purchases of land in any part of New Zealand which may be made by any of Her Majesty's subjects from any of the native chiefs or tribes of these islands, after the date hereof, will be considered as absolutely null and void, and neither confirmed nor in any way recognised by Her Majesty.[19]

Hobson's repeat of this proclamation at Kororareka, on 30 January 1840, the day after his arrival in New Zealand, included an additional reference to the proclamation being for 'the present as well as the future interests of Her said subjects, and also the interests and rights of the chiefs and native tribes'.[20] Both proclamations stated that all title to land must derive from or be confirmed by a Crown grant. All former purchases were to be investigated by commissioners, and only those found to be equitable, and not excessive, would be confirmed.[21] The settlers' 'free for all' was over. According to Russell Stone, who wrote a biography on Auckland settler John Logan Campbell, the proclamation 'spread gloom among speculators on either side of the Tasman'.[22] Some 'land-jobbers' had already left, others waited only until they could arrange return passages to Sydney. Some stayed to risk their future.[23] The Crown had indeed stopped the main tide of land speculation.

2.3 ARTICLE 2 OF THE TREATY

Hobson's Secretary, J S Freeman, initially drafted the Treaty of Waitangi. Freeman's second article was skeletal. It contained the pre-emption clause alone – the second major concession Normanby had instructed Hobson to seek from Maori. It provided that: '[t]he United Chiefs of New Zealand yield to Her Majesty the Queen of England the exclusive right of Pre-emption over such waste Lands as the Tribes may feel disposed to alienate'.[24]

As is well known, the ex-British Resident, James Busby, was then asked to revise Freeman's draft. Aware that Maori would not accept a treaty which did not secure for them their authority, Busby included at the beginning of the article a guarantee to Maori of the 'full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties' as long as they wished to retain them.

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18. Hobson to Gipps, 16 January 1840, G36/1, NA Wellington
19. Proclamation, 14 January 1840, encl 1 in Gipps to Russell, 9 February 1840, BPP, vol 3, pp 124–125
20. Proclamation, 30 January 1840, in encl 2 in Gipps to Russell, 19 February 1840, BPP, vol 3, pp 44–45
21. Proclamation, 14 January 1840, in encl 1 in Gipps to Russell, 9 February 1840, BPP, vol 3, pp 38–39; Proclamation, 30 January 1840, in encl 2 in Gipps to Russell, 19 February 1840, BPP, vol 3, pp 44–45
22. R C J Stone, *Young Logan Campbell*, Auckland, Auckland University Press, 1982, p 48
23. Ibid, p 48
24. Ruth Ross, 'Te Tiriti o Waitangi: Texts and Translations', NZJH, vol 6, no 2, 1972, p 144; Claudia Orange, *The Treaty of Waitangi*, Wellington, Allen & Unwin and Port Nicholson Press, 1987, pp 36–37

The pre-emption clause was shifted behind this guarantee. The position and wording of the clause now indicated that pre-emption was a mere limit upon that essential guarantee. It was not directly linked to the cession of sovereignty in article 1. Had it been so, perhaps it may have indicated more clearly its value to the Crown, as a Crown 'right' and an expression of its sovereignty.

Hobson accepted Busby's article 2 for the final English form of the Treaty. The pre-emption clause appeared then, in the article 2 of the English version of the Treaty, as follows:

> Her Majesty the Queen of England confirms and guarantees to the Chiefs and tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession: *but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.* [Emphasis added.]

This was translated overnight by Henry Williams and his son Edward Williams as:

> Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu – ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. *Otiia ko nga Rangatira o te wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te wenua – ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.* [Emphasis added.][25]

Williams had translated 'the exclusive right of pre-emption' as 'te hokonga'. Recent analysis of the meaning that the word 'hokonga' may have had to Maori in 1840, by Anne Salmond, Margaret Mutu, and Lyndsay Head, has indicated that 'hoko' involved both buying and selling or barter exchange. But they do not indicate whether 'te hokonga' was an adequate translation of 'the exclusive right of pre-emption'.[26]

However, there have been a number of attempts over the years to reconstruct an English translation of the Maori Treaty text, which may enlighten us further on the meaning portrayed to Maori in the Maori text:

- A 'literal translation', attributed by Claudia Orange to the Reverend Richard Davis, included this version of article 2:

25. Hugh Carleton, *The Life of Henry Williams, Archdeacon of Waimate*, Auckland, Wilsons & Horton, 1877, vol 2, p 12
26. See Anne Salmond, 'Likely Maori Understanding of Tuku and Hoko', report commissioned by the Waitangi Tribunal, July 1991 (Wai 45 ROD, doc D17); Margaret Mutu, 'Tuku Whenua or Land Sale?', report commissioned by the claimants, 24 April 1992 (Wai 45 ROD, doc F12); and L F Head, 'Maori Understanding of Land Transactions in the Mangonui–Muritoki Area During 1861–1865', report commissioned by the Waitangi Tribunal, nd (Wai 45 ROD, doc F21)

The Queen of England acknowledges and guarantees to the Chiefs, the Tribes, and all the people of New Zealand, the entire supremacy of their lands, of their settlements, and of all their personal property. *But the Chiefs of the Assembly, and all other Chiefs, make over to the Queen the purchasing of such lands, which the man who possesses the land is willing to sell, according to prices agreed upon by him, and the purchaser appointed by the Queen to purchase for her.* [Emphasis added.][27]

- An 1869 translation by T E Young, translator of the Native Department held:

The Queen of England arranges and agrees to give to the Chiefs, the Hapus, and all the People of New Zealand, the full chieftainship of their lands, their settlements, and all their property. *But the Chiefs of the Assembly, and all the other Chiefs, give to the Queen the purchase of those pieces of land which the proprietors of the land may wish, for such payment as may be agreed upon by them and the purchaser who is now appointed by the Queen to be her purchaser.* [Emphasis added.][28]

- A more recent literal translation by Professor Sir Hugh Kawharu reads:

The Queen of England arranges [and] agrees to the Chiefs to the subtribes to people all of New Zealand the unqualified exercise of their chieftainship over their lands over their villages and over their treasures all. *But on the other hand the Chiefs of the Confederation and the Chiefs all will give to the Queen the sale and purchase of those parts land is willing [to sell] the person owning the land for the amount of the price agreed between them [viz the vendor and] the purchaser appointed by the Queen as an agent purchase for her.* [Emphasis added.][29]

All three translations indicate that the vendor must not only agree to sell, but also agree to the price with the Crown's agent. This may imply an equal footing envisaged between Maori and the Crown – or that the Crown was ready and willing to participate as impartially as possible, with its fiduciary obligations in mind. But it was probably more related to Normanby's prerequisite that Crown purchases of Maori land be conducted with the free consent of those Maori involved. Of course, the Crown monopoly as a buyer made a mockery of Maori consent over price. Pre-emption meant that they had little bargaining power over the Crown's offer.

None of the above translations specifically refer to the Crown as the sole or exclusive purchaser or dealer, although they may imply it. Only Professor Kawharu's much later translation clearly indicates the Crown was to be both the purchaser and the vendor of land.

Interestingly, the word 'exclusive' is used in relation to the rangatiratanga of the chiefs, as well as the Crown's right of pre-emption in the English text. But the differing context in each case does not result in its appearance in the latter (pre-emption) clause, in either the Maori translation, or the English re-translations of the

27. J Noble Coleman, *A Memoir of the Reverend Richard Davis*, London, James Nisbet, 1865, pp 455–456; copy in Orange, app 4, pp 261–262
28. T E Young, translation 'from the original Maori', AJLC, 1869, p 70; copy in Orange, app 5, p 265. See also Ross, p 145.
29. *NZ Maori Council v Attorney-General* [1987] 1 NZLR 641, 662–663

Maori text. An interpretation of either the Crown as sole purchaser or as having the first right to purchase could equally apply.

Perhaps the expression of pre-emption in this manner had been informed by the lack of success of Gipps's treaty, which he had asked Tuhawaiki and other Ngai Tahu chiefs to sign in Sydney. Gipps's treaty had stipulated that the chiefs agreed:

> not to sell or otherwise alienate any land occupied by or belonging to them, to any person whatsoever except to Her said Majesty upon such consideration as may be hereafter fixed.

Ruth Ross believed, based on the failure of Gipps's treaty, that the chiefs in New Zealand would have refused to sign the Treaty of Waitangi had they understood they were being asked to agree not to sell lands occupied by or belonging to them to anyone but the Crown. Claudia Orange too thought it 'surprising' that Maori would have been prepared to restrict land dealings in this way and questioned whether they fully understood its meaning and implications.[30]

Orange has noted that the Maori Treaty text did not stress the absolute and exclusive right granted to the Crown. Yet, she pointed out, Williams must have known of Hobson's proclamation, which gave 'clear warning of Crown intention to handle all land transactions'.[31] It might be added that while Williams as translator was key, he was not the only one who would have been aware of this. Hobson had read the proclamation aloud, less than a week earlier, to a meeting of Pakeha residents at Kororareka, and then published it.[32] Any one of these people could have enlightened Maori further. Perhaps they, as well as the missionaries, chose not to warn Maori about this effect, and derogation of chiefly authority implied.

The proclamation would have alerted settlers to the exclusivity of Crown pre-emption (although Ross doubted all Pakeha were aware of its exclusive nature). But to Maori, the concept of the Government being the sole purchaser was completely new. The chiefs would therefore have been largely dependent on explanations and discussion of the meaning of Crown pre-emption at the Treaty debates.

2.4 THE TREATY DEBATES

While Normanby's instructions 'flesh out' Crown intentions for the British officials, the Treaty debates would have been the place for fleshing out the Treaty for Maori.

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30. See E Sweetman, *The Unsigned New Zealand Treaty*, Melbourne, Arrow Printery, 1939, pp 61–65, copy in Orange, pp 260–261; Ross, p 145; Orange, p 100
31. Orange, p 42. Belich (p 194) goes even further and suggests the use of rangatiratanga for 'ownership' was probably a deliberate or semi-deliberate act of deceit. But in response to this statement by Belich, Alan Ward has pointed out that the Muriwhenua Tribunal considers the versions to be complementary rather than contradictory. Ward notes that both versions must be consulted, but that even so, stress must be placed on underlying principles (see Alan Ward, *National Overview*, Waitangi Tribunal Rangahaua Whanui Series, 1997, vol 2, p 25; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1988, pp 212–213).
32. Hobson to Gipps, 4 February 1840, in encl 2 in Gipps to Russell, 19 February 1840, BPP, vol 3, p 43

The appearance of the Crown's 'exclusive right of pre-emption' in the English version of the Treaty, and its translation as 'hokonga' in the Maori version, was not the sole record upon which Maori relied. The verbal explanation of this document, given at Treaty debates, and Maori understanding of those oral interpretations, is of equal, if not greater, importance.[33] But accounts of these, too, must be treated cautiously. As the Tribunal advises: 'the debate in Maori has not survived but only English interpretations of it'.[34]

Hobson reported that, at Waitangi, he 'dwelt on each article, and offered a few remarks explanatory of such passages as they [Maori] might be supposed not to understand'. Williams then 'repeated [this] in the native tongue, sentence by sentence'.[35] At Mangungu, Hobson 'read the treaty, expounded its provisions, invited discussion, and offered elucidation'.[36] These accounts indicate pre-emption may well have been explained beyond the mere use of the term 'hokonga'. Yet these possible explanations of the meaning of the term are not recorded. Williams, questioned later on the explanation he had given, unhelpfully wrote: 'The chiefs wishing to sell any portion of their lands, shall give to the Queen the right of pre-emption'.[37] This possibly indicates that he chose not to explain pre-emption.

At Waitangi, the recorded discussions on the topic of pre-emption, to follow these explanations, were very specific. Moka, a Kororareka chief, alleged that local British settlers were still privately purchasing Maori land, despite the 30 January 1840 proclamation. Moka had evidently been the only chief present when the land proclamation had been made public. He expressed doubt at Hobson's ability to enforce Crown control.[38] Hobson's response was to assure Moka that 'all claims to lands, however purchased, after the date of the Proclamation would not be held to be lawful'.[39] This aspect of pre-emption – preventing settlers from buying Maori land – was spelt out to Maori, at least to those present at this debate.

At other Treaty debates, places where presumably the proclamation had not been read aloud, the discussion took a different, and less specific, turn. The instructions given by Hobson to the other, largely missionary, negotiators do not appear to have included any specific explanation of pre-emption. This begs the question whether those appointed to negotiate on the Crown's behalf themselves clearly understood pre-emption enough to explain it. They were told to explain the Treaty's 'principle and object', which Maori were to 'clearly understand' before they would be permitted to sign.[40] Presumably the 'principle and object' meant here was understood to be

33. This is especially so when one considers that, as Belich, p 195, has noted, of the Maori signatures on the Treaty, under 15 percent are signed names as opposed to moko or a mark. Belich suggests that this probably reflects nominacy rather than literacy, indicating most signatories (not Maori generally) could not read either Treaty version.
34. *Muriwhenua Land Report*, p 110
35. Hobson to Gipps, 5 February 1840, in encl 3 in Gipps to Russell, 19 February 1840, BPP, vol 3, p 45
36. Hobson to Gipps, 17 February 1840, encl in Hobson to Normanby, 16 February 1840, BPP, vol 3, pp 132–134
37. Orange pp 100–101; Ross p 149; Carleton, p 157
38. Orange, p 47
39. Colenso, *The Authenic and Genuine History of the Signing of the Treaty of Waitangi*, Wellington, Government Printer, 1890, p 19
40. Orange, p 69

those sentiments expressed largely in the Treaty's preamble – involving Crown protection and the maintenance of peace, order and lawfulness.[41] George Clarke, who was appointed the Protector of Aborigines in April 1840 and later became the Chief Protector of Aborigines (see below), was to reflect years later, that the Treaty 'never would have been signed' but for the assurances that the Queen's object was solely to protect Maori rights, suppress disorder and to increase commerce and prosperity.[42] It is this context, in which the Treaty was delivered and discussions held, which gives an important indication of the meaning pre-emption was likely to have had for Maori, apart from, or in addition to, the few recorded discussions of its purpose.

There were broader, more fundamental, points than the specific meaning of the term pre-emption, for Maori present at the Treaty-signing hui to grasp, or to ensure they attained, in an agreement with the British Crown.[43] The Muriwhenua Tribunal has put it in these terms: 'in forming contracts, Maori looked not to the heart of the terms but to the heart of the person making them'.[44] This appears to have been the case here. The apprehensions raised concerning the Treaty differed depending on the particular experiences of those present. But a common theme centred around the need for general clarification of the respective powers the Treaty would give the Crown and Maori. Many of those who had not had much contact with Pakeha settlers simply could not see the point in the Treaty. Those who had been involved in land transactions indicated their desire to have Pakeha actions stopped or regulated. Many chiefs appeared to feel that land sales were out of control, more specifically out of their control (at least for those who had adopted Christianity). They recognized that something must be done. Their anxiety centred around a recognition that, as Makoare Taonui eloquently put it at Mangungu, 'the land is our father; the land is our chieftainship'. He added: 'we will not give it up'.[45]

Elsewhere, rumours had been circulating regarding the effect of accepting the Treaty. It had been said by disaffected Pakeha settlers, and apparently feared by Maori who had visited, or heard tales of, other British colonies, that Maori would be 'reduced to the condition of slaves', that their land would be taken from them and their dignity as chiefs destroyed.[46] Again the Tribunal's recent comments perhaps add to our understanding of what may have been going on. It explained its view that:

> impassioned declamation is also a standard oratorical tool. It solicits a clear position on a point in issue. Thus Europeans opposed to the Treaty (for annexation would restrict their ability to trade and buy land) had advised Maori that the Governor would enslave

41. Symonds directed Whiteley to explain 'perfectly' the 'nature of the cession of rights' and the missionary later believed that he had done this to the best of his ability (Orange, p 70; Symonds to Whiteley, 8 April 1840, in encl 5 in Hobson to Secretary of State for Colonies, 15 October 1840, BPP, vol 3, p 224).
42. Clarke to Colonial Secretary, 30 March 1846, George Clarke, letters and journals, qMS-0468, ATL Wellington
43. Some Pakeha involved also overlooked this specific point in light of the more urgent considerations of general issues to hand. For example, Hobbs's diary entry summarising the Treaty omitted any mention of pre-emption (John Hobbs's diary, 28 March 1840, MS 144, vol 5, AIM Auckland).
44. *Muriwhenua Land Report*, pp 111–112
45. Account of the speeches of chiefs at the Hokianga Treaty signing, encl 2 in Shortland to Stanley, 18 January 1845, BPP, vol 4, p 512; Richard Taylor journal, MS 302, vol 2, pp 361–366, AIM Auckland
46. Hobson to Gipps, 5 February 1840, in encl 3 in Gipps to Russell, 19 February 1840, BPP, vol 3, p 130

> them and leave them landless. The Maori way is to clear the air by so averring, in order to compel a forthright denial.[47]

In light of this, the Tribunal doubted whether Maori anxieties 'were in fact as large as the reports of their alarm that they would be made slaves or would lose their land'.[48]

The impassioned declamations made in the Treaty debates, regarding land and pre-emption, received the necessary clarification on the point at issue. At Mangungu, Hobson's response was to give:

> repeated assurances ... that the Queen did not want the land, but merely the sovereignty, that she, by her officers, might be able more effectually to govern her subjects who had already settled here, or might hereafter arrive, and punish those of them who might be guilty of crime.[49]

Hobson told those present that land would 'never be forcibly taken' from the Maori; if the Queen wanted land she would purchase it.[50]

In Kaikohe, Taiamai, and Waimate, Hobson assured chiefs that:

> he was commanded by the Queen to prevent them from selling all their lands to white men, instead that the Queen would buy only such lands from them as they did not require. Which they felt relieved at.[51]

Similar assurances were given by Shortland at Kaitaia. Shortland told those present that the Queen would:

> appoint gentlemen to protect them and prevent them from being cheated in the sale of their lands - that Her Majesty was ready to purchase such as they did not require for their own use, to dispose of again to his [sic] subjects who [she] would take care were responsible men who would not injure them.[52]

At the Thames meeting, Captain Bunbury recorded that Williams 'explained the treaty; its object in consequence of the increasing influx of strangers' and:

> that the claim of pre-emption on the part of Her Majesty was intended to check their imprudently selling their lands without sufficiently benefiting [sic] themselves, or obtaining a fair equivalent.[53]

At Tauranga, Bunbury recorded that he told the Otumoetai chiefs that the Queen sought their authority to govern them, 'for their own good, and to avert the evils

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47. *Muriwhenua Land Report*, p 111
48. Ibid, p 113
49. Hobbs to Martin, 22 October 1847, in W Martin, *England and the New Zealanders*, Auckland, College Press, 1847, pp 73–74
50. Ibid
51. John Johnson journal, 7 April 1840, NZMS 27, APL Auckland
52. John Johnson journal, 28 April 1840, NZMS 27, APL Auckland
53. Bunbury to Hobson, 6 May 1840, encl 3 in Hobson to Secretary of State for Colonies, 15 October 1840, BPP, vol 3, p 222

which she foresaw were accumulating around them, by the increasing influx of white men', who would otherwise be subject to no law or control. He continued:

> On my speaking of the sale of lands, and of the right of pre-emption claimed by the Queen as intended equally for their benefit, and to encourage industrious white men to settle amongst them, to teach them arts, and how to manufacture those articles which were so much sought after and admired by them, rather than by leaving the sale of large tracts of lands to themselves, they might pass into the hands of white men, who would never come amongst them, but to hamper by their speculations the industrious. The Queen, therefore, knew the object of these men, many of whom, I had no doubt, had counselled them not to sign the treaty; but she would, nevertheless, unceasingly exert herself, to mitigate the evils they sought to inflict on this country, by purchasing their lands herself at a juster valuation. He said it was useless now to speak of this, as the white men had purchased all their lands; but they appeared quite satisfied, saying it was very just.[54]

The promise of the Queen purchasing Maori land at 'a juster valuation' is interesting in light of the Crown's aim to purchase Maori land cheaply.

South of Cook Strait and up the coast to Wanganui, Henry Williams reported, chiefs 'appeared much gratified that a check was put to the importunities of the Europeans to the purchase of their lands'. The British negotiators had repeated, in essence, the protective intent expressed in Normanby's instructions.

All these recorded instances of discussion of pre-emption suggest that the negotiators (including Hobson) were less concerned with explaining the practical meaning, and full effect, of pre-emption as the Crown's sole right to purchase, than with expanding upon the purpose it was being held out to fulfil.[55] This was consistent with Hobson's instructions to the other negotiators. Explanation of the practical meaning and effect of pre-emption was subsumed by the explanation of its 'principle and object'. This may also have been the main concern of the Maori present (as the Tribunal's comments, discussed above, also suggest). It is not surprising then, that as Orange has commented: '[i]t does not seem to have occurred to Maori to question whether the Government had sole right of purchase or only first offer'.[56]

But questions on the specifics arose later. Tirarau, who went to the Bay of Islands from Wairoa to sign the Treaty in early May 1840, asked Hobson two weeks later for clarification of pre-emption. Hara, from the Bay of Islands, who had offered land to a private purchaser immediately after signing the Treaty, was surprised to find that this was not permissible, and indignantly replied he would do what he liked with his

54. Bunbury to Hobson, 15 May 1840, encl 6 in Hobson to Secretary of State for Colonies, 15 October 1840, BPP, vol 3, p 225. The reference to pre-emption being intended 'equally for their [Maori] benefit' is interesting. Grey later noted that the right of pre-emption was 'to be exercised for the benefit of [H]er Majesty's subjects of both races', that the power given to the Queen through pre-emption was 'evidently conferred for public purposes, and for the general good of Her Majesty's subjects' and 'evidently intended to be so exercised that no partiality or preference could be shewn to any individual' (see Grey, memo dated 20 April 1847, encl 3 in Grey to Earl Grey, 19 April 1847, BPP, vol 6, [892], pp 33–34).

55. The practical effect, that the settlers were to be prevented from purchasing land directly from Maori, was discussed at Waitangi, as noted above.

56. Orange, p 102

own.[57] If the Treaty secured Maori rangatiratanga, and the pre-emption clause was intended to be solely for their protection, why should his offer be problematic? And Kanini (a Ngati Tamatera chief) claimed to have sold Motukorea (in the Hauraki Gulf) to Logan Campbell and William Brown, when in September 1840 Pakeha officials tried to erect a flagpole on the island, in preparation for taking possession of it for the Crown.[58] The 'purchase' had taken place on 22 May 1840.[59]

William Colenso, after the Waitangi Treaty meeting, wrote that he did not 'for a moment' suppose that the chiefs were 'aware that by signing the Treaty they had restrained themselves from selling their land to whomsoever they will'.[60] Colenso's impression was shared by William Brodie, another onlooker at Waitangi. But Whiteley, on the other hand, was adamant that Maori signatories at Kawhia had fully understood that they were to sell to the Crown alone.[61]

Tamati Wiremu of Paihia complained in March 1840 that settlers wanted to induce him to sell part of his land and asked the Governor to interfere and stop the practice which he considered wrong.[62] While this could show an understanding of the exclusive nature of Crown pre-emption, it does not clearly do so. What it does indicate is that the chief clearly understood that the Crown administration would provide a protective cloak around land dealings. This was, it appears, the Maori understanding of the Crown's 'heart' in the matter. Moka's queries (above) similarly indicated this. Orange noted that his comments showed he had 'grasped the import of Crown control over all land transactions' (she reserved judgment on whether this was fully understood by other chiefs at the Waitangi meeting).[63] Otumoetai chiefs likewise appear to have understood, and were not averse to, the idea of a (protective) British administration. They were recorded as having thought pre-emption, as explained to them, was just.[64] Again, this is consistent with the 'heart' of the Crown with respect to pre-emption being its intent only to protect. The concept of British administration of land matters, at least in as far as they related to halting Pakeha actions and protecting Maori interests, was acceptable to many Maori.

There had been precedents for such a system in British-Maori relations, without any lessening of Maori authority. James Busby, the ex-Resident, had acted as 'a kind of race relations conciliator in affairs between Maori and Pakeha', as had the

57. Colenso to Church Missionary Society, 24 January 1840, quoted in A G Bagnall and G C Petersen, *William Colenso, Missionary, Botanist, Explorer, Politician; His Life and Journeys*, Wellington, AH & AW Reed, 1948, pp 93–94, in Ross, pp 145–146. See also Orange, pp 100–101.
58. Stone, p 84
59. H H Turton, *Maori Deeds of Land Purchases in the North Island of New Zealand* (Turton's *Deeds*), Wellington, Government Printer, 1877, p 441
60. Ross, pp 145–146. Adams, p 198, refers to an anonymous letter (possibly written by Henry Williams in 1861) where the writer explained that pre-emption was described at Waitangi as follows: 'The Queen is to have the first offer of the land you may wish to sell, and in the event of its being refused by the Crown, the land is yours to sell it to whom you please'. But he doubts the reliability of this evidence, and notes that Colenso queried Maori understanding of the meaning of the term, not the accuracy of the explanation given.
61. Orange, p 101
62. Ross, pp 145–146
63. Orange, p 47
64. Bunbury to Hobson, 15 May 1840, encl 6 in Hobson to Secretary of State for Colonies, 15 October 1840, BPP, vol 3, p 225

missionaries before and during his residency.[65] Land dealings with Pakeha had been an especial source of requests for such input. Northern Maori had sought Busby's services to ensure that transactions were conducted with the correct parties, and to control Pakeha actions. Orange described some Maori concerns expressed to Busby:

> Hau was concerned that tribal land had been sold by an individual Maori; Tupe and others requested that land between Matauri and Whangaroa would be left untouched; and in the Mahurangi area, where Ngapuhi and Hauraki Gulf Maori interests overlapped, Herua expressed his fears that Pomare might use his powerful position in the Bay of Islands to effect a sale.[66]

This clearly would have involved some control of both Maori and Pakeha actions, and mediation between tribes, as well as between tribes and Pakeha.[67] As Orange noted, Wakena Rukaruka pointed out to Busby that 'chiefly rank was not always an advantage in negotiations, since in certain situations, a chief would be lowering his prestige if he initiated discussions with another tribe'. Wakena believed such circumstances to be 'ideally suited to the intermediary role of the Resident'.[68]

An intermediary or mediator, or even an arbitrator instilling a new Christian moral-legal code – as the missionary example had set for Busby – was, in some circumstances, an acceptable addition to Maori life.

To Orange, this indicated that Maori had seemed 'increasingly aware that the Crown alone possessed the kind of authority capable of controlling new and essentially temporal difficulties'. In her view, the above-mentioned concerns about land 'seemed to indicate a predisposition to accept a greater regulation of Maori-European affairs'. But it may rather have been that Maori assumed the Crown alone to be capable of controlling Pakeha more effectively, thereby setting up more effective communication in cases of difficulty between Maori tribes and the Pakeha. A number of subsequent statements made by Maori appear to support this view (see below). As Belich has noted, Maori may well have seen the new Governor's authority as 'substantial and significant, but restricted to Pakeha', freeing the chiefs from 'the burden of ruling the large and new Pakeha communities' and assisting them in 'policing' Maori-Pakeha interaction.[69]

Maori may have been seeking, in agreeing to the Treaty's pre-emption clause as it was explained to them, to gain more controlled interaction with Pakeha – not seeing it as a submission to British authority, but rather as a means of regulating relations with Pakeha. They may have been seeking a representative person, a chief in effect, who could speak for, and be responsible for, all Pakeha actions, perhaps modified by

65. Orange, p 14; see also G E O Ramsden, *Busby of Waitangi*, Wellington, A H & A W Reed, 1942, pp 39–46, 60–61, 85
66. Orange, p 17, cites William Marshall Hau to Busby, December 1839, Hemi Kepa Tupe to Busby, nd [1839?], Herua to Busby, nd [1839?] and Fairburn to Busby, 20 December 1839, BR 1/2. Paradoxically, the accusation made by Hau is the very one other Te Whiu people levelled at Wiremu Hau during the Myers Mokau Commission in 1947. Hall Skelton, counsel for Te Whiu, blamed Hau and H T Kemp for the 1859 Mokau (or Puketi) Crown purchase.
67. Orange, p 16 (no assessment is made here of how well Busby carried out the task).
68. Orange, p 17
69. Belich, pp 180–182, 196, 200

a recognition of the British experience in Pakeha land transactions, their importance on a global scale, and the desirability of maintaining a good trading relationship with them. Maori had also been led to believe by the (largely Church Missionary Society missionary) Treaty negotiators that the Crown's motives were purely for their benefit, and this was particularly so in their arguments for pre-emption. Maori agreement had hinged on this, and the implication with it, that the Crown position lacked self-interest. A benevolent Christian Crown as mediator or arbitrator may well have seemed attractive in this light.

The Muriwhenua Tribunal recently interpreted the chief Nopera Panakareao's statement that 'The shadow of the land goes to the Queen, but the substance remains with us' as meaning that the Queen:

> would serve as kaitiaki, as guardian and protector. Maori in turn would protect the Queen, the two standing in alliance. The Governor would serve as kai-whakarite, as broker or mediator between Maori and European, but the authority of the land would remain with the rangatira, with whom it had always been.[70]

In light of this, the Tribunal stated its belief that:

> We think the Treaty rhetoric was, rather, a warning that Maori would entertain no diminution of their authority and expected, at the very least, that power would be shared in arrangements made with the missionaries and the Governor.[71]

But the Crown's right of pre-emption, along with the theories behind it, which tangibly illustrated the link between land, power and authority, soon appeared to some Maori to diminish their authority.

70. *Muriwhenua Land Report*, pp 109, 113
71. Ibid, p 113

CHAPTER 3

THE THEORY BEHIND PRE-EMPTION APPLIED TO NEW ZEALAND, 1840–43

3.1 Overview

Hobson proclaimed British sovereignty over all of New Zealand by June 1840 – over the North Island on the ground of cession by Treaty, and over the South Island by 'discovery'. Initially British sovereignty was largely only nominal. It did not have much immediate practical impact, except at least in one key respect. It had confirmed Gipps's and Hobson's January proclamations' control of the purchase and sale of New Zealand land through the imposition of pre-emption.[1]

Although the Crown Treaty negotiators had not fully explained the practical effect of pre-emption on land transactions to Maori in the Treaty debates, the practical impact of imposing pre-emption was immediate and almost entirely complete. The proclamations, and article 2 of the Treaty, did effectively prevent settlers from purchasing land directly from Maori.

But the theory behind the Crown's pre-emption policy, which was to influence the way in which Maori land interests were recognized and protected, was far more elusive – especially (but by no means exclusively) to Maori. This theory was based on 'foreign' (to Maori, at least) notions of sovereignty, and of the nature and extent of aboriginal property rights. It had spawned two key legal theories: those of the United States Supreme Court Chief Justice Marshall (who held that the 'uncivilised' character of Indian title to land required a modification of the normal presumption that Indian title would continue – a modification effected through the Crown's right of pre-emption); and those of the Swiss jurist Emmerich de Vattel (who in the eighteenth century argued that 'civilised' nations had an obligation to displace peoples who did not use their lands for agriculture and provide food for a growing population).[2]

Gipps elaborated upon these theories in the initial debates over New Zealand's early land legislation, the New Zealand Land Claims Bill 1840 (NSW), held in New South Wales. His arguments were to set the groundwork for land policy in New Zealand. To a lesser degree, these ideas percolated through to New Zealand. And to

1. James Belich, *Making Peoples: A History of New Zealanders From Polynesian Settlement to the End of the Nineteenth Century*, Auckland, Allen Lane and the Penguin Press, 1996, pp 181, 187, 194. Compare with, for example, Michael Belgrave, 'Pre-emption, the Treaty of Waitangi and the Politics of Crown Purchase', NZJH, vol 31, no 1, 1997, p 27.
2. Belgrave, pp 24–25

an even lesser degree still, these theories appeared explicitly in the legislation itself (although obviously the statutes themselves were expressions of these key ideas).

Much, if not all, of this debate was unavailable to Maori. Neither Gipps, nor Hobson, explained the notions elaborated on in the debates to Maori. Nor did they explain their proposal to apply these theories to Maori title and New Zealand land. They failed to openly discuss, with Maori representatives, this basis for Crown assumptions and actions. Settler interests were expressed in the debates, but no independent representation was made to ensure Maori interests were protected. Some Maori subsequently heard about Gipps's New South Wales speech. But it seems this was only informal and unofficial, and probably from those almost as ill-informed. Hearing of the Crown's actions second-hand merely aroused Maori suspicions about what the Crown had in mind for them and their land.

So, the meaning and effect of British sovereignty, and in particular the meaning and effect of British concepts of sovereign title to land, began to become apparent to Maori only indirectly through the land legislation and policies – and mainly through the grapevine of self-interested settlers. Maori began to question the Crown's motives in its land policies, the most obvious of which were the Crown's right of pre-emption and the Crown's acquisition of surplus lands.

George Clarke later reflected that '[a]lmost the first Act of the Government immediately after the Treaty of Waitangi' threw discredit on all settler titles derived directly from Maori, and prohibited future sales by the chiefs to any but the Government. He thought that the publication of these measures 'as the principles upon which the newly constituted Government would Act, at once identified the Authorities in the eyes of the Natives with the Land speculators of the day and placed them in the undignified position of common land jobbers'.[3]

In reality, Crown officials believed that when the Crown had acquired sovereignty over New Zealand it had acquired the underlying, 'radical', title to New Zealand as a whole. Most of them believed that this title already included much 'waste' or 'unsettled' lands unnecessary to be purchased from Maori (as Vattel's theories opined).[4] And they claimed that the Crown had the sole right to 'extinguish' Maori title over settled or occupied lands, through pre-emptive purchasing, or by transferring its right of pre-emption (or a partial application of this right) to the New Zealand Company.

The Crown's assumption of this acquisition of the radical title of New Zealand land also allowed it to assume the power to either recognize or refuse to acknowledge settler titles to land purchased from Maori chiefs prior to 1840. Pre-emption and the retrospective review of pre-1840 claims together made Crown control over all land dealings complete. All past and present purchases were covered by these provisions.

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3. Clarke to Colonial Secretary, 30 March 1846, George Clarke, letters and journals, qMS-0468, ATL Wellington
4. This needs to be reconciled with Normanby's statement that wastelands were to be obtained by 'fair and equal contracts with the natives'. Normanby also recognized that Maori 'title to the soil and to the sovereignty of New Zealand' was indisputable. The 1840 select committee on New Zealand later considered this statement to have been unwise. See also section 23 of the Land Sales Act 1842, which provides a definition of wasteland.

The Crown assumed that all New Zealand land, not held under native (Maori) title, could now be treated as part of the Crown's demesne. It required all settler titles to be either derived from, or confirmed by, the Crown.

Settlers claiming to have bought land from Maori chiefs prior to 1840, were now dependent on the two stage process set up by the Crown. The first step was the Crown's recognition that the settler's alleged purchase was valid, and had extinguished native title over the land it comprised. If native title had been extinguished, then the Crown deemed that the land the settler had 'purchased' prior to 1840 was Crown land. The Crown could then choose to take the second step, which was to recognize or confirm the settler's title, by giving him or her a Crown grant of either all, or part of, the purchased land. The calculation of how much land the Crown would grant to the settler was based on a number of factors, such as the date of the purchase, the payment made, and whether the purchaser had occupied the land. The New Zealand Company was similarly dependent on the Crown's recognition of its alleged purchases of lands from Maori. Land which the Crown recognized as being 'extinguished' from native title, but which was not granted to a settler or the Company, was to revert to the Crown. It was referred to as 'surplus' land.

While pre-emption meant that any settler purchase of land was to be derived from the Crown's demesne, by June 1841, the Crown extended this rule to any private leasing of Maori land. Maori options (according to the above theories) had already been limited through the Crown's assumption of its title to 'wastelands', its acquisition of 'surplus' lands, and its sole right of pre-emption over Maori settled or occupied lands. But the prohibition on leasing to private parties took this a step further. If Maori wished to enter land transactions they had only two potential options for the limited areas of settled or occupied lands over which the Crown would clearly recognize their title. Maori could either sell to the Crown, or they could lease to the Crown, dependent on the Crown's ability and willingness to do either. All of these powers, combined, inevitably, to leave Maori questioning whether Crown motives were truly for their benefit, as had been portrayed by the Crown's Treaty negotiators. Maori began to wonder whether they had been misled in signing the Treaty, and in submitting to this very evident loss of their own autonomy over their land. Clarke noted in 1846 that he thought that Maori:

> could hardly avoid the conclusion that they had been Misled, – that in assenting to the establishment of British Authority they had made a false step – and that instead of their protection and advancement being matters of solicitude the sole object of the Government was to obtain their lands and to promote objects foreign to their interests and welfare . . .[5]

Crown Treaty negotiators had emphasised that pre-emption would protect Maori land rights and interests. They had presented it as a qualification on Maori rangatiratanga – to be used for Maori benefit. The land legislation and policies of the early 1840s, however, introduced Maori to the benefits the Crown gained through

5. Clarke to Colonial Secretary, 30 March 1846, George Clarke, letters and journals, qMS-0468, ATL Wellington

pre-emption, as an expression of its sovereignty. The acquisition of funds through the difference between the price paid to Maori for their land, and the price the Crown required from settlers, was rudely apparent to them. By acquiring funds in this way, the Crown was clearly (in Maori eyes) serving its own interests, just as speculators had formerly done.[6] The Crown's inability, or unwillingness, to purchase land at a mutually acceptable price, was also seen by Maori to be contrary to the Treaty's promise of commercial prosperity. This is not to say that if settlers had been allowed to continue purchasing lands directly from Maori, Maori would have had the same access to incoming revenue as before (particularly in Northland), or that it would not have resulted in other, equally concerning, losses. But in the Treaty debates, Maori had been concerned about regulating land sales. They were now concerned about their inability to sell at all. Kororareka Maori described pre-emption, and the control it gave the Crown, as a 'badge of slavery'.[7]

But first, Crown officials sought to establish the Crown's resources. One of their key concerns throughout this process was establishing the Crown's demesne. Those who believed the Crown had acquired both the radical title and all 'wasteland' in New Zealand decided that the process of determining this demesne was like a photo negative. They would determine what the demesne was not, then claim all the rest. Their focus was to identify Maori title, and to organise the granting of limited areas of land to settlers whose claims were considered both equitable, and non-prejudicial to community interests. They did not see that Maori were a necessary party to either the Crown's identification of Maori title or its determination of settler claims. They did perceive, however, that settler discontent was detrimental to the successfully-controlled colonisation of New Zealand. The Crown's ability to control orderly British settlement in this country was a key aspect of the promises made to Maori by Crown Treaty negotiators. The Crown's role was to reconcile this Treaty obligation with its promise to protect Maori interests. Its attempts at defining Maori interests, using its own theories on native title, without consultation with Maori representatives, made these two Treaty obligations impossible to reconcile.

In this chapter, I outline the theories behind pre-emption described in the New Zealand Land Claims Bill 1840 (NSW). I then look at the subsequent attempts of the Crown to define settler, New Zealand Company and Maori land title, and to determine the Crown's demesne. I conclude with Maori reaction to these developments. These reactions were based on settler-spread rumour to Maori about the processes being undertaken, rather than Crown-initiated information. And they were based on the practical expressions of the above theories on British sovereign title to land, evident on the ground. Prominent amongst these were the Crown's acquisition of surplus lands and the Crown's right of pre-emption.

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6. Acting Governor Shortland (who took over from Hobson) also noted this criticism was eroding Maori respect for the Crown, as did Governor FitzRoy following him (see ch 4).
7. Petition of 104 Kororareka residents, 15 December 1841, CO 209/14, pp 312–21, NA Wellington. See Adams, p 201. Pleas for Maori to be released from a state of semi-slavery featured constantly in *Southern Cross* editorials (for example, *Southern Cross*, 29 April 1843).

3.2 THE NEW ZEALAND LAND CLAIMS BILL 1840 (NSW): THE CONTEMPORARY RATIONALE FOR CROWN TITLE, ABORIGINAL TITLE, AND PRE-EMPTION APPLIED TO NEW ZEALAND

As noted above, key Crown officials believed that, by proclaiming British sovereignty, the Crown had acquired the radical title to all New Zealand land. The right of extinguishing native title – primarily through pre-emption – now belonged exclusively to the Crown. Purchases made by settlers prior to 1840 were yet to be recognized by the Crown. The Crown's two-step process to achieve this involved the recognition that Maori title had been extinguished (so that the land could be declared Crown land) and the subsequent granting of a Crown title to the Pakeha claimant.

Gipps's and Hobson's January 1840 proclamations had effectively halted the main tide of speculation in New Zealand land before British sovereignty had been proclaimed. In these proclamations, the Crown had expressed its intention to institute pre-emption by deeming all future private land purchases 'null and void'. Gipps recognized that the proclamations could not have the effect of law.[8] They were, he claimed, 'intended only as notices or warnings to the public of what the law was'.[9]

Normanby's instructions, and the proclamations, had also indicated that a commission was to be appointed to investigate and report on settler claims to land purchased prior to 1840, with powers derived from the Governor and legislature of New South Wales.[10] (New Zealand land 'acquired in sovereignty' by the Queen had also been proclaimed to be the territory of New South Wales in January 1840.) But uncertainty still prevailed over whether the existing 'old land claims', as these pre-Treaty purchases were termed, would be upheld, and the land granted to the settlers they affected. It was to this question that Gipps's and Hobson's attention was at first directed.

3.2.1 The theory behind the Bill

The New Zealand Land Claims Bill 1840 was drafted in New South Wales around April 1840. Late that month, Busby met with Gipps in Sydney. In a private letter, Busby later claimed that Gipps's intention at the time was 'to claim all the land in the Queen's name' then 'give an equitable distribution to our claims'.[11] Gipps himself, in a confidential letter to Hobson dated 6 May 1840, explained that his Bill[12] would claim:

8. The 1840 select committee on New Zealand noted the 'Royal commands, issued in the form of proclamations' could not be enforced if made when the Crown 'neither possessed nor claimed any lawful authority' (Report of the Select Committee on New Zealand, 3 August 1840, BPP, vol 1, [582], p vii).
9. Gipps's speech on the second reading of the Bill, 9 July 1840, in Gipps to Russell, 16 August 1840 (Gipps's speech), BPP, vol 3, p 186
10. Normanby to Hobson, 14 August 1839, BPP, vol 3, p 87
11. Donald Loveridge, 'The New Zealand Land Claims Act of 1840', report commissioned by the Crown, 18 June 1993, (Wai 45 ROD, doc 12) p 63. Note British sovereignty had not yet been proclaimed. The claim to all the land in the Queen's name was more obviously made in the New Zealand Land Claims Ordinance 1841 than in the New South Wales Act. Gipps's stated purpose, although underlain by the principle that all land title derives from the Crown, was to establish settlers' titles to land (see below).
12. The Bill was introduced by Governor Gipps to the New South Wales legislature on 28 May 1840.

> that neither the chiefs nor any number of individuals of uncivilised tribes, such as inhabit the islands of New Zealand, have nor can have a right to dispose of their lands to persons not belonging to their own tribes.[13]

The Bill would 'declare all purchases, or pretended purchases' null and void, then provide for a commission to inquire into such land claims.[14]

Gipps elaborated on the rationale further in his address at the Bill's second reading, on 9 July 1840. At least one Maori was present at the New South Wales debate.[15] But on the whole, the debate on the Bill, including Gipps's speech, ignored Maori interests. As Michael Belgrave puts it '[t]he Maori right of ownership only had value if it could be obtained by a European' in this debate.[16] Accounts of the Bill were given to some Maori by Pakeha settlers in New Zealand. This would possibly have been the first, indirect, indication Maori had of the British Government's view of the relationship between their own 'aboriginal' title and that of the Crown.

Firstly, Gipps claimed it to be a 'general principle' that:

> the uncivilized inhabitants of any country have but a qualified dominion over it, or a right of occupancy only; and that, until they establish amongst themselves a settled form of government and subjugate the ground to their own uses by the cultivation of it, they cannot grant to individuals, not of their own tribe, any portion of it, for the simple reason that they have not themselves any individual property in it.[17]

In the late 1830s, the British Parliament's Committee on Aborigines in British Settlements had rejected the notion that 'uncivilised' peoples were unable to make permanent transfers of land in principle (although it recognized the danger of dispossession in unregulated alienation).[18] Normanby's instructions also had said nothing about the inability of 'uncivilised' peoples to sell land.[19] But Gipps relied on the committee's suggestion that if aboriginal lands were 'in immediate contiguity' to the Queen's dominions, or could be described as being within the Queen's allegiance, or 'affected by any of those intimate relations which grow out of neighbourhood', then the acquisition of those lands by Her subjects should be declared illegal and void.[20]

Gipps argued that New Zealand came within the recommendations of the committee on this point. Though 'perhaps not immediately in contiguity with New South Wales' it certainly had 'relations with it, growing out of neighbourhood'. He commented that the witnesses appearing before the Aborigines Committee had:

13. Loveridge, pp 60–62, cites micro–z, 2710, NA Wellington. Hackshaw has noted that pre-emption was concerned with safeguarding the international interests of European States. Gipps's approach here was part of that safeguarding (Frederika Hackshaw, 'Nineteenth Century Notions of Aboriginal Title and Their Influence on the Interpretation of the Treaty of Waitangi', in *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, I H Kawharu (ed), Auckland, Oxford University Press, 1989, p 99).
14. Loveridge, pp 60–62, cites micro–z, 2710, NA Wellington
15. Gipps's speech, pp 185–200; Busby to Hope, 17 January 1845, BPP, vol 4, p 517
16. Belgrave, pp 28–30
17. Gipps's speech, p 185
18. BPP, vol 2, [425], p 78
19. See Loveridge, p 59; see also chs 1– 2
20. BPP, vol 2, [425], p 78

> all considered the New Zealanders as minors, or as wards of Chancery, incapable of managing their own affairs; and therefore entitled to the same protection as the law of England affords to persons under similar or analogous circumstances. To set aside a bargain on the ground of fraud, or of the incapacity of one of the parties to understand the nature of it, or his legal inability to execute it, is a proceeding certainly not unknown to the law of England; nor is it in any way contrary to the spirit of equity. The injustice would be in confirming any such bargain . . .[21]

That is, they saw it to be an issue between the Crown and the Pakeha settlers. Underlying all this was Gipps's second 'general principle':

> if a settlement be made in any such country by a civilized power, the right of pre-emption of the soil, or in other words, the right of extinguishing the native title, is exclusively in the government of that power, and cannot be enjoyed by individuals without the consent of their government.[22]

Gipps turned at first to the American legal writings of Storey and Kent to support this principle. Gipps claimed that Britain's sovereignty over New Zealand had been acquired by Cook's 'discovery'. Storey had held that discovery gave title to the discovering government against all other European governments and, once established, excluded all other persons from any right to acquire the soil by any grant from the native people:

> It was deemed a right exclusively belonging to the government in its sovereign capacity to extinguish the Indian title, and to perfect its own dominion over the soil, and dispose of it according to its own good pleasure.[23]

According to Storey, native peoples possessed only 'a right of occupancy, or use in the soil, which was subordinate to the ultimate dominion of the discoverer'. It gave them a 'legal' and 'just' claim to retain possession of it, and to use it according to their own discretion, but limited its alienability to the sovereign.[24]

Kent too explained the legal understanding of the position at the time. He held it to be:

> a fundamental principle in the English law, derived from the maxims of feudal tenures, that the king was the original proprietor of all the land in the kingdom, and the true and only source of title . . . The European nations, which respectively established colonies in America, assumed the ultimate dominion to be in themselves, and claimed an exclusive right to grant title to the soil, subject only to the Indian right of occupancy.[25]

Kent then stated, with particularly racist paternalism, that the 'peculiar character and habits of the Indian nations' had 'rendered them incapable of sustaining any other

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21. Gipps's speech, p 200
22. Ibid, p 186. As noted above, this was not always so. And Hackshaw has noted that pre-emption allowed governments to stake their claim above other nation's interests.
23. Gipps's speech, p 188
24. Ibid
25. Ibid, p 189

relation with the whites than that of dependence and pupilage'. The only way of 'dealing' with them, he continued, unabated, was 'keeping them separate, subordinate, and dependent, with a guardian care thrown around them for their protection'. He went on:

> The rule that the Indian title was subordinate to the absolute ultimate title of the government of the European colonists, and that the Indians were to be considered as occupants, and entitled to protection in peace in that character only, and incapable of transferring their right to others, was the best one that could be adopted with safety.[26]

This view obviously held the Crown's interests to be paramount. But it did not mean that native rights were to be ignored by settlers completely. Kent noted it was considered 'expedient' for colonists to obtain the consent of the aborigines 'by fair purchase, under the sanction of the civil authorities'. In New England, Puritans:

> always negotiated with the Indian nations as distinct and independent powers; and neither the right of pre-emption, which was uniformly claimed and exercised, nor the state of dependence and pupilage under which the Indian tribes, within their territorial limits, were necessarily placed, were carried so far as to destroy the existence of the Indians as self-governing communities.[27]

Turning to British legal authorities, the opinion given by Burge, whom Gipps considered 'one of the first authorities now living' in 'all matters of colonial law', was cited in response to questions regarding the validity of land purchased from Aborigines in Australia by a settler called John Batman.[28] Burge claimed that John Batman's purchase of land was invalid. He held that, as was the situation 'between Great Britain and her own subjects, as well as the subjects of foreign states', the right to the soil was vested in the Crown. Burge claimed it to be have been a principle adopted by Great Britain, as well as by the other European states, that:

> the title which discovery conferred on the Government by whose authority or by whose subjects the discovery was made, was that of the ultimate dominion in and sovereignty over the soil, even whilst it continued in the possession of the aborigines. Vattel, B2, c18. This principle was reconciled with humanity and justice toward the aborigines, because the dominion was qualified by allowing them to retain, not only the rights of occupancy, but also a restricted power of alienating those parts of the territory which they occupied. It was essential that the power of alienation should be restricted. To have allowed them to sell their lands to the subjects of a foreign state would have been inconsistent with the right of the state, by the title of discovery to exclude all other states from the discovered country. To have allowed them to sell to her own subjects would have been inconsistent with their relation of subjects.
>
> The restriction imposed on their power of alienation consisted in the right of pre-emption of these lands by that state, and in not permitting its own subjects or foreigners

26. Gipps's speech, p 190
27. Ibid
28. Burge was an ex-Attorney-General of Jamaica. Burge's opinion was concurred with by two other prominent English lawyers: Mr Pemberton and Sir William Follett.

> to acquire a title by purchase from them without its consent. Therein consists the sovereignty of a dominion or right to the soil asserted, and exercised by the European government against the aborigines, even whilst it continued in their possession.[29]

Burge cited instances where cessions of land had been made from one sovereign to another without that sovereign being in actual possession (or occupation of the soil, as opposed to the separate right of dominion or sovereignty over the soil) of any of the ceded land. That which was 'really surrendered', it was held, was the 'sovereignty, or the exclusive right of acquiring and of controlling the acquisition by others' of lands occupied by native peoples.[30]

Opponents of the Bill (prominent among these was the land claimant speculator William Charles Wentworth) had seen a discrepancy between Normanby's acknowledgment of sovereignty and the ownership of the soil in the chiefs, in his instructions to Hobson, and the provisions of the Bill.[31] Gipps had noted that Normanby's acknowledgment had been qualified, but that even if Normanby had recognized sovereignty, and individual land title, to be held by the chiefs, he had still insisted on Her Majesty's right to confirm or disallow titles to land derived from those chiefs.[32] Gipps concluded:

> it is not independence which confers on any people the right of so disposing of the soil they occupy, as to give to individuals not of their own tribes a property in it; it is civilization which does this, and the establishment of a government capable at once of protecting the rights of individuals, and of entering into relations with foreign powers; above all it is the establishment of law, of which property is justly said to be the creature.[33]

But there appears to have been no inquiry into whether Maori society already possessed these characteristics, if such a measure should have been required. And of course, none of this reasoning was translated into Maori, and neither Gipps nor Hobson explained this to Maori specifically, so that they may represent their own interests. Settler interests were expressed in the debates, but no independent representation was made to ensure Maori interests were protected, despite the existence of a Protector of Aborigines in New Zealand at this time. Colonial officials viewed the issue to be solely between the Crown and British settlers.

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29. Gipps's speech, p 192. A further learned opinion, sought by the purchasers, confirmed that the purchase would not be valid without Crown consent, and claimed the Crown could oust the purchasers from their purchases, even if the purchases were made in a country not within the sovereignty of the Queen (see Gipps's speech, pp 193–194).
30. See Gipps's speech, p 188
31. Wentworth argued that Maori sovereignty was absolute, and pre-Treaty land sales would have to be respected by the Crown (Belgrave, pp 28–29).
32. Gipps's speech, p 196. Normanby acknowledged New Zealand to be a sovereign and independent state 'as far at least as it is possible to make that acknowledgment in favour of a people consisted of numerous and petty tribes, who possess few political relations to each other, and are incompetent to act or even to deliberate in concert'. See ch 2.
33. Gipps's speech, p 197

3.2.2 The New Zealand Land Claims Act 1840 (NSW)

Gipps's arguments, based on American and British legal opinions, held sway with the New South Wales legislature. The Bill was passed on 4 August 1840.[34]

The preamble of the Act contained some remnants of the theory expounded in the debates on the Bill. It reiterated that no individual could 'acquire a legal title to or permanent interest in' land purchased from Maori chiefs, or other individuals. And it added that any titles to New Zealand land which did not proceed from 'or are not, or shall not be allowed by, Her Majesty', were not to be recognized.[35]

Gipps remarked that the preamble was 'not absolutely necessary to the Bill'. Its object being 'principally, if not solely' to give the commission its powers of inquiry. The preamble had been added because Gipps professed that 'gross ignorance' prevailed on the subject, 'even amongst persons otherwise well informed'. He thought it essential to warn Englishmen that they may not 'set up a government for themselves wherever they like, regardless alike of the Queen's authority and of their own allegiance'.[36] Yet, despite the 'gross ignorance' which existed amongst British settlers and speculators – for whom the Act, and the preamble in particular, was intended – it did not appear to occur to Gipps that it may also be essential to explain these points to Maori, a key party whose interests were affected by the measures being taken in the Act. As noted above, Gipps saw the issue to be between the Crown and the British settlers.

The Act was indeed largely devoted to the establishment of the commission and its powers.[37] Section 2 held that claims to land which had been obtained from Maori on 'equitable terms', and which were not prejudicial to the present or prospective interests of 'such of Her Majesty's subjects as may resort to, or settle in the said islands', would be recognized by the commission.[38] This latter statement possibly changed the emphasis of the conditions for recognising settler land claims, expressed in August 1839 by Normanby. Normanby had noted the concern that speculators may have purchased land on a scale prejudicial to 'community' interests, perhaps suggesting a broader concern for both Pakeha and Maori, although he may well have meant the 'settler' community. The Act continued: the commission was to be 'guided by the real justice and good conscience' of each case, ascertaining how much had been paid, and applying the Act's second schedule which showed how many acres were to be awarded according to the amount paid to Maori for the land, the date at which it was paid (on a sliding scale), and whether the claimant was resident on the land. No grant was to exceed 2560 acres, unless specially authorised by the Governor.

Gipps stressed that the Bill sought to bestow (Pakeha) title, not to destroy it.[39] He was adamant that the Bill was not intended to give to Her Majesty any powers she did

34. New Zealand Land Bill 1840, BPP, vol 3, pp 175–177
35. Ibid
36. Gipps's speech, p 199. It is interesting to note that the Attorney-General had suggested an amendment which changed the focus from the inability of Maori to grant title to the incapacity of Englishmen to take land under such circumstances.
37. Gipps's speech, p 199
38. New Zealand Land Bill 1840, BPP, vol 3, p 175
39. Gipps's speech, p 199

not already possess; he stated that her power to disallow titles existed 'by virtue of her prerogative' and the 'principle of English law' that all landed property is derived from the Crown.[40]

3.3 THE 1840 SELECT COMMITTEE ON NEW ZEALAND AND THE ROYAL CHARTER: REFINING THE DEFINITION OF CROWN, SETTLER, AND MAORI TITLE

3.3.1 The 1840 select committee on New Zealand: the 'wastelands' argument

While Gipps was busy arguing the case for the New Zealand Land Claims Act 1840 (NSW), for British sovereignty based on discovery, and against speculators, discussions on the extent of Crown title in New Zealand were also taking place in London.

In July 1840, the New Zealand Company, dissatisfied with its position in the new colony, succeeded in stacking with its own supporters a select committee of the House of Commons, appointed to inquire into the state of affairs in New Zealand.[41] By the end of that month, immediately prior to the passing of Gipps's Bill in New South Wales, the select committee had produced its report.

The committee claimed the British Government had been unwise in treating New Zealand 'as an independent foreign state'. In doing this, it stated, the Government had in effect sanctioned the purchase of lands by individual purchasers, because:

> when the right of the natives to sell to all the world was admitted by the British Government, it followed that all persons, whether British subjects or others, had a right to buy without its sanction.[42]

The committee thought the Government had 'lost sight' of the former principle by which, following discovery and occupation, the discovering nation had 'the sole right to purchase from the natives, to establish settlements within its territory, and to regulate its relations with foreign powers'.[43] The Company saw that its interests were threatened by those of individual land speculators. It argued that its purchases had extinguished native title in favour of the Crown, and that the Crown should allow the Company to apply pre-emption on its behalf.[44]

The committee stated that 'irreparable evils' would ensue if the Crown did not become 'the sole proprietor of the whole of the soil of New Zealand'. To remedy this,

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40. Gipps's speech, p 199
41. Belgrave, p 30
42. Report of the Select Committee on New Zealand, 3 August 1840, BPP, vol 1, [582], p vii. The committee claimed that recognising such rights led to: purchases of large tracts of land by settlers for nominal considerations; boundary disputes; conflicting claims; a lack of surveys; 'no law to regulate the possession of property, its descent, or its alienation'; and the inability of the Government to use 'the most approved method of colonization, viz that of disposing of the whole of the waste lands by sale at a uniform and sufficient price'.
43. Ibid
44. Belgrave, p 29

it proposed the introduction of ex post facto legislation. This legislation was to provide that New Zealand be made independent of New South Wales. And then it was to stipulate:

> That the soil of New Zealand, or of any parts thereof, over which the sovereignty of the Crown shall have been established, should be vested solely in the Crown; and that the titles to land, of settlers, at whatever period acquired, should not be recognised as legal, unless the same shall be confirmed by, or derived from, a grant to be made in Her Majesty's name. The possessory rights of the natives to their lands should be retained in full; but the Crown should have the exclusive right of pre-emption over all such lands as they may be disposed to alienate.[45]

Significantly, the committee, in Britain, assumed that Maori did not 'own' – or hold native title over – all New Zealand land. Consequently, it also assumed that there were large amounts of what it described as 'wasteland' in New Zealand: land which the Crown would acquire by virtue of its declaration of sovereignty alone (not by purchase, as at least implied by Normanby). The 'wasteland' idea was part of a broader concept applied throughout the British Empire. Again it was sought to be applied in New Zealand without real inquiry into whether it was appropriate to do so.[46]

Three years later, in response to a question put by the then newly appointed Governor, Captain Robert FitzRoy, to the Colonial Office, James Stephen, the Permanent Under-Secretary, provided a definition of 'wasteland'. Stephen defined wasteland as '[l]and which costs the Crown nothing'. He understood such land to be the 'waste' or 'wild' or 'unsettled' lands 'of which the Queen is Proprietor in right of the Crown'.[47] But he rightly suspected that there may not be any 'waste' land in New Zealand. Those living in New Zealand knew this to be the case.

With settler lands being defined by the commission, and the Crown's demesne being determined by the 'surplus' and 'wasteland' theories, the British definition of what Maori land constituted, was to follow in the royal charter. This, together with the 'wasteland' theory, was the beginnings of an argument not finally put to rest until the late 1840s.

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45. Ibid, p ix
46. 'Waste lands of the Crown' were defined, a few years later, in section 23 of the Land Sales Act 1842 (which regulated the sale of such lands in the Australian colonies, including New Zealand) as, any lands 'which now are or shall hereafter be vested in Her Majesty ... and which have not been already granted or lawfully contracted to be granted to any Persons or Persons in Fee Simple ... and which have not been dedicated and set apart for some public Use'. Simplified, that meant wasteland was defined in 1842 as land which had not yet been granted by the Crown (and was not required for public use), (Ann Parsonson, 'Ngai Tahu Claim Wai 27 in Respect of the Otakou Tenths' ('Otakou Tenths'), (Wai 27 ROD, doc R35), p 95).
47. Parsonson, 'Otakou Tenths', pp 77–80. On British discussions about 'wastelands of the Crown' in the early 1840s, see Ann Parsonson, 'Nga Whenua Tautohetohe o Tarauaki: Land Conflict in Taranaki, 1839–59' ('Taranaki'), November 1991 (Wai 143 ROD, doc A1(A)), app 2.

3.3.2 The royal charter: Maori lands defined by the Crown

In November 1840, Lord Russell, the British Colonial Secretary, completed the royal charter which created New Zealand as an independent colony. The charter gave the Governor of the newly separated colony 'full power and authority' to grant 'waste land' belonging to the Crown to private individuals.[48] But this power and authority was given only on the condition that 'nothing within these letters patent shall affect or be construed to affect' the rights of Maori to lands 'now actually occupied or enjoyed' by them.[49] All land not 'now actually occupied or enjoyed' by Maori was to be considered vested in the Crown, as 'wasteland', by virtue of its sovereignty. Again there appears to have been no inquiry into whether the theoretical position regarding the extent of aboriginal land rights should be applied to Maori in New Zealand. The Crown did not discuss the concept with Maori representatives.

Gipps's New Zealand Land Claims Act 1840 (NSW) was now no longer in force in New Zealand.[50] He had, however, appointed commissioners who had arrived in New Zealand in early 1841, and awaited Hobson's instructions. Lord Russell's concern turned to the 'absolute necessity' of a land claims commission ascertaining, and the law determining, what lands were private and what were public property. He instructed Hobson to replace Gipps's legislation with a local land claims ordinance, and:

> When the demesne of the Crown shall thus have been clearly separated from the lands of private persons, and from those still retained by the aborigines, the sale and settlement of that demesne will proceed according to the rules laid down in the accompanying instructions . . .[51]

Like the 1840 select committee, the British Colonial Secretary, Russell, assumed that not only could land be bought cheaply from Maori and sold at a profit for British settlement, but 'wasteland' could be claimed by virtue of British sovereignty and sold at a profit for settlement as well.

Russell provided additional instructions regarding the identification of Maori land in January 1841. Maori land was to be 'defined with all practicable and necessary precision on the general maps and surveys of the colony'. The Surveyor-General was to identify, out of all land purchased by the Crown, 'what particular tract of land it would be desirable that the natives should permanently retain for their own use and occupation'. Those reports were to be referred to the Protector of Aborigines, and 'the lands indicated in them, or pointed out by the protector as essential to the well being of the natives' were to be regarded as inalienable 'even in favour of the local

48. Charter, 16 November 1840, encl 1 in Russell to Hobson, 9 December 1840, BPP, vol 3, p 154
49. Ibid, pp 153–155; see also BPP, vol 3, pp 450–452
50. Russell had instructed Gipps in November 1840 to defer the execution of any powers given to him by the New South Wales Act because, to ensure that the greatest possible accuracy and impartiality, he thought to send a commissioner from England (Russell to Gipps, 21 November 1840, BPP, vol 3, pp 142–143). Following the decision to separate New Zealand from New South Wales, Gipps was informed that the Bill should be disallowed (Russell to Gipps, 31 December 1840, BPP, vol 3, p 175).
51. Russell to Hobson, 9 December 1840, BPP, vol 3, p 152; Hobson to Principal Secretary of State for Colonies, 27 July 1841, BPP, vol 3, p 464

government', once the Governor ratified and approved the surveyor's reports, and Protector's suggestions.[52]

Although it is unclear how much of the tenor of Lord Russell's January 1841 instructions was expressed to Maori, the charter (stipulating that the rights of Maori to lands 'now actually occupied or enjoyed' by them were not to be affected) was publicly read and proclaimed in New Zealand (presumably at Kororareka) on 3 May 1841 'in the presence of the civil and military officers of this government and a large concourse of Europeans and New Zealanders'. Depending on the Crown's contemporary interpretation of lands occupied and 'enjoyed', it appears to have unilaterally altered and restricted article 2 guarantees. A proclamation announcing the separation of New Zealand from to New South Wales was also published.[53]

3.3.3 The theory applied to 'surplus' lands: the further identification of the Crown's demesne

In the meantime Gipps, in New South Wales, had laid down a general rule regarding land not granted to the pre-1840 land purchasers, which had allowed the further diminution of land held by the tribes, independent of its limitation to that required for Maori 'use and occupation' or that 'essential to their well-being' (to be defined by the Protector of Aborigines, George Clarke). Of course, while Gipps acknowledged Maori to be akin to 'minors' or 'wards of chancery' in his arguments in favour of the land claims Bill, he fully acknowledged their ability to have extinguished their title to the land transacted prior to British annexation. He instructed Hobson, in November 1840, that:

> In every case in which the chiefs admit the sale of land to individuals, the title of such chiefs to such lands are of course to be considered as extinct whether or not the whole or any portion of the land be confirmed to the purchasers or pretended purchasers. Should it appear in any case that lands have been obtained for an insufficient consideration, it will be proper and necessary for you, in concert with the official Protector of Aborigines, to award to them some further compensation.[54]

The concept of making additional payments to ensure that the consideration given for the land was 'sufficient' was one which the Crown soon allowed the New Zealand Company to adopt. This approach is referred to below, in the case of the New Zealand Company, as the recognition of a 'partial sale' – although the native title to all of the land was deemed to have been extinguished.

In September 1842, a notice to land claimants, published in the English *Gazette*, explained to settlers what was to happen to the 'surplus' land:

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52. Russell to Hobson, 28 January 1841, BPP, vol 3, p 174
53. Hobson to Secretary of State for Colonies, 26 May 1841, BPP, pp 450–451; see also Russell to Hobson, 9 December 1840, BPP, vol 3, p 152
54. David Armstrong, 'The Land Claims Commission: Practice and Procedure, 1840–1856' (Wai 45 ROD, doc 14), pp 20–21 cites Gipps to Hobson, 30 November 1840, in NSW micro-z 2710, 4/1651, pp 20–30 NA Wellington; see also Duncan Moore, 'The Origins of the Crown's Demesne at Port Nicholson, 1839–1846', report commissioned by the claimants, August 1995 (Wai 145 ROD, doc E3), p 68.

> The Crown Grants will convey the number of acres to which the Claimant shall have been found entitled. Should the boundaries marked out by the Contract Surveyor at any time be found to contain a greater quantity of land than shall be contained in the Deed of Grant, the excess will be resumed. The particular portion of the land to be resumed, will be selected at the discretion of the Surveyor-General.[55]

As the Surplus Lands Commission of 1948 (the Myers commission) noted, the 'excess' meant 'surplus' land, and 'will be resumed' meant 'resumption by the Crown'.[56]

At that time, the land claims commissioners had just recommended that of the original 192,000 acres claimed, only 42,000 acres be granted to the Pakeha claimants. At an Executive Council meeting, where this recommendation was noted, the Surveyor-General declared that the remaining 150,000 acres would 'consequently remain the demesne lands of the Crown'.[57]

3.4 THE LAND CLAIMS ORDINANCE 1841: ABORIGINAL TITLE ARGUMENTS APPLIED TO LEASING

Few changes were made by the New Zealand legislature to Gipps's 1840 (NSW) Act. But one key change was particularly important in further restricting Maori options regarding their land. The New Zealand Land Claims Ordinance 1841 (which Lord Russell had instructed Hobson should replace Gipps's New Zealand Land Claims Act) added that all 'leases or pretended leases' not allowed by the Crown were also to be deemed null and void.[58] The Crown sought to control all land administration. It did not wish to limit Crown control to land sales.

Hobson had complained to Gipps in October 1840 about the 'practice of taking land on fictitious leases from natives for long terms', particularly in the Thames district. The lessees had claimed Gipps's Act did not prohibit leasehold tenure 'in express terms'.[59] Gipps had then recommended that as long as the Colonial Office sanctioned the principle underlying the New South Wales Act, then a similar law, based on the same principle, could specifically prohibit leases. The theory behind pre-emption would be the theory to justify prohibition of leasing. That is:

> that uncivilised tribes, not having an individual right of property in the soil, but only a right analogous to that of commonage, cannot, by either sale or lease, impart to others

55. M Myers CJ, 'Memorandum by the Chairman' in the 'Report of the Royal Commission to Inquire into and Report on Claims Preferred by Members of the Maori Race Touching Certain Lands Known as Surplus Lands of the Crown', AJHR, 1948, G-8, p 48, para 44. See also the Colonial Office decision regarding surplus lands in June 1843 (see Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830-1847*, Auckland, Auckland University Press and Oxford University Press, 1977, p 192).
56. Myers, AJHR, 1948, G-8, p 48, para 44; see also Waitangi Tribunal, *The Muriwhenua Land Report 1997*, Wellington, GP Publications, 1997, pp 174-175
57. Myers, AJHR, 1948, G-8, pp 57-58, para 73
58. Hobson to Principal Secretary of State for Colonies, 27 July 1841, BPP, vol 3, p 465
59. Hobson to Gipps, 25 October 1840, encl 1 in Gipps to Russell, 5 March 1841, BPP, vol 3, p 438

> an individual interest in it, or, in any [other?] words, that they cannot give to others that which they do not themselves possess.[60]

This provided a further restriction to Maori rangatiratanga; one not discussed in the Treaty negotiations.

Hobson's original title for the New Zealand Bill, 'to declare certain lands part of the Domain of the Crown of Great Britain', perhaps more clearly identified the land claims legislation's focus on the establishment of Crown lands. But the original title was changed when it was successfully moved by the Colonial Treasurer, on the second reading of the Bill, that it be replaced. The Bill's title became more obtuse: 'to declare all other titles, except those allowed by the Crown, null and void'.[61]

Section 2 maintained the focus on definition of the Crown's domain. It held that 'to remove certain doubts which have arisen in respect of titles to Land in New Zealand':

> all unappropriated lands within the said colony of New Zealand, subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants of the said colony, are and remain Crown or domain lands of Her Majesty, Her heirs and successors, and that the sole and absolute right of pre-emption from the said aboriginal inhabitants vests in and can only be exercised by Her said Majesty, Her heirs and successors . . .[62]

The Legislative Council passed the New Zealand Land Claims Ordinance on 9 June 1841. It gave a new version of the limited view of the extent of Maori land ownership evident in the royal charter – from lands 'now actually occupied or enjoyed', to lands 'rightfully and necessarily occupied and used' by Maori.[63] This ordinance does not appear to have been translated into Maori. It is unlikely to have been publicly read and proclaimed, as the royal charter had been. But, like the royal charter, it also unilaterally added a further restriction – in the nature and extent of Maori land ownership – to the broad guarantee of Maori land rights given in article 2 of the Treaty.

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60. Gipps to Hobson, 6 March 1841 in Gipps to Russell, 5 March 1841, BPP, vol 3, p 439. Russell received copies of Hobson and Gipps's correspondence in late July 1841, and on 3 August 1841 instructed Hobson to introduce an Act declaring leases from natives, and every other alienation of their lands, invalid since the proclamation of Crown sovereignty (Russell to Hobson, 3 August 1841, BPP, vol 3, p 440). See also Armstrong, pp 19–20, 85.
61. Ordinance no 2, 9 June 1841, BPP, vol 3, p 276
62. Amendment to the Legislative Council minutes, 1 June 1841 (see Wai 145 ROD, doc E6, pp 97B–97D); Ordinance no 2, 9 June 1841, BPP, vol 3, p 276. Royal confirmation came on 18 March 1842 (Stanley to Hobson, 18 March 1842, BPP, vol 3, p 476).
63. It repealed the New South Wales Act, terminated the commission issued under it, and authorised the Governor of New Zealand to appoint commissioners to examine and report on land claims (BPP, vol 3, pp 275–281). An ordinance dated 3 June 1841 had extended the laws of New South Wales to be in force in New Zealand 'as far as they can be made applicable, from and subsequent to the date of HM's Royal Charter and letters patent, creating New Zealand into a separate colony' (BPP, vol 3, pp 273–274).

3.5 NEW ZEALAND COMPANY CLAIMS AND HOBSON'S 'FOREGOING OF PRE-EMPTION' IN THE COMPANY'S FAVOUR: THE CROWN'S DEFINITION OF THE NEW ZEALAND COMPANY'S TITLE

The New Zealand Company, which sent the *Tory* to New Zealand in haste in mid-1839, claimed to have purchased large areas of New Zealand land prior to 1840. The Company, like other purchasers of land prior to the January 1840 proclamations, initially argued that Maori owned every inch of New Zealand. It reasoned that recognition of Maori ownership would validate its claim to land purchased from sovereign chiefs. But, as Peter Adams has noted, and as is illustrated above, the Colonial Office rejected this.[64] Russell claimed that Maori 'owned' only that land they 'occupied'.

Finally, in October 1840, having failed to reach an agreement with the Crown on its claims, the New Zealand Company's Governor, Somes, requested from Lord Russell the terms on which he 'would be disposed to sanction our corporate existence, to determine our present claims, and to regulate our future operations'.[65] Russell replied with a draft agreement, specifically for the Company, in November 1840. The Company accepted it immediately.[66] Again Maori were not seen to be a necessary party to this agreement.

The November 1840 agreement between the Company and the Colonial Office was that the Company would receive four acres of New Zealand land for every £1 it had spent in connection with the colonisation of New Zealand. This included money spent on emigration, surveys, establishment, and the like. In return, the Company relinquished the full extent of its 20-million-acre claim. The Company would get a grant, and the Crown would claim, and have the power to grant, a large amount of the remaining land. As noted above, Russell believed Maori could not claim the lands not in actual occupation or use by them. He noted to Somes, in December 1840 that the basis for the land claims inquiry 'will be the assertion on behalf of the Crown of a title to all lands' which the chiefs had sold 'in return for some adequate consideration'.[67] By coming to this arrangement, the parties to it anticipated that colonisation and settlement of New Zealand would not be hindered.

While Russell had approved the 'general provisions' of Gipps's land claims Act, he informed Hobson, in April 1841, that the arrangement with the New Zealand Company would 'forbid the application of the Act, in its present form, to the case of the lands to be granted to them'.[68] The Land Claims Ordinance 1841 closely resembled the form of Gipps's Act. A new arrangement needed to be worked out on the ground for the New Zealand Company.

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64. Adams, pp 181–182
65. Somes to Russell, 22 October 1840, in *New Zealand Company, Documents appended to the Twelfth Report of the Directors of the New Zealand Company April 26, 1844*, (the *Twelfth Report*), London, Palmer and Clayton, 1844, vol 1, app C, p 4C (see Wai 145 ROD, doc A28, p 85)
66. Vernon Smith to Somes, 18 November 1840, in *Twelfth Report*, vol 1, app C, pp 5C–10C (see Wai 145 ROD, doc A28, pp 85–88)
67. Moore, pp 71, 73, cites Russell to Somes, 29 June 1844, NZC 1/3/13, NA Wellington; see also Adams, p 181
68. Russell to Hobson, 16 April 1841, BPP, vol 3, p 182; see also Stanley to Hobson 19 December 1842, in *Twelfth Report*, vol 2, app 1, p 88(1)–95(1) (see Wai 145 ROD, doc A29, pp 632–634).

This was done when Governor Hobson visited Port Nicholson in August to September 1841 – despite local Maori requests and expectations that he would instead protect them from the encroachments of the New Zealand Company (see below).[69] In Colonel Wakefield's report of his initial meeting with Hobson, he noted that Hobson 'positively refused to look upon the native title as fairly extinguished by reason of the advantage secured to the aborigines by their reserved lands, and the introduction of civilization amongst them'. Wakefield explained that while Hobson took this view in consequence of the Treaty, from which he was not willing to depart, he was 'willing to deal with any land that has been alienated by the natives (no matter to whom), as the property of the Crown'.[70] Hobson suggested that Wakefield submit a written proposal to bring into effect the November agreement and settle the claims of those who had purchased land from the Company.

Wakefield subsequently proposed that Hobson should guarantee to those who had purchased land from the Company 'a sure and indefeasible title to all such lands as have been surveyed, or may be surveyed, for the purpose of satisfying their claims'. If it was found that the lands were not validly purchased, full compensation was to be made 'to the natives or the previous purchaser' by the Company. In the case of the former, compensation was 'to be decided by the native protector and an agent of the Company or in case of difference, by an umpire named by them'. The New Zealand Company, he stated, would not interfere with pa 'actually occupied by the natives' or with 'any place held sacred by them on religious grounds, or with any land hitherto unsold by the natives, and which they absolutely refuse to dispose of'.[71] His proposal, and Hobson's actions to follow, did not extend to disallowing the Company purchases if they were found to be invalid, or to allowing those Maori who had not sold, or did not wish to sell, to veto a 'sale'.

Hobson then drafted a proclamation which stressed that 'all unappropriated lands within the colony of New Zealand, subject to the right thereto of the aboriginal inhabitants, are Crown lands', and that the 'sole and absolute' right of pre-emption vested in the Crown, as defined in the 1841 Land Claims Ordinance. It repeated that all titles to land not allowed by Her Majesty were 'absolutely null and void'. The proclamation continued: to prevent further impairment and impediment to agriculture and commerce (in light of the considerable time it would take before the validity of the Company's claims could finally be decided), and to relieve the New Zealand Company colonists from sustaining 'great loss and inconvenience', 'so far as the same may arise from the right of pre-emption vested in the Crown', the Governor would:

69. Chief Protector's Report of a Visit to Port Nicholson, encl 1 in Hobson to Principal Secretary of State for Colonies, 13 November 1841, BPP, vol 3, pp 521–522
70. Wakefield to New Zealand Company Secretary, 11 September 1841, in *Twelfth Report*, vol 2, app E, p 4E (see Wai 145 ROD, doc A29, p 306)
71. Wakefield to Hobson, 24 August 1841, in *Twelfth Report*, vol 2, app E, p 6E (see Wai 145 ROD, doc A29, p 307). Reserving pa, urupa, and land they refused to sell is similar to FitzRoy's later pre-emption waiver proclamation reserves provision.

> forego, on the part of Her Majesty, her heirs and successors, all claim to the land comprised in the schedule hereunto subjoined, which shall be found to have been validly sold by the aboriginal inhabitants.[72]

Hobson intended this proclamation to bring the November 1840 agreement into effect. He authorised the Company to validly complete the purchase of the land comprised in the schedule (the amount of which having been determined by the November agreement), within what was termed the 'Company districts'. Once title was given to these lands, a Crown grant would be issued to the New Zealand Company, reserving certain areas for Maori. The meaning of Hobson's proclamation will be discussed further below.

Wakefield objected to 'the impolicy and injustice' of the proclamation and 'particularly [to] the doubts thrown upon the titles in the preamble'.[73] Hobson withdrew the proclamation, replacing it with a short letter to Colonel Wakefield which merely acknowledged the doubt entertained regarding:

> the intentions of the Government with respect to the lands claimed by the New Zealand Company, in reference both to the right of pre-emption vested in the Crown, and to conflicting claims between the Company and other purchasers.

It announced that the Crown would 'forego its right of pre-emption to the lands comprised within the limits laid down in the accompanying schedule', and that the Company would receive a grant of 'all such lands, as may by any one have been validly purchased from the natives'. The Company was to compensate 'all previous purchasers according to a scale to be fixed by a local Ordinance'.[74] Hobson reported to the Colonial Office that he had notified Wakefield that as long as the land was validly purchased the Crown would forego its right of pre-emption over certain specified lands.[75]

The Crown's right of pre-emption is generally understood to be the sole right of the Crown to extinguish native title by purchase. But Duncan Moore, in his study of the New Zealand Company transactions, has recently suggested that the 'claim' Hobson intended to 'forego' in his initial proclamation, and his subsequent reference to foregoing the 'right of pre-emption' three days later, was essentially 'a right to complete existing partial purchases'; it was not 'any general right of first purchase'.[76] That is, Hobson intended the Company to 'complete' any incomplete purchases it had already begun, by making further payments. But it could not, as may normally be implied by foregoing the Crown's right of pre-emption, make fresh purchases.

This interpretation is confirmed by Hobson's comments six months later. In March 1842, when he heard that Wanganui Maori had objected to part with their land

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72. Proclamation, 3 September 1841, in *Twelfth Report*, vol 2, app E, p 7E (see Wai 145 ROD, doc A29, p 307)
73. Wakefield to New Zealand Company Secretary, 11 September 1841, in *Twelfth Report*, vol 2, app E, p 4E (see Wai 145 ROD, doc A29, p 306)
74. Hobson to Wakefield, 6 September 1841, in *Twelfth Report*, vol 2, app E, p 8E (see Wai 145 ROD, doc A29, p 308)
75. Hobson to Secretary of State for Colonies, 13 November 1841, BPP, vol 3, pp 523–524
76. Moore, p 96

'on any conditions', Hobson noted that having had 'a strong presumption that purchases had been loosely contracted' in September 1841 he had:

> promised to allow any defect in his [Wakefield's] engagements to be corrected by after payments, in order that the wishes of Her Majesty's Government might with greater certainty be fulfilled, and that the settlers under the auspices of the Company should not be exposed to disappointment. But I never pledged myself, as I have heard it has been asserted, to allow the purchase of any land by the Company after the [January 1840] proclamation, except to permit subsequent demands of the natives to be satisfied.[77]

As noted above, this did not extend to disallowing a 'sale', or to allowing those Maori who had not sold, or did not wish to sell, to veto a 'sale'.

As Moore notes, Hobson understood his 'foregoing' of pre-emption to work similarly to the retrospective mechanism for granting land to settlers under the Land Claims Ordinance 1841 – up to a point. All claims to land purchased prior to the January 1840 proclamation were void 'insofar as they were based on their Maori vendors' customary title'. The extinguishment of native title, achieved by the old land claims, merely provided for the land to be 'vested in the Crown to do with as it pleased'. The Crown had chosen to grant lands to individual colonist land claimants where a purchase was shown to be 'valid' (or was made on equitable terms), as long as it was not 'excessive' (or contrary to community interests). Commissioners were provided a schedule (in the Company's case four acres for every £1 spent) which determined the award of land. Moore concluded:

> This gracious act of granting was probably what Hobson's draft proclamation expressed as the Crown 'foregoing' its claim to the lands validly sold. If so, then Hobson's simple intention in 'waiving pre-emption' was to substitute the Company's special 1840 agreement schedule of lands for the Ordinance's usual schedule of lands. The interest he sought to waive was the invisible intermediary interest in the Ordinance, the partial purchase (acquired when the chiefs 'admitted the sale'), the right to complete a purchase.[78]

The Crown's preferential treatment of the Company allowed the Company to claim over and above what it may have been granted based on existing transactions. Individual settlers did not have this right – although the Crown could 'award' further 'compensation' to Maori if the land had been obtained for an 'insufficient consideration', regardless of whether or not the settler received a grant for the whole or any portion of the land.[79]

The Crown had allowed the Company to complete existing partial purchases; or in Hobson's view, to 'correct' any 'defect' by making 'after payments'. Without further

77. Hobson to Stanley, 12 March 1842, BPP, vol 3, p 543
78. Moore, pp 96–97
79. Remember that Gipps instructed Hobson, in November 1840, that if it appeared in any case that surplus lands had been obtained for an insufficient consideration, it would be 'proper and necessary' for him, and Clarke, to award Maori 'some further compensation' (see Gipps to Hobson, 30 November 1840, in NSW Micro-z 2710, NA Wellington).

payments to the vendors, most of the Company claims would not have been accepted as 'valid' sales, able to be granted under the November 1840 agreement. Therefore, Hobson's foregoing of pre-emption resulted in more land, which may otherwise have passed to the Crown as 'surplus' (because native title had been extinguished), being passed to the Company instead. But that is as far as it can be linked to allowing fresh purchases to be made independently of the Crown. Hobson's foregoing of pre-emption was not a waiver of Crown pre-emption as such. His pre-emption 'arrangement' was geographically limited to lands in an accompanying schedule within what was termed the 'Company districts' (the areas the Company included in its original transactions). But when FitzRoy, and later Grey, waived pre-emption they enabled the Company to make fresh purchases.[80]

Exactly what protection of Maori interests existed within Hobson's 1841 arrangement with the Company is unclear. Paragraph 13 of the 1840 agreement had provided that the Crown would fulfil any arrangements to reserve lands for Maori benefit, which the Company had already made (for example, presumably, for 'tenths' and so on) in the Company areas; but it would make its own arrangements in the Crown's 'surplus'. That provision read:

> It being also understood that the Company have entered into engagements for the reservation of certain lands for the benefit of the natives, it is agreed that in respect of all the lands so to be granted to the Company as aforesaid, reservations of such lands shall be made for the benefit of the natives by Her Majesty's government, in fulfilment of, and according to the tenor of, such stipulations; the Government reserving to themselves, in respect of all other lands, to make such arrangements as to them shall seem just and expedient for the benefit of the natives.[81]

In addition to this, Moore has noted that it is not clear whether Hobson's September 1841 arrangement sought to enable the Company to negotiate for habitations, or to exclude these areas from negotiations. In one breath Hobson claimed to have told Wakefield that pa and cultivations were to be respected, but that Wakefield could make further payments 'for the rest'; while in another, he described giving Wakefield permission to 'enter upon any equitable arrangement for removing the native claims', by which 'the natives are guaranteed against forcible expulsion'.[82]

Ultimately, he appears to have specifically authorised Wakefield to purchase Maori pa and cultivations. Hobson informed Wakefield, in a note for his 'private guidance and information', that the local government would 'sanction any equitable arrangement you may make' to induce Maori to 'yield up possession of their habitations', if those habitations were within the limits of the accompanying schedule, but that 'no force or compulsory measure for their removal will be permitted'.[83] Wakefield's interpretation of this as an authorization allowing him 'to

80. See chs 4, 7
81. 'Agreement', encl, in Vernon Smith to Somes, 18 November 1840, in *Twelfth Report*, vol 1, app C, p 8C (see Wai 145 ROD, doc A28, p 87)
82. Hobson to Secretary of State for the Colonies, 13 November 1841, in *Twelfth Report*, vol 2, app E, pp 95E–97E (see Wai 145 ROD, doc A29, pp 351–352)
83. Hobson to Wakefield, 5 September 1841, encl 2, in Hobson to Principal Secretary of State for the Colonies, 13 November 1841, BPP, vol 3, p 525

induce the natives by any means in my power, except compulsion, to give up possession of any land they may occupy or claim', follows fairly directly from this. But, as Moore notes, in fact the Company used their selection of native reserves to set aside lands which Maori were refusing to sell.[84]

The Colonial Secretary in London had appointed William Spain, an attorney from Hampshire, as a commissioner in January 1841, independently from the other old land claims commissioners.[85] Spain's job was to inquire exclusively into the New Zealand Company claims and any non-Company counter-claims to the same lands. When he began work in May 1842, Spain found that the New Zealand Company purchases at Port Nicholson, Wanganui, and New Plymouth were hotly contested by Maori and he sympathised with their complaints. The question of who should compensate Maori for land which they had not sold, but which the New Zealand Company settlers had already occupied, then arose. The Company officials in Britain argued that the 1840 agreement had put the onus on the Crown. The Colonial Office claimed that the agreement was made on the assumption that the Company's claim was valid, and the Company should compensate Maori. The growing awareness that Maori held and asserted rights to more than merely those areas occupied and cultivated, to the 'waste' lands, made this question even more contentious.[86] Again, neither the Crown nor the Company thought of disallowing a 'sale', or allowing those Maori who had not sold, or did not wish to sell, to veto a 'sale'.

3.6 MAORI RESPONSES TO THESE DEVELOPMENTS, 1840–43

The Crown's Treaty negotiators had emphasised the protective nature of British sovereignty, particularly in relation to Maori land rights. Hobson had made assurances to Maori that 'the Queen did not want the land, but merely the sovereignty'.[87] But if Maori wished to sell, the Queen's representative would purchase it to ensure the sale was fair. All the Crown's negotiators had assured Maori that pre-emption was for their benefit. But by the end of 1840, Maori were asking questions about the British Government's intentions, again particularly with regard to their land and their freedom. They were questioning the Crown's 'heart'. A new awareness of the nature and extent of Crown sovereignty over the land and, correspondingly, the British view of what their title was not, had begun to arise. At first this was only in a very general sense, and largely dependent on information passed on to them by discontented settlers.

George Clarke, the Protector of Aborigines, visited Maori settlements in Thames and Waikato from December 1840 to January 1841.[88] At each place he visited, Maori

84. Moore, pp 102–110
85. Spain sailed for New Zealand in April 1841, arriving in Auckland in December 1841 (Rosemarie Tonks, 'William Spain', DNZB, 1990, vol 1, p 402).
86. Adams, p 182
87. Hobbs to Martin, 22 October 1847, in W Martin, *England and the New Zealanders*, Auckland, College Press, 1847, pp 73–74; Orange pp 64–65
88. Protector of Aborigines's Report of His Visit to the Thames and Waikato, encl in Gipps to Russell, 7 March 1841, BPP, vol 3, pp 441–448

asked Clarke about the British Government's intentions. Edward Shortland, who became a Protector in 1842 (see below), independently noted, in his journal, that Maori debates in the 1840s had never been greater, as a result of increased contact with Europeans and the assertion of Government authority in land questions.[89]

Some Maori had heard alarming accounts of British colonial practice in other nations. Others had previously witnessed the treatment of Aborigines in Australia and expressed a fear they would be similarly treated. The tenor of Maori concerns was that they had been warned of either an actual, imminent or impending loss of independence, power, authority, and liberty.

At Orere, on the western shores of the Hauraki Gulf, Kahukoti of Ngati Paoa had been told that in a few years all the chiefs who had signed the Treaty would lose their independence and their land. Maori of Waihopuhopu (a short distance south of Orere) were apprehensive 'as to what the governor was about to do with them and their land'. Matamata (Waikato) Maori stated that very few of them had signed the Treaty: they were not, nor would they be, 'slaves'. Self-interested Europeans had told them:

> that they were gentlemen [chiefs?] no longer; that they were prohibited from selling their land, except to the Queen, and that very soon other laws would be in operation which would make them no better than slaves; that this would not be accomplished all at once, but by degrees; that governor would succeed governor, with new regulations, until the object was accomplished: already they were called the slaves of the Queen, and were threatened with imprisonment if they, the Europeans, could not drive a good bargain with them.[90]

A few had heard of, and mentioned, Gipps's New Zealand Land Claims Bill specifically. News of the Bill had reached a Wakatewai (south of Waihopuhopu) chief, who asked Clarke: 'What has that other man on the other side of the water [Gipps] to do with us?'. They had never seen him, nor he them, nor had he visited their country, yet they had been given to understand that he and his committee (the Executive Council) were 'about taking their land from them'.[91]

Maori at Otawao (this is possibly Otawhao, a Church Missionary Society mission station at Te Awamutu) had heard Gipps was legislating for them and asked why his regulations had not been translated into Maori so that they could read and judge them for themselves. The English were not the only people interested in the laws he was making. One asserted: 'we are now a reading people; render Government acts and designs into native fairly, and then we will think for ourselves for the future'.[92]

Clarke attributed these concerns to 'incorrect' statements made about Government notices and Acts, and remarks in local newspapers made by those 'in

89. Peter Gibbons, 'The Protectorate of Aborigines, 1840–1846', MA thesis, Victoria University of Wellington, 1963, fol 114
90. Protector of Aborigines's Report of His Visit to the Thames and Waikato, encl in Gipps to Russell, 7 March 1841, BPP, vol 3, p 445
91. Ibid, p 442. Clarke thought this last comment probably meant legislating for them.
92. Protector of Aborigines's Report of His Visit to the Thames and Waikato, encl in Gipps to Russell, 7 March 1841, BPP, vol 3, p 446; Gipps to Russell, 7 March 1841, BPP, vol 3, p 441

many cases inimical to the government'. He noted that Maori were suspicious of 'why the government should keep them ignorant of their acts', and had 'repeatedly required that publicity should be given to everything done in which they are so deeply interested'. Clarke concluded that it would be 'much safer' if events were portrayed through the Government. Gipps concurred, indicating he would 'readily sanction whatever expenditure' Hobson considered necessary.[93]

As a result, from 1 January 1842, *Te Karere o Nui Tireni* (the *New Zealand Messenger*, or the Maori *Gazette*), was printed in Maori and published as a monthly periodical. Herbert Williams attributed its editing to Edward Shortland.[94] But Peter Gibbons has, more recently, attributed this task, and the writing of *Te Karere*, to other Protectorate employees. He noted that 'Clarke contributed occasional articles, but in 1842 and 1843 most of the material was prepared and edited by Thomas Forsaith, and between 1844 and 1846 by Charles Davis'.[95] Forsaith, by then a Protector, and Davis, then an interpreter, appear again below, in discussion of the pre-emption waiver purchases.

The opening paragraph of the first issue of *Te Karere* explained that the paper was 'to enlighten the Maori of the ways and laws of the Pakeha and to the Pakeha people of the ways of the people'.[96] It largely contained official Government announcements (policies and laws) affecting Maori – but it also contained a fair amount of moralizing on the value of education and on Christian beliefs.[97] Whether it was useful to Maori in explaining Crown actions is not clear.

According to Walter Brodie, *Te Karere* was well received by Maori. Brodie noted Maori would come into Auckland on the days of publication:

> One native of a party is generally selected to read the news aloud. When he takes his seat upon the ground, a circle is then formed, and after the reader has promulgated the contents, the different natives, according to their rank, stand up and argue the different points contained; which being done, they retire home, and answer the different letters by writing to the editor who is the Protector of Aborigines.[98]

Up until June 1842, 250 copies were printed with 'partial' circulation. Clarke then sought, and was granted permission, to increase the print run to 500 copies. Governor George Grey cancelled publication of *Te Karere* in January 1846 and it ceased along with the Protectorate itself in March of that year.

Despite the greater print run in its last years, there were difficulties in regularly and systematically distributing the *Gazette*. Initially, Clarke sent *Te Karere* to the missionaries for distribution at their different stations.[99] Later, when district

93. Protector of Aborigines's Report of His Visit to the Thames and Waikato, encl in Gipps to Russell, 7 March 1841, BPP, vol 3, pp 447–448; Gipps to Russell, 7 March 1841, BPP, p 441; see also Gibbons, fol 114
94. H Williams, *A Bibliography of Printed Maori to 1900*, Wellington, Dominion Museum, 1924, pp 24–25, in Parsonson, 'Otakou Tenths', p 16
95. Gibbons, fol 116
96. Translation by Te Aue Davis, February 1989, of *Te Karere o Nui Tireni*, 1 Hanuere 1842, vol 1, no 1, in Parsonson, 'Otakou Tenths', p 16
97. Gibbons, fols 117–118
98. Walter Brodie, *Remarks on the Past and Present State of New Zealand*, London, Whittaker and Co, 1845, pp 108–110
99. Gibbons, fol 116

protectors were appointed, Clarke was instructed to distribute it 'fairly' among the protectors, to enable them to further distribute it within their districts.[100] District Protector George Clarke Jr, at the time situated in the lower North and upper South Islands, reported in late 1843 that '[t]he numbers of the Maori Gazette transmitted to me, have been circulated as widely as possible, and have given great satisfaction to the natives'.[101] The *New Zealander* observed in 1845 that *Te Karere* was circulated 'far and wide among the Natives'.[102] But others noted it was not generally and extensively circulated throughout the island.[103]

But Clarke's immediate reply to the questions of Otawao Maori, in January 1841, was to reassure them that the Government was there to protect them. This did not allay Maori suspicions. One astute listener responded: 'Does he (Sir George Gipps) love us more than his own countrymen?'. His reference was directed to the Crown's acquisition of surplus land. If the Crown was to take surplus land from Pakeha, why would it not take Maori land too? Thinking it prudent not to broach the subject of purchasing land at this point, Clarke changed the subject.[104]

Clarke remarked on this five years later, in March 1846, noting that the Crown's appropriation of surplus lands had led Maori to lose confidence in the Crown. Had the Crown returned surplus land to Maori, or compensated them, he thought, 'their sense of justice would have remained unaltered'. But because the Crown appropriated those lands 'the Govt received a blow as to its integrity and justice from which it has not yet wholly recovered'. He recalled that Maori had exclaimed 'E tika ana tenei mahi a te kawanatanga[?]' – 'Is this the justice of the Govt[?]' – what confidence can we have in it?[105]

Northland Maori, also, were disturbed at the Government's decision that 'surplus' lands would revert to the Crown, which they saw as unjust. Kaitaia Maori declared that surplus lands would be resumed by the chiefs.[106] Clearly the Crown had failed to explain to Maori the theory behind its actions on this perplexing, yet vitally important, topic with which they were, as Clarke put it, 'so deeply interested'.

The lack of explanation for the Crown's actions led some Maori to leap to unnerving conclusions. Pukitea claimed that if Maori and their country had been sold to the Government, he would rather have fought and died. Clarke remarked:

> The New Zealanders are jealous of their liberty, as well as of their lands; they see them intimately connected, and they are carefully watching and comparing every

100. Parsonson, 'Otakou Tenths', p 20. Parsonson also notes that from mid-1843, the Government took steps to ensure that protectors were also supplied with copies of Acts of Council and the Government (English) *Gazette*.
101. Clarke Jr to Clarke, 30 December 1843, encl 3 in FitzRoy to Stanley, 18 December 1844, BPP, vol 4, p 457
102. *The New Zealander*, 25 October 1845
103. W Brown, *New Zealand and its Aborigines*, London, Smith, Elder and Co, 1845, p 148
104. Protector of Aborigines's Report of His Visit to the Thames and Waikato, encl in Gipps to Russell, 7 March 1841, BPP, vol 3, p 446
105. Clarke to Fox (private), 29 May 1862, OLC 6/2, NA Wellington
106. Godfrey to Colonial Secretary, 10 February 1843 encl 1 in FitzRoy to Stanley, 18 December 1844, BPP, vol 4, p 454; Kemp to Clarke, 10 February 1843, encl 2 in FitzRoy to Stanley, 18 December 1844, BPP, vol 4, p 455

public act, deducing from thence positive conclusions as to the line of conduct that will be pursued towards themselves.[107]

In September 1841, Clarke reported that he:

> generally found that one of the principal subjects of complaint, is the manner in which they have heard the British Government proposes treating them and their property ... Amongst the old chiefs (in whom there is a large share of pride and ignorance combined, and whose power to do mischief is very limited) there is a dread of degradation by submission to the Government; but amongst the younger chiefs (whose views are more enlarged and whose dispositions are more pacific) there is an inclination to rely on the integrity of the British Government; they hold inviolate the treaty, saying that the words of it *cannot* be broken. [Emphasis in original.]

Around this time these more generalised fears gained more specificity. Discontent focused on particular expressions of Crown sovereignty. Prominent amongst these was the Crown's right of pre-emption. Clarke reported:

> During the year I have made two or three important purchases of land on behalf of the Crown, which however have led to various remarks among the natives, more or less prejudicial to my duties as chief protector; they being apprehensive that their interests in connexion [sic] with this department are less studied than those of the government. On this point I have been unable fully to satisfy them, great pains having been taken by inconsiderate Europeans to show them the incompatibility of the two duties, as well as the great disproportion between the price the government gave for their lands, and the amount they realised when resold.[108]

Clarke, and later FitzRoy, continually referred to the influence of 'unprincipled Europeans, disaffected to Her Majesty's government' as a cause of Maori discontent. They downplayed the role Maori had in reacting to these matters themselves. Settlers may well have encouraged or exacerbated Maori unrest, but they could not force Maori chiefs to speak out. Clarke later reflected that the separation of his two incompatible duties (in December 1842) had come too late to provide Maori with confidence that the Government had not been acting in its own interests.[109]

At a meeting of over 100 Kororareka residents, in December 1841, Hobson was told that, in that area, no Maori gathering took place without expressions of discontent at the effect of pre-emption on land sales and trade. The petitioners warned of a Maori attempt to regain independence unless 'the badge of slavery' fixed upon them by the pre-emption clause was removed.[110]

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107. Protector of Aborigines's Report of His Visit to the Thames and Waikato, encl in Gipps to Russell, 7 March 1841, BPP, vol 3, pp 447–448
108. Chief Protector's Half-Yearly Report, 30 September 1841, encl in Hobson to Principal Secretary of State for the Colonies, 15 December 1841, BPP, vol 3, p 539–40
109. Clarke to Colonial Secretary, 30 March 1846, George Clarke, letters and journals, qMS-0468, ATL Wellington
110. Petition of 104 Kororareka residents, 15 December 1841, CO 209/14, pp 312–21, NA Wellington; see Adams, p 201. Pleas for Maori to be released from a state of semi-slavery featured constantly in *Southern Cross* editorials (for example, *Southern Cross*, 29 April 1843).

In early 1842, Hobson reported that Kaipara Maori were 'in a state of considerable excitement' and complained that:

> Even the notice in the London papers, that certain lands would be sold in New Zealand, has been construed by them into a proof that Her Majesty's Government mean to seize upon their lands; and a notice respecting Kauri timber, which I issued, and which only had reference to the unrestrained and profligate destruction, by sawyers and others, of that valuable staple, was converted into the means of exciting the most alarming apprehensions that the property of the natives would not be respected, and that the treaty was a mere farce. These ruffians have even taken advantage of the imprisonment and trial of Maketu to show that the British Government have no respect for their rights and customs, and that they will in a short time overturn them altogether.[111]

He felt he had done all in his power to 'avert this evil' by publishing *Te Karere* free of charge.

In early 1843, dispute over the Mangonui purchase led Nopera Panakareao and other chiefs of Kaitaia to declare that they would sell no more land, either to individuals or to the Government.[112] This appears to have been a reaction to Maori loss of power and authority generally. The chiefs claimed that instead they would exercise all their ancient rights and authority of every description. They would not in future allow any claims or interference on the part of the Government. They were unwilling to resolve the Mangonui dispute and vowed never again to submit to similar investigations. Commissioner Godfrey noted that:

> These and many other violent expressions seemed to proceed partly from a feeling, that not being allowed to dispose of their lands to whomsoever they pleased, as formerly, is an interference by the government with a right they are not quite convinced they surrendered to the Crown. But in my humble opinion, there are other causes of regret and discontent which we were unable to discover.[113]

Kemp, the Protector of Aborigines for the Northern District, thought he had discovered the cause. He too recorded the Kaitaia chiefs' objection to the Government assuming any authority over their possessions. While he also saw their 'disaffection towards the Government' arising from the right of pre-emption being vested in the Crown, he attributed this to its 'depriving them of a privilege they formerly enjoyed, and from [sic] the sales of which they derived a very considerable revenue'.[114]

Looking back, Clarke thought that:

> Notwithstanding the unfavorable impression made upon the minds of the Natives by the first Acts of the Local Government [the old land claims investigation and pre-

111. Hobson to Principal Secretary of State for the Colonies, 12 March 1842, BPP, vol 3, p 543
112. Report of Northern District Protector, 10 February 1843, in encl 3 in Shortland to Stanley, 15 June 1843, BPP, vol 2, app 4, p 125
113. Godfrey to Colonial Secretary, 10 February 1843 encl 1 in FitzRoy to Stanley, 18 December 1844, BPP, vol 4, p 454; see also Godfrey to Colonial Secretary, 16 February 1843, encl 5 in Shortland to Stanley, 15 June 1843, BPP, vol 2, app 4, pp 126–127
114. Kemp to Clarke, 10 February 1843, encl 2 in FitzRoy to Stanley, 18 December 1844, BPP, vol 4, p 455

> emption] if provision had been made for buying all the Land which was offered to them by the Natives and which ought to have been done in order to preserve the consistency of their own regulations, all might have proceeded quietly: but When the Natives found that the Government would neither buy themselves nor allow other persons to do so, they became very indignant and unsparing on their remarks: and evinced at once that disaffection and restlessness which are the sure precursors of Mischief.[115]

The Crown's Treaty negotiators had promised that the Crown would protect Maori interests, control the orderly settlement of British settlers, and promote commercial prosperity. The Crown's inability, or unwillingness, to purchase Maori land; the price difference between what it paid Maori for the land it did purchase, and the amount it received from Europeans for that land; and the appropriation of 'surplus' lands, put the Crown's inability, or unwillingness, to carry out its Treaty promises into question. Maori began to see pre-emption, not as a benefit to them, but as a benefit to the Crown – an expression of British sovereignty, and with it the initial understandings of what that term meant to the Crown. As Godfrey reported, pre-emption was a Crown 'interference' with a right they were 'not quite convinced' they had given up. Panakareao wanted to turn back the clock, to regain his former authority and rights, to retain the 'substance' of the land, without such Crown 'interference'.

While Northern Maori tended to see the Crown's claims as threatening the power and authority of the chiefs, those Maori whose land had been claimed by the New Zealand Company, further south, initially welcomed Crown intervention. The Company claims were far more vast and all-encompassing than most settler claims. Rangatira meeting Hobson on his August 1841 visit to Port Nicholson, Clarke discovered, had been 'anxiously awaiting' his arrival 'expecting they should be protected from the encroachments of the New Zealand Company on their lands, which they declared had never been alienated'. But as noted above, Hobson did not think of disallowing Company 'sales', or allowing that Maori who had not sold, or did not wish to sell, to veto a sale. Yet, Clarke described Port Nicholson Maori as 'clamorous and indignant about their lands, they having been given to understand that their pahs and cultivations were sold'.[116] Maori objection to Crown pre-emption appears largely to have been a northern issue. Further research is required on this point.

3.7 THE THEORY'S EFFECT ON LOCAL SETTLER AND COLONIAL ADMINISTRATION INTERESTS

In Auckland, Hobson's governorship, which had followed the above Crown theories, had been under constant criticism from settlers. Settlers saw the Crown's actions as detrimental to their interests. A large part of the problem was the inadequate funding of Hobson's administration from the start. Lack of funds had virtually paralysed it

115. Clarke to Colonial Secretary, 30 March 1846, George Clarke, letters and journals, qMS-0468, ATL Wellington

116. Chief Protector's Report of a Visit to Port Nicholson, encl 1 in Hobson to Principal Secretary of State for Colonies, 13 November 1841, BPP, vol 3, pp 521–522

during its first year of operation, and this lack of funds continued to dog Hobson until his death in September 1842.

Willoughby Shortland, who took over as Acting Governor and served in that capacity for over a year, found the situation intolerable. As Barry Rigby notes, Shortland informed those in London that 'at the heart of New Zealand's fiscal crisis' was 'imperial illusions about a potentially vast public domain'. Shortland 'argued that imperial authorities had failed to acknowledge the fundamental fiscal differences between New Zealand and Australia. While the Crown claimed a vast revenue generating domain in Australia by right of discovery, it could not repeat this performance in New Zealand'. All Crown land policies had been made assuming that Maori had 'alienated vast tracts of land and that the Crown is consequently in possession, through the land claims and other sources, of considerable disposable Demesne'. By late 1843, Shortland realised that Maori had not alienated such 'vast tracts'.[117]

The resulting financial crisis affected everyone in New Zealand. The income Maori had been accustomed to receiving from land sales dried up as the colonial administration's lack of funds affected its ability to use its pre-emptive right to purchase Maori land. Settlers, whose resources had already been worn thin, were then expected to purchase this land at a high price, and the economy continued its downward trend. The colonial administration, which had ground to a halt by the end of 1841, had two more years to wait before a new experiment in colonial land administration was launched by Governor FitzRoy – through waiving pre-emption.

117. Barry Rigby, 'Empire on the Cheap: Crown Policies and Purchases in Muriwhenua 1840–1850', report commissioned by the Waitangi Tribunal, March 1992 (Wai 45 rod, doc F8), pp 56–57

CHAPTER 4

NEGOTIATING AND MODIFYING PRE-EMPTION, 1843–44

4.1 Governor FitzRoy's Initial Questions and Instructions on Pre-emption

Captain Robert FitzRoy was appointed New Zealand's new Governor in April 1843. Neither Hobson nor Shortland had relaxed the pre-emption clause of the Treaty beyond Hobson's 'foregoing of pre-emption' in favour of the New Zealand Company. Settler hopes – in particular of those living in the capital, Auckland – were high that this would change once the new Governor arrived.[1]

In May 1843, before he left Britain, FitzRoy was already thinking about pre-emption. He was aware of the dissatisfaction the prohibition on private purchases of Maori land had been generating. Anticipating that he may need to act on the issue once in New Zealand, he sought guidance from Stanley about the possibility of waiving pre-emption 'in certain cases' under 'defined restrictions'. This question resulted in a series of opinions being given on the advisability of such a move, and on how such a venture may be regulated. Not all of these opinions were formally referred by Stanley to FitzRoy.

FitzRoy's proposal was that a cautious use of waivers to individuals or to companies, such as had already been adopted with the New Zealand Company, may solve existing and threatening difficulties. Two such difficulties came to mind: where settlers had invested capital in buildings, or other works on the land; and when Maori refused to sell land to the Government, because they were aware that the resale price would be far higher.[2] With respect to the latter point he noted that:

> Some powerful tribes are said to have already combined to refuse to sell land to the Government, and such combination is likely to be extended while the aborigines look upon the Government as opposed to their interest, seeking only its own advantage.[3]

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1. 'The Purchase of Lands from the Natives by the Government', *Southern Cross*, 16 December 1843, vol 1, no 35. See also Clarke to Colonial Secretary, 31 July 1844, encl 4 in FitzRoy to Stanley, 18 December 1844, BPP, vol 4, p 457.
2. FitzRoy would also have been aware, from accounts taken at the Treaty debates at least, that Maori had complained about settlers re-selling their land at a large profit. He would also have been aware that the Crown's representatives had heralded the practices of some private land purchasers as a reason for signing the Treaty, and obtaining Crown protection from speculators' through the imposition of pre-emption.
3. FitzRoy to Stanley, 16 May 1843, BPP, vol 2, app 13, p 388

FitzRoy proposed that companies or individuals willing to pay more than say £1 per acre to Maori owners might be permitted to buy, providing that every such transaction was authorised by the Governor and 'inquired into, witnessed and registered by a Government officer'. He believed the reason for not allowing any land to be sold to private purchasers for less than £1 an acre could be readily explained to Maori by comparing such purchases, where there was no financial input by the private purchaser into the community at large, with that of the local government or a chartered company.

A chartered company (under the same restrictions as individual purchasers with regard to the sanction, guarantee, and registry by local government) may purchase land in the same manner as the local government; but only if they guaranteed employing 75 percent of the 're-selling price' in conveying labour and capital to the colony. FitzRoy assured Stanley that if the power was so delegated 'the fullest accounts and explanations of each instance of its exercise should be transmitted to the Secretary of State for the Colonies'. He recognized that such discretionary power, if delegated to one person, 'might be very much abused'.[4]

FitzRoy knew that his proposal would tend to 'induce' Maori 'to sell to private parties, rather than the Government' and he was not averse to this. No doubt he had read of Clarke's concerns, expressed in his regular reports which were forwarded to the Colonial Office, about the conflict he felt between his duties as Protector of Aborigines with his role in purchasing land for the Crown, and the suspicions it invoked regarding whose interests the Crown was protecting. He would have known that Clarke had been relieved of his land purchase duties from 31 December 1842 as a result.[5] FitzRoy noted in the margin of his May 1843 proposal to Stanley that he did 'not think it disadvantageous' that such a scheme encouraged Maori to sell to private individuals rather than the Government.[6] His predecessor, Shortland, who was also to come up with a concept for waiving pre-emption (see below), obviously agreed.[7] Ann Parsonson has noted that, in short:

> FitzRoy was clearly hoping to distance his government from the direct process of land purchases ... and to impress on the Maori that the role of the government henceforth was to be a protective one – scrutinizing the purchases of others, to see fair play ...[8]

FitzRoy's question regarding pre-emption was only one of a number he presented to the Colonial Office. G W Hope, Stanley's parliamentary Under-Secretary, and James Stephen, Stanley's Permanent Under-Secretary, were more interested in

4. Ibid, pp 387–388
5. Connell (for Colonial Secretary) to Clarke, 25 November 1842, in H H Turton, *An Epitome of Official Documents Relative to Native Affairs in the North Island of New Zealand*, Wellington, Government Printer, 1883, C 152
6. FitzRoy to Stanley, 16 May 1843, BPP, vol 2, app 13, p 388
7. Shortland to Stanley, 30 October 1843, in Report from the Select Committee on New Zealand, 29 July 1844, BPP, vol 2, app 9, no 4, pp 340–341
8. Ann Parsonson, 'Ngai Tahu Claim Wai 27 in Respect of the Otakou Tenths' ('Otakou Tenths'), (Wai 27 ROD, doc R35), p 72

another of FitzRoy's questions – regarding surplus land.[9] It was left to the Colonial Land and Emigration Commissioners, Theodore Elliot and Edward Villiers, to address the matter of waiving the Crown's right of pre-emption. They were opposed to such a waiver.

The land and emigration commissioners reviewed most official colonial correspondence relating to land. Their job was to manage the sale of land in British colonies and promote a well regulated emigration to them.[10] The commissioners gave a number of reasons for their opinion that the right of pre-emption should be maintained. They argued that there was no sufficient practical motive for unilaterally breaking the Treaty, or going against the general precedent on which the pre-emption clause was based. This was particularly so, they continued, when the Government would be responsible for any ill-consequences to the Maori which may result from letting land speculators loose. The commissioners recommended that the Government announce its strict adherence to the Treaty. And that it be supported with the argument that because the Crown was trustee for 'various beneficial purposes', it should make more out of land sales than Maori sellers.[11] Their response is worth noting in full:

> This right is one of the Conditions of the solemn Treaty with the Natives on assuming the Sovereignty of N Zealand, a compact which it would seem undesirable to depart from unless on some very strong reason. It might possibly admit of a question whether it could be departed from, consistently with good faith. At any rate any deviation from it must greatly enhance the responsibility of Govt for any unforeseen ill-consequences to the Natives.
>
> 2ndly. This stipulation of the Treaty is believed to be in consonance with the mode of dealing with the Aboriginal owners or claimants of Lands in analogous cases in other parts of the world: it falls into a broad current of Precedent.
>
> 3rdly. The same danger – which probably prompted the condition – of the Natives' being cheated by European Purchasers, will remain, with the addition that Govt will be more or less involved in the responsibility for their proceedings. Captn FitzRoy shows that the bargain would not be ratified till payment had been actually made. But there would have been previous negotiations, and conditions which might not immediately come to light. – It may be permissible therefore, without coming under the charge of over-anxiety, to feel some fears of the effect of Government's becoming *mixed up* with any dealings of European Land-Jobbers with people from the condition of savages.
>
> 4thly. No sufficient practical motive is alleged for the change. – On the one hand as regards the Natives it would hardly remove the unwillingness at present said to have arisen on their part, to sell to the Crown, but on the contrary by the hopes it would

9. FitzRoy thought surplus land should revert to Maori. But Stanley's formal reply to his surplus land question was that if the land had been 'justly extinguished', the aboriginal sellers would have no claim, and any surplus above that awarded to the settler claimant would be vested in the Crown, 'representing and protecting the interests of the society at large'. The land would become available for sale by the Crown and settlement.

10. Fred Hitchens, *The Colonial Land and Emigration Commission*, Philadelphia, University of Pennsylvania Press, 1931, p 59

11. Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830–1847*, Auckland, Auckland University Press and Oxford University Press, 1977, pp 202–203

> excite, must be likely to do the reverse. A better remedy for this would seem to be to announce to them firmly that the Govt would abide by the terms of the Treaty on the right of pre-emption; that nothing therefore was to be gained by holding back from accepting their offers of purchase; but at the same time explaining why it was reasonable (as Ld Stanley has pointed out) that more should be obtained for Land by a Govt. which acted as Trustee for various beneficial purposes, than by Individual Sellers, in the condition of the Natives. [Emphasis in original.][12]

Yet, as Parsonson notes, these opinions were not conveyed to FitzRoy in Stanley's written replies to his proposal. She suggests it was perhaps unusual for the commissioners' opinion to be so completely ignored. The logical explanation is that Stanley did not agree with their opinion. Whatever his reasons, Parsonson concludes, Stanley chose 'not to pass on to him [FitzRoy], on paper, a set of cogent reasons from the Commissioners as to why the Crown's right of pre-emption should *not* be waived' (emphasis in original).[13] Instead, Stanley's response contained no mention of the commissioners' opinion. He appears, from his initial thoughts on the matter, to have been worried only about the price FitzRoy suggested Maori should be paid for the land.

Stanley's initial draft response clearly indicated that his concern was with the economic function of pre-emption, and with the Government's role in establishing the colony. He argued that if Maori received the whole 20 shillings, 'no portion of the purchase money would be applicable to emigration or to local objects. It would all go to the selfish private advantage'. He was quite prepared to allow Maori to sell land to individuals. But he suggested Maori receive not less than around five shillings an acre (a quarter of that proposed by FitzRoy), 'imposing at the same time the condition on the purchaser of paying to the Government for his title a balance of at least 15s pr acre, such balance to be applicable to the same purposes as money raised under the Land Sales Act'.[14]

The Land Sales Act 1842, passed in Britain in June 1842, regulated the sale of wastelands belonging to the Crown in the Australian colonies (including New Zealand). This Act was gazetted in New Zealand on 23 November 1842. Section 8 of the Act required that wastelands be sold for at least £1 per acre. Section 19 specified that the proceeds of sales of land were to be applied to the public service of the colony, one half of which money was to go towards emigration to that colony.

James Stephen then attempted a response. He drew up a reply to FitzRoy following Stanley's draft, rather than that of the commissioners, and added some suggestions of his own. Stephen proposed, for instance, that the purchaser pay one-fourth of the 20 shillings an acre 'to the use of the Aborigines to the satisfaction of the Protector'.[15]

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12. Unsigned report of Colonial Land and Emigration Commissioners, attached to FitzRoy to Stanley, 16 May 1843, marked 'recd from Mr Elliott June 23(?)/43 G W H[ope]', CO 209/24, pp 137–138B, NA Wellington
13. Parsonson, 'Otakou Tenths', pp 75, 80–81; Ann Parsonson, 'Nga Whenua Tautohetohe o Taranaki: Land Conflict in Taranaki, 1839–59' ('Taranaki'), November 1991 (Wai 143 ROD, doc A1(A)), app 3, p 203
14. Stanley, undated minute attached to FitzRoy to Stanley, 16 May 1843, CO 209/24, pp 136–136B, NA Wellington
15. Stephen, draft reply, 26 June 1843, attached to FitzRoy to Stanley, 16 May 1843, CO 209/24, p 141B, NA Wellington

Both he and Hope, who provided a further alternative draft, left the answer to FitzRoy's question vague. Stephen admitted that there may be cases where it would be 'inexpedient to adhere inflexibly to the Rule that the Crown is to be the only Purchaser from the Natives'. Hope thought it would be better for FitzRoy to wait until he actually got to New Zealand and reported back, before a decision could be made on a waiver of Crown pre-emption.

The letter, finally drafted by Hope, as Stanley's formal response to FitzRoy, was that FitzRoy's request was premature. FitzRoy was to report to Stanley and make any recommendations he felt expedient 'after inquiry on the spot'. In the event of its being advisable to waive pre-emption, FitzRoy was to keep two objects in view. Europeans were to be prevented from acquiring land from Maori at a cheaper rate than they would have encountered if they had acquired land from the Government. And if such purchases were made, a contribution should be paid by the purchaser to the emigration fund, perhaps concurrently with payment to the Maori owners. A portion of this payment, equivalent at least to the amount required under the Imperial Act, could then be devoted to emigration.[16]

Stanley had not agreed with FitzRoy's proposition, but he did not support the commissioners. He had left the answer to FitzRoy's question indefinite. As Parsonson suggests, perhaps he felt he had a better grasp of the practical difficulties facing the new Governor in respect of land purchase – that is, local dissatisfaction regarding pre-emption and the local administration's lack of adequate finance to purchase Maori land.[17] As shall be seen below, FitzRoy interpreted Stanley's response as a licence to waive pre-emption if circumstances required it.

In New Zealand, Acting Governor Shortland was, seemingly independently, also giving the matter of pre-emption some thought. After Clarke's duties as Crown land purchase agent had ceased, on 31 December 1842, a new system of Crown purchasing had been put in place. Firstly, the Surveyor-General was to recommend land for colonisation, and then, the recommendations were to be referred to the Protectorate. The Protector was to report on (a) whether Maori were disposed to sell the land, and (b) what reserves he considered it necessary to be made for their benefit.[18] If the Protectorate's approval was given, notice would be given in the Maori *Gazette* for Maori to respond to within a set period. A land purchase agent would then be sent with a surveyor to negotiate the purchase. Clarke was still to recommend purchase of disputed land.

Less than a year later, Clarke advised Shortland, in his continued role, that Maori were not only unwilling, but could not 'by any means be induced to part with their paternal possessions, which are generally the best lands, both for soil and situation, the country contains'. Not only this, but Clarke believed that little desirable land

16. Stanley to FitzRoy, 26 June 1843, BPP, vol 2, app 13, pp 389–390. Dean Cowie noted that Stanley would have assumed that FitzRoy would keep the price per acre on or above one pound an acre in observance of the Land Sales Act 1842 (D Cowie, '"To Do All The Good I Can" Robert FitzRoy: Governor of New Zealand', MA thesis, University of Auckland, 1994, fol 77).
17. Parsonson, 'Otakou Tenths', p 81
18. Connell to Clarke, 29 December 1842, Turton's *Epitome*, c 152; see also Russell to Hobson, 28 January 1841, BPP, vol 3, p 174

would be left to sell once Maori needs were met. He also argued that the Government should not buy large areas from Maori (the Crown land purchase agent was to try to buy blocks of 10,000 acres or more[19]) because he believed their 'independence' (presumably what was 'essential, or highly conducive, to their own comfort, safety or subsistence') would only be maintained by retaining their lands. Clarke concluded it would 'not only be difficult but very injurious to them to purchase large blocks of land, even if offered'.[20]

With Clarke's advice enclosed, Shortland argued in an October 1843 letter to Stanley, that by becoming a purchaser of land, the Government was 'placed in a position which tends to weaken its influence and lower its dignity in the eyes of the natives generally'. He warned that the 'high situation of Her Majesty's representative' was, because of this circumstance, 'classed in their [Maori] minds with that of any other buyer of land'. He stated that it was impossible to buy large continuous tracts of land from the Maori. He complained that it was expensive to buy small pieces as they were offered, pieces that may include inferior land useless for settlement in the foreseeable future. And he added that it was costly buying land in advance of the establishment of settlement.

These points led up to Shortland's suggestion that pre-emption may be waived in certain circumstances. But his proposal was that individuals ought to be allowed to buy 'country' lands directly from the Maori, in certain districts which the Government would proclaim from time to time. At the same time, the Government would lay out the chief towns of the district and sell the town land by auction. In his scenario, direct buyers would have to prove their title to the Government in order to gain a Crown grant. He believed the Protectorate should be separated from the control of the executive, and combined with the 'trust for native reserves', under the control of the trustees.[21] But, as Clarke later observed, Shortland 'did not feel at liberty practically to adopt the principles he recommended'.[22]

All concerned were attempting to reconcile the Crown's commitment to create British settlement in New Zealand – colonisation – with its duty to protect Maori land rights. But the problem was how the two may be reconciled, especially if the Crown had acquired no demesne land as sovereign of New Zealand, merely the right of pre-emption over Maori land, as some officials appeared to realise.

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19. Thomas Forsaith, who had been chosen in December 1842 as the Government's land purchase agent, had been instructed to try to buy land only in compact blocks of not less than 10,000 acres, to pay not more than 3d an acre for arable land – and nothing at all for unsuitable land, though it was to be purchased – and to make payment in cattle, clothes and agricultural implements with a proportion in money if the sellers insisted (Colonial Secretary to Forsaith, 29 December 1842, Outward Letterbooks, Protector of Aborigines, IA 4/271, NA Wellington).
20. Clarke to Colonial Secretary, 1 November 1843, encl in Shortland to Stanley, 30 October 1843, in Report from the Select Committee on New Zealand, 29 July 1844, BPP, vol 2, app 9, no 4, p 360. This was a view very much at odds with the subsequent history of colonial land policy.
21. Shortland to Stanley, 30 October 1843, in Report from the Select Committee on New Zealand, 29 July 1844, BPP, vol 2, app 9, no 4, pp 340–341
22. Clarke to Colonial Secretary, 30 March 1846, George Clarke, letters and journals, qMS-0468, ATL Wellington

4.2 FITZROY'S ARRIVAL AND DISCUSSIONS WITH AUCKLAND CHIEFS AND SETTLERS

When FitzRoy arrived in Auckland on 23 December 1843, pre-emption was one of the first topics he turned his attention to. On 26 December, the day of his public landing, he was met by representatives from Maori and Pakeha groups.[23] While welcoming FitzRoy in their addresses at his levee, the chiefs complained about Crown pre-emption. Chiefs Te Kawau, Tinana, and others of Ngati Whatua took the opportunity to point out that:

> [a]t the meeting of Waitangi you pledged your Government that we should be British subjects, and that our lands should be sold to the Queen. But we understand from that part of the Treaty that Her Majesty should have the first offer; but in the event of Her Majesty not being able to bargain with us we should then be allowed to bargain with any other European.[24]

Chiefs Te Wherowhero, Takewaru Kati, Epiha Putini, Tamati, and Paora of Waikato expressed similar sentiments:

> But there is another thing that makes our hearts very dark. This agreement at Waitangi said: The land was to be sold to the Queen; now, we supposed that the land was first to be offered to Her, and if Her Governor was not willing to buy, we might sell to whom we pleased; but no, it is for the Queen alone to buy; now, this is displeasing to us, for our waste lands will not be bought up by Her only, because She wants only large tracts; but the common Europeans are content with small places to sit down upon.[25]

The interpretation of the Treaty's pre-emption clause to mean that the Crown would have the first offer of land only, not the sole right to purchase, was new to the British officials. As noted above, this type of practical detail does not appear to have been discussed at the Treaty debates.

The chiefs' statements have been interpreted as identifying inconsistencies between the Crown's interpretation of articles 2 and 3 of the Treaty. Ngati Whatua chiefs argued that the Crown's concept of the pre-emption clause was inconsistent with their rights as British subjects in article 3 of the Treaty. How could Maori have all the rights of British citizenship promised in article 3 if they, but not other subjects, were restricted in the alienation of their lands? The Waikato chiefs argued that the Treaty's preservation of their chieftainship was not compatible with a surrender of their right to sell land freely. How could chiefs be so restricted?[26]

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23. Ross notes FitzRoy was met 'immediately' by Maori and Pakeha groups – no doubt meaning at the first available instance (R M Ross, 'Te Tiriti o Waitangi Texts and Translations', NZJH, vol 6, no 2, 1972, p 146).
24. 'Natives' Addresses', *Southern Cross*, 30 December 1843, vol 1, no 37
25. Ibid. These addresses were translated by Clarke (now Chief Protector) and Forsaith (a Protector) respectively. The latter point concurs with Shortland's statements (above).
26. See Ross, p 146 cf Grey to Stanley, 9 June 1846, CO 209/44, pp 56–58, NA Wellington. Clarke interpreted these addresses as merely a request for 'an extension of their privileges' (Clarke to Colonial Secretary, 31 July 1844, encl 4 in FitzRoy to Stanley, 18 December 1844, BPP, vol 4, pp 457–458). Yet waiving pre-emption was understood by the colonial land and emigration commissioners as far more than an extension of privileges (see above).

FitzRoy's verbal response clarified his personal stance on the purpose of pre-emption. It echoed the sentiments expressed at the Treaty debates. To the assembled crowd, FitzRoy replied that pre-emption had originated solely with a view to benefit Maori. But, departing from the strict terms of the Treaty, he added that 'if upon enquiry it was found to be to their disadvantage, it should be discontinued'. FitzRoy also said that he was 'happy' to tell Maori that 'their protectors were no longer to purchase any lands from them on account of Government'. They were to act as 'protectors solely'. And he reportedly went so far as to say that he 'could wish that even the Government itself should not purchase any land from the natives'.[27] (This concurs with his note in the margin of his May 1843 question to Stanley.) FitzRoy told those at his levee that waiving pre-emption could not be accomplished immediately. It 'required some time and some consideration to form the necessary arrangements'. Later in his speech, FitzRoy specifically asked Clarke to repeat that 'so great a change' would 'take some time to effect'. He also stated that '[w]ith the view of immediate and mutual benefit to the Europeans and Natives, permission would as soon as possible be given for the occupation of Natives lands by Europeans upon short leases, for which they would pay a yearly rent to the native owners'.[28]

FitzRoy's more brief written replies to the chiefs repeated his assurance: if it would benefit Maori, the chiefs' request would be granted. He emphasised that his decision would be based on consultation with Maori. He wrote that he was 'most anxious' to see Ngati Whatua enjoying 'all the rights and privileges of British subjects'. And he would 'use every proper means of effecting gradually' this object. This was to include his authorised enquiry among them with a view to 'altering the present method of selling your lands'.[29] He assured Waikato chiefs that the Queen had heard of their 'wish to sell land to Europeans *direct*, without in the first place selling them to Her Representative' (emphasis in original). He noted again his authorisation to enquire among them 'and make arrangements more pleasing to yourselves'.[30] These were the inquiries on the spot FitzRoy obviously thought Stanley had required he make first.

These accounts concur with Samuel McDonald Martin's separate record of the meeting. Martin, a land claimant of Auckland, noted that the Maori petitions for redress of their grievances, 'particularly dwelt on the injustice of preventing them from selling their land to Europeans' and that FitzRoy had replied that he hoped '[t]he liberty of selling their own lands, would be granted to them. He was required to report upon it, and if proved to their benefit the right would be conceded'.[31]

At a public meeting held the same morning, FitzRoy also received statements, similar to those received from the chiefs, from the Pakeha inhabitants of Auckland. Many had long wanted the opportunity to purchase land unhampered by the colonial administration. The auction of town allotments following the establishment of the capital at Auckland had ended unhappily for many of those who had gambled on

27. 'Levee', *Southern Cross*, 30 December 1843, vol 1, no 37
28. Ibid
29. 'Natives' Addresses', *Southern Cross*, 30 December 1843, vol 1, no 37
30. Ibid
31. Samuel McDonald Martin, *New Zealand; in a Series of Letters: Containing an Account of the Country, Both Before and Since its Occupation by the British Government*, London, Simmonds and Ward, 1845, p 184

staying. To their disgust, the long-awaited auction had been delayed in 1841. They saw the delay merely as a means used by colonial officials to beat up anticipation and competition, and thereby increase the prices received for the limited number of allotments being offered. The result they had feared had occurred – most allotments had indeed realised extraordinarily high prices. These had largely been paid by speculators, way beyond most settlers' means.[32] The prices sought in the auction of the town, suburban, and country allotments continued to be beyond their reach. This was especially so as the local economy came to a near standstill by the end of 1841. Only 5 of the 80 town and country allotments auctioned by the Crown in mid-1843 were sold.[33]

Some Auckland settlers, disgruntled with the price of land sold at the auctions, had formed an anti-official faction, commonly known as the 'Senate'. The Senate lobbied against pre-emption, and other controls imposed by the officials, such as that on trade. Russell Stone, who wrote a biography on one of Auckland's more prominent settlers (and Senate member) John Logan Campbell, noted that the Senate believed:

> cheap and abundant land must be made freely available. The Crown should abandon its policy of keeping up the price by releasing only, as Campbell put it, 'miserable quantities'. In fact it should withdraw from the land market completely: the Crown preemption should be waived and Maoris [sic] allowed to sell directly to European buyers. 'Free Trade' in land should be accompanied by Free Trade in fiscal matters; customs duties should be abolished as serving no purpose beyond maintaining a top-heavy colonial bureaucracy in Auckland. The group also pressed for the early introduction of representative institutions.[34]

These policies were argued and expounded in the local papers. In January 1842, one of the most prominent of the Senate's sympathisers, Martin, became editor of the local newspaper, the *New Zealand Herald and Auckland Gazette*, until it was closed down in March 1842. In April 1843, he and another Senate leader, William Brown (Campbell's business partner), launched the *Southern Cross*, the 'undisguised mouthpiece of the Auckland Senate', which they used to argue their cause.[35] This paper was to continue to be a major mouthpiece of settler self-interest until the 1870s.

The address made by Auckland settlers now, on FitzRoy's arrival, was read out by the chairman, Martin, on behalf of the 60 or so people present.[36] It dealt with many matters – among them the purchase of Maori land. To justify their wish for direct purchase, the settlers argued that Maori were not being given their full rights as British subjects – more specifically, the power to sell their land to whomsoever they chose. But they added an extra caution, to push their goal along. They surmised that unless Maori were given those rights, settler lives and property would not be secure.[37]

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32. R C J Stone, *Young Logan Campbell*, Auckland, Auckland University Press, 1982, pp 50, 87, 91–93
33. Stone, pp 101, 105, 113
34. Ibid, p 103
35. Ibid, pp 104–105, 114
36. Parsonson, 'Otakou Tenths', p 13
37. Samuel McDonald Martin, chairman, 'Address from the Inhabitants of Anckland to Governor FitzRoy', 26 December 1843, encl 1 in FitzRoy to Stanley, 14 July 1844, BPP, vol 4 p 238

Nothing would affect the interests of the colony more powerfully, they argued, than 'the proper adjustment' of their interaction with Maori. Providing Maori with this right would 'ensure their good will and friendship; without which, we do not hesitate to express our conviction that this colony can never prosper'.[38] They continued:

> Our relations with the Natives we believe can never be placed upon a secure basis until their full rights as British subjects are conceded to them – more particularly the power of selling their land to whom they please – a power which they ardently desire to possess, and which their intelligence as well as their natural right gives them the strongest claim to enjoy. The sudden deprivation of this right has already caused them great hardship and injustice, and we therefore hope to see it restored to them while it is yet a matter of choice rather than a matter of necessity with the Government. The principle of Government becoming traders in the buying [of] land from the Natives at the least possible price, and reselling it to the Europeans at the very highest price – seems highly objectionable in any case; but is particularly so here, where the Natives have so frequent disputes as to the rightful ownership of the land. If the Government is the purchaser, who can be the umpire between the claimants?[39]

Others asked why it was acceptable for the Government to 'cheat' Maori into accepting 'ridiculously low' prices for their land in the name of protection, whereas if settlers did the same it would be labelled exploitation.[40]

FitzRoy's assurances to the settlers again pointed to his perception of pre-emption being for Maori protection. He explained to Pakeha Aucklanders that:

> No one is more desirous than I am myself, that the Natives of New Zealand should enjoy the full rights of British subjects, as soon as they are sufficiently advanced in civilization.
>
> The power of selling their land to whom they please, was withheld from them by the Crown for their own benefit. I am authorized to prepare for other arrangements more suitable to their improved, and daily improving condition.[41]

The idea that Maori were to enjoy the full rights of British subjects 'as soon as they are sufficiently advanced in civilization' was a qualification which was not spelt out to Maori at the Treaty debates. Nor was it a condition of article 3 of the Treaty. It was, however, a fundamental principle underlying the contemporary humanitarian movement.[42]

All these statements might have indicated to the settlers that what FitzRoy envisaged was a modification of the existing system, allowing for a limited right in some cases, rather than an immediate and complete change in policy. Maori were not

38. 'Address', *Southern Cross*, 6 January 1844, vol 1, no 38
39. Martin, 'Address from the Inhabitants of Auckland', p 238
40. See Walter Brodie, *Remarks on the Past and Present State of New Zealand*, London, Whittaker and Co, 1845, p 70
41. 'Address', *Southern Cross*, 6 January 1844, vol 1, no 38. See also FitzRoy to 'S McD Martin and the other gentlemen of the Deputation from the Inhabitants of Auckland', 30 December 1843, encl 2 in FitzRoy to Stanley, 14 July 1844, BPP, vol 4, p 240 (see also FitzRoy to Stanley, 16 May 1843, BPP, vol 2, app 13, pp 387–389).
42. Perhaps FitzRoy considered that 'civilization' would 'raise' Maori from being considered as 'minors'.

going to be able to sell to Pakeha without the fetters of a protective government attached.

But Auckland settlers were able to conclude from what FitzRoy had said that they might soon be allowed to make direct purchases. FitzRoy's address to the chiefs was hailed enthusiastically by the *Southern Cross* as having done 'more to advance the interests of this Colony, to inspire confidence in the people, to allay the fears and apprehensions of the Natives, to generate friendly and a generously sympathising feeling between the two races, and to raise the character of our Government in the estimation of both', than the previous four years of government![43] Aucklanders rejoiced that the Government was to act as 'Umpire ... for the purpose of Justice solely' and had 'abandoned' its claim to the 'Lion's share'. Reporting specifically on the new Governor's statements on pre-emption, probably attempting to force his hand, the *Southern Cross* eagerly stated: 'there is every prospect that before long the Aborigines of this country shall receive the fullest rights and privileges of British subjects in being permitted to sell their lands to whom they please'.[44]

FitzRoy used the settlers' arguments in his subsequent report to Stanley. He explained that on and following his arrival, Maori had been:

> clamorous to sell their lands. They called on the Government to buy, or let others buy; and great discontent has been caused among them by the inability of the Government to do either. But while they called on the Government to buy from them, it was at a price wholly out of the question. They said: 'Let the Government give us as much as it receives from others, or let them buy from us. By the Treaty of Waitangi, we agreed to let the Queen have the first choice (the refusal) of our lands, but we never thought that we should be prevented from selling to others if the Queen would not buy. Is it just to us that you will neither buy at a fair price, nor let others buy, who will give us as large a price as they give to you, after you have bought from us for a trifle?'[45]

The Government, he wrote, was:

> unable to buy land for two most cogent reasons, – one the exorbitant demands of the natives, and the other, having neither money nor credit; beset daily by the importunate demands of powerful tribes'.[46]

As to the need for urgency, FitzRoy, like his predecessor, Shortland, described the situation as critical. He claimed to be apprehensive that unless pre-emption was not waived immediately the character of the Government would be 'irretrievably injured in the native estimation'. He postulated that 'open opposition to authority' would otherwise result, and the Crown's 'moral influence, by which alone we stand firmly in New Zealand' would be lost. (He appears to have not altered this view in February 1846, when he wrote *Remarks on New Zealand.*) In recognition that he had acted

43. 'Arrival of His Excellency Captain FitzRoy', *Southern Cross*, 30 December 1843, vol 1, no 37
44. Ibid
45. FitzRoy to Stanley, 15 April 1844, BPP, vol 4, pp 178–179. These arguments impressed FitzRoy, although he attributed their origin yet again to dissatisfied Pakeha.
46. Ibid

before formal authorisation had been given, he concluded: 'to that decision I found myself obliged to come without waiting for your Lordship's express sanction'.[47]

FitzRoy's views, although perhaps exaggerated, were a recognition also that his colony still depended on Maori goodwill. As Belich puts it, Maori still held 'the capacity for effective resistance, or for cooperation that was sufficiently important to Pakeha to be valued by them'.[48] Auckland settlers had an effective role in informing and influencing Maori opinions. FitzRoy's fears of Maori revolt were very much linked with settler dissatisfaction. But he, and Clarke, tended to underestimate Maori abilities to discriminate between matters which truly concerned them, and matters which concerned settlers alone.

Maori capacity for resistance was also evident in the south.[49] Tensions, relating this time to the lack of Government control of New Zealand Company land dealings with Maori, soon reached breaking point in the northern South Island. In June 1843, Wairau Maori responded to the incursions of the Company with force, and deaths on both sides resulted. Other New Zealand Company settlements were similarly marked by interracial tension. At Port Nicholson, FitzRoy was soon to report 'a virulent animosity between the races, which, if not effectively checked and eventually removed, would defeat all hopes of successfully colonizing New Zealand in a peaceful and legitimate manner'.[50]

FitzRoy had found northern Maori opposed to pre-emption and wanting to sell to individual Pakeha at market prices. He had also found a colonial administration completely lacking in funds to buy Maori land at market prices, settlers everywhere clamorous to buy land or be confirmed in their ownership of pre-1840 purchases, and a country in uncertainty over the security of title to land. Moreover, there was fear, confusion, anger, and resentment on both Maori and settler sides over the New Zealand Company dealings to the south, particularly following the altercation at Wairau in June 1843.

4.3 FITZROY'S NEW ZEALAND COMPANY PRE-EMPTION WAIVERS

In mid-January 1844, having provided assurances to Auckland Maori and settlers that he was authorised to make arrangements more suitable to Maori, FitzRoy left Auckland for Wellington. He hoped to calm the mounting tensions caused by the unsettled New Zealand Company claims there, and by the Wairau affray.

On 27 February 1844, after assessing the Company's position in Wellington, in light of the fact that its settlers had already left Britain, and the fact that the Government now had neither the time nor the funds to purchase land before their

47. Ibid. He repeated these views in his subsequent book *Remarks on New Zealand*, Dunedin, Hocken Library, reprint/facsimile no 10, 1969, pp 17–24; see also Lefevre and Wood to Stephen, 19 November 1844, CO 209/40, pp 255–256, NA Wellington.

48. James Belich, *Making Peoples: a History of New Zealanders From Polynesian Settlement to the End of the Nineteenth Century*, Auckland, Allen Lane and the Penguin Press, 1996, pp 192–193

49. Belich, p 205

50. FitzRoy to Stanley, 15 April 1844, BPP, vol 4, p 172

arrival, FitzRoy adopted the only course which appeared practicable to him. He waived the Crown's right of pre-emption over 150,000 acres of land for a proposed Scottish settlement in 'New Munster' (the South Island). The land was to be selected by the Company's agent, Colonel William Wakefield, 'under the superintendence and with the assistance of the most efficient Government officer' available: John Jermyn Symonds.[51]

FitzRoy trusted that Wakefield's bitter experience and difficulty in effecting valid purchases of large areas of New Zealand land, and his 'acquaintance with the native habits and customs', would ensure a bona fide purchase would now be made under his direction. Wakefield's 'direction' was given to Frederick Tuckett, the principal New Zealand Company surveyor at Nelson, and to Wakefield's brother, Daniel. Tuckett was appointed to select a suitable site for the settlement, and Daniel Wakefield was later sent with the purchase money, so that Tuckett could make the Otakou purchase.[52] FitzRoy saw the appointment of Symonds, to superintend the whole transaction, merely as a check on any 'unadvisable proceedings of over-hasty arrangements'.

The Company settlement did not have the more particular conditions of the 10-shillings-an-acre general waiver to follow. The Ngai Tahu Tribunal has noted that this waiver was in the absence of any reference to tenths or provision of other reserves.[53] But FitzRoy gave a few guidelines to Symonds. No encroachment on, or infringement of, existing rights or claims 'whether native or other' would be tolerated unless clearly sanctioned by the possessor. Symonds was to assure Maori that he would make sure that the purchases of lands they wished to sell were 'honest, equitable and in every way irreproachable'. Symonds was also to inform existing New Munster settlers that they were to be:

> most carefully and kindly dealt with by Government, under existing regulations, or by a special act of grace, such as by waiving the Crown's right of pre-emption in their favour to a reasonable extent.

Interestingly, the instruction that Symonds was to inform these settlers that even they too might be granted a waiver of the Crown's right of pre-emption 'to a reasonable extent', was given with no further guidelines.[54] It was apparently left up to Symonds to decide as he saw fit.

Symonds was not a designated Protector (although he had been a sub-Protector at one time). In the *Ngai Tahu Report*, the Tribunal noted that these instructions gave Symonds obligations to both the Company (to assist it to make a valid purchase) and to Maori (to ensure Maori owners wished to sell and that proceedings were 'honest,

51. FitzRoy to Stanley, 15 April 1844, BPP, vol 4, p 176. Symonds was described by FitzRoy as having spent several years in New Zealand, having been employed as a surveyor, then a sub-Protector of Aborigines, and was, at the time FitzRoy appointed him to superintend the Company agent, a police magistrate. FitzRoy noted that Symonds spoke Maori and had an 'irreproachable character'.
52. Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wellington, Brooker and Friend Ltd, 1991, vol 2, pp 300–304
53. Ibid, p 290
54. FitzRoy to Symonds, 27 February 1844, BPP, vol 4, p 437. For more information on Symonds instructions see Parsonson, 'Otakou Tenths', pp 45–46.

equitable and irreproachable'). The role of Protector was assigned to George Clarke Jr (the Chief Protector's son). FitzRoy only sent Clarke Jr down to the South Island in July, when it appeared the sale might be finalised.[55] The Ngai Tahu Tribunal has noted that Clarke explained the nature of the deed, and it commented that he played an active role in ensuring Ngai Tahu understood the arrangements being entered into.[56]

FitzRoy gave a further waiver of the Crown's right of pre-emption in favour of the New Zealand Company in the North Island. He instructed Commissioner Spain that he was to superintend and assist the Company's agent in purchasing not more than 150,000 acres of land in or near the Wairarapa, and of not more than 250,000 acres of land 'in other places within the limits claimed by the New Zealand Company under Mr. Pennington's award'.[57] That is, the award made under the original November 1840 agreement between the Crown and the Company, in which the Company would receive four acres of New Zealand land for every £1 it had spent in connection with the purchase of Maori land.[58] Spain was also not a designated Protector. He had a Protector, Clarke Jr, on his staff; although Clarke Jr complained (at times) about Spain disregarding his advice. FitzRoy obviously envisaged the Company dealings to be more 'responsible' than that of an individual purchaser.

These Company waivers were dependent upon the officials' reports that the purchases were valid. And the purchases were to conform with certain conditions. These were that first, all existing arrangements made with the Government with respect to the Company's settlements be strictly observed 'except as altered by the present arrangement'; secondly, land so purchased be counted in exchange for an equal number of acres claimed by, and to which a valid title can be proved by, the Company elsewhere, 'it being clearly understood, that the purchase-money in both cases referred to is to be provided by the Company'; and thirdly, the exterior boundaries and interior divisions of the land be surveyed by and at the expense of the Company.

None of these conditions specifically concerned the protection of Maori interests.[59] They did not, as the Ngai Tahu Tribunal has noted (above), require that 'tenths', or any reserves other than those which may have been required by existing arrangements (also above), be provided.[60] This was despite the New Zealand Company's earlier professed commitment to a general tenths scheme which would

55. See the *Ngai Tahu Report*, vol 2, pp 323–324. See G Clarke, *Notes on Early Life in New Zealand*, Hobart, J Walch and Sons, 1903, pp 65–67; Symonds to Richmond, 2 September 1844, BPP, vol 4, p 435; Richmond to Symonds, 2 April 1844, BPP, vol 4, p 440.
56. See the *Ngai Tahu Report*, vol 2, pp 310, 326
57. FitzRoy to Spain, 27 February 1844, BPP, vol 4, p 437
58. See ch 3
59. Hamilton to Wakefield, 27 February 1844, BPP, vol 4, p 437. Stanley presumed it was intended that lands which may be acquired were to form part of the extent of land to which the Company was entitled under Pennington's award, and that any payment which may be necessary to complete the Company's title would not become an additional claim for land, involving a subsequent inquiry as to the amount (see Stanley to FitzRoy, 30 November 1844, BPP, vol 4, pp 206–207).
60. *Ngai Tahu Report*, vol 2, pp 290–294

place Maori chiefs throughout the new settler communities.[61] Again, pressing concern for settlers' interests took precedence over protection of Maori interests.

When he received word of FitzRoy's New Zealand Company waivers, Stanley was not completely happy. But his discontent was not in relation to any infringement of Maori interests. He was concerned that these waivers gave too many privileges to the Company at the expense of the wider settlement of the colony. He stated that the Company waivers provided insufficient precautions to prevent the Company exercising its 'privilege' of purchase to the detriment of the colony at large. No limits had been placed on selection of land 'except the necessity of buying from the natives'. He feared the Company could monopolise all areas of particular value, such as those suitable for town sites, ports, mills, water-frontages, mines, military works, or other public works. He was also concerned that 'they may be tempted to purchase a large number of detached portions of land' and obstruct purchase of the land in between, thereby 'claiming' huge tracts of land for 'one large absentee proprietor'.[62] Again, his concerns were not directed at protection of Maori interests, but the general establishment of settlement.

Despite viewing this 'general right of selection' to be injurious (albeit controlled to some degree by its dependence on purchase from Maori and the Government officer's intervention), Stanley approved the New Zealand Company waivers. He did so because they had been adopted 'under the pressure of peculiar circumstances, limited in its amount, and designed to meet a specific exigency'.[63] His consideration and approval of these February 1844 New Zealand Company waivers was independent from his consideration of the 'more general and extensive' 10-shilling-an-acre waiver which was to follow a month later.[64]

4.4 FITZROY'S 10-SHILLINGS-AN-ACRE PRE-EMPTION WAIVER PROCLAMATION, MARCH 1844

FitzRoy returned to Auckland early in March 1844. There, settlers had been urged by the obstreperous *Southern Cross* to resume direct purchasing. The writer of one article had argued that such purchases would be secure because: (a) Maori had the right (not given up by the Treaty), and the might, to sell; (b) purchases were not illegal, as there was no enactment to prohibit them; (c) if they were illegal, 'the Government now appear to be satisfied of the injustice and impolicy of preventing such sales', and FitzRoy had indicated that immediate measures were likely to be taken to enable private purchasing; and (d) Maori would refuse to sell to the

61. See ch 1
62. Stanley to FitzRoy, 30 November 1844, BPP, vol 4, pp 206–207
63. Ibid. In July 1844, a purchase was made of 400,000 acres at Otago for £2400. The completion of the other intended purchases to be supervised by Spain (150,000 acres at Wairarapa and 250,000 acres elsewhere) was said to have been 'prevented' by FitzRoy's October proclamation and by the suspension of the Company's operations (see encl in Stanley to Grey, 6 July 1845, BPP, vol 4, p 578).
64. Stanley to FitzRoy, 30 November 1844, BPP, vol 4, pp 206–207; see also the *Ngai Tahu Report*, vol 2, p 297

Government, being aware they can obtain higher prices from settlers.[65] Some settlers and Maori had already entered into land transactions.[66]

FitzRoy had in fact already decided to waive pre-emption. He had informed the Legislative Council before leaving Auckland for the Cook Strait that on his return, in order to promote general prosperity, he would lay before them 'a mode by which the Crown's right of pre-emption, may in some cases be waived'.[67] In February 1844, he had also intimated to some private land claimants in Port Nicholson his intention 'at some future period, to allow the natives to dispose of their lands to private individuals upon certain conditions'.[68] And, of course, he had instructed Symonds to let New Munster settlers know that they may be granted a waiver of Crown pre-emption 'to a reasonable extent'.[69] He had also told a Nelson group that he was an advocate of free trade.[70]

FitzRoy drafted his first general pre-emption waiver proclamation on his return to Auckland. On 22 March, his 'arrangement for sanctioning the purchase of land direct from the aboriginal owners' was read to the Executive Council for its consideration.[71] The council spent two days of 'prolonged' and 'considerable' discussion and deliberation on Friday 22 and Monday 25 March before deciding it would approve the measure.[72] It was presented as part of a comprehensive approach to hasten the availability of land to settlers around Auckland specifically.

Clarke, although not a member of the Executive Council, was present and introduced at both meetings. In his thesis on the Protectorate, Peter Gibbons has suggested that Clarke may not have played a large part in the discussions leading up to the March waiver, as 'those who urged waiver upon FitzRoy were preaching to the converted'.[73] FitzRoy's questions to Stanley prior to leaving Britain had suggested this would be the case. But it should also be remembered that Clarke's views, expressed in his regular reports, and forwarded to the Colonial Office, were probably influential in FitzRoy's conclusions. FitzRoy also conducted private discussions with Clarke on his arrival in New Zealand.[74] And Clarke appears to have been instrumental in

65. 'The Prospects of this Government', *Southern Cross*, 9 March 1844, vol 1, no 47. Other *Southern Cross* articles on how pre-emption may be implemented (some again, actively encouraging its readers to enter into private land deals) had appeared both before and after FitzRoy's arrival in New Zealand. See for example *Southern Cross*, 17 June 1843, vol 1, no 9; *Southern Cross*, 16 December 1843, vol 1, no 35; *Southern Cross*, 16 March 1844, vol 1, no 48; *Southern Cross*, 30 March 1844, vol 1, no 50.
66. See chs 5–6
67. 'Legislative Council', *Southern Cross*, 13 January 1844, vol 1, no 39. The Wellington *Spectator* also published this extract from the Legislative Council, on 31 January 1844.
68. Wakefield to Secretary of the New Zealand Company, 17 April 1844, in New Zealand Company, *The Seventeenth Report of the Directors of the New Zealand Company*, London, Stewart and Murray, 1845, p 49
69. FitzRoy to Symonds, 27 February 1844, BPP, vol 4, p 437
70. FitzRoy to the Inhabitants of Nelson, 7 February 1844, *New Zealand Gazette and Spectator*, 24 February 1844
71. Minutes of the Executive Council, 22 March 1844, BPP, vol 4, pp 199, 313
72. Minutes of the Executive Council, 25 March 1844, BPP, vol 4, pp 199–200, 313–314
73. Peter Gibbons, 'The Protectorate of Aborigines, 1840–1846', MA thesis, Victoria University of Wellington, 1963, fol 39
74. Shortland to Secretary of State for Colonies, 12 January 1844, in Robert FitzRoy, papers, qMS-0794, ATL Wellington

Shortland's proposal to waive pre-emption as well. Gibbons suggests that Clarke, in whom FitzRoy placed great confidence,[75] and whose position as Chief Protector was fundamental to the discussion of pre-emption as it affected native policy, would have been key in these Executive Council discussions.[76]

The Executive Council discussions resulted in FitzRoy's first general pre-emption waiver proclamation, dated 26 March 1844.[77] The proclamation stated that FitzRoy would consent, until otherwise ordered, to waive the right of pre-emption over 'certain limited portions of land in New Zealand' on the Queen's behalf, under certain conditions.[78] It was to apply throughout New Zealand, although Stanley did not originally understand this.[79] The conditions were as follows:

- Applications were to be made in writing to the Governor for a waiver over 'a certain number of acres of land at or immediately adjoining a place distinctly specified'. The description of the land was to be done 'as accurately as may be practicable'.[80]
- The Governor's consent or refusal would then be given, 'to a certain person, or his assignee', as he judged best 'for the public welfare, rather than for the private interest of the applicant'.[81]
- FitzRoy would fully consider the 'nature of the locality; the state of the neighbouring and resident natives; their abundance or deficiency of land; their disposition towards Europeans; and [their disposition] towards Her Majesty's Government'. He would also consult the Protector of Aborigines before consenting 'in any case'.[82]
- No Crown title would be given for any pa or urupa, or land about them, 'however desirous the owners may now be to part with them'. As a 'general rule' pre-emption would not be waived over land required by Maori for their present use 'although they themselves may now be desirous that it should be alienated'.
- No waivers were to be given over land lying between 'Tamaki road and the sea to the northward' near Auckland.[83] (See fig 1.)

75. See ch 5
76. Gibbons, fol 39–41
77. Proclamation, 26 March 1844, in encl P in FitzRoy to Stanley, 15 April 1844, BPP, vol 4, p 202
78. FitzRoy later clarified that '[b]y a limited portion of land, not more than a few hundred acres is the quantity implied' (*New Zealand Gazette*, 7 December 1844, notice in encl 1 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 403).
79. See also Parsonson, 'Otakou Tenths', p 56
80. Ibid, p 57
81. FitzRoy also later explained that he had not intended the applicant to necessarily be the purchaser of the land for which a pre-emption waiver was sought; the waiver merely had the effect of opening it up to competition (*New Zealand Gazette*, 7 December 1844, notice in encl 1 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 403). See also FitzRoy's comments in his book, *Remarks on New Zealand in February 1846*, London, Hocken Library Facsimile No 10, 1969.
82. The colonial land and emigration commissioners, in assessing FitzRoy's actions (see below), noted that the Governor's decision would be based on the public welfare and that of natives, rather than that of private interests (see Lefevre and Wood to Stephen, 19 November 1844, CO 209/40, p 250, NA Wellington).
83. The reason for this condition was later explained as being so that the land be kept for Maori.

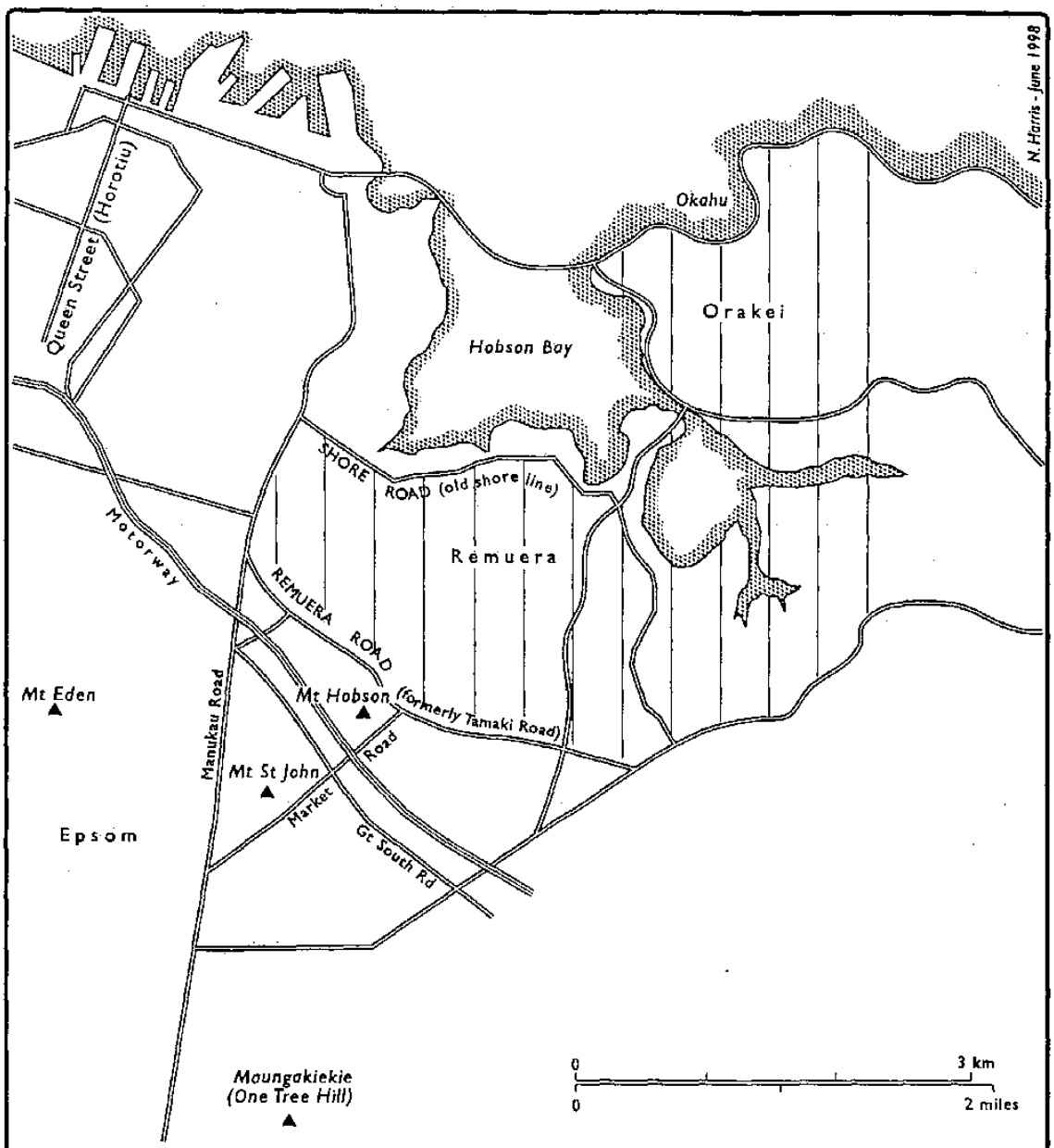

Figure 1 : Approximation of the area of land reserved from purchase in the March proclamation, lying between 'Tamaki road and the sea to the northward'

- Of all land purchased under a waiver, 'one-tenth part, of fair average value, as to position and quality' was to be conveyed by the purchaser to the Queen 'for public purposes, especially the future benefit of the aborigines'.
- A fee of 10 shillings per acre, for nine-tenths of the land over which pre-emption had been waived, was to be paid by the Pakeha applicant as a contribution 'to the land fund, and for the general purposes of Government'. Four shillings per acre of this fee was to be paid on receiving the Governor's consent for a waiver.
- At least 12 months were to pass from the time the applicant received the Governor's consent (by paying the fees and being issued with a pre-emption waiver certificate), to the issue of a Crown grant. The remaining six shillings per acre were to be paid on the issuing of a Crown grant.[84]
- Surveys of the land purchased under a waiver certificate were to be done at the purchaser's expense 'by a competent surveyor, licensed or otherwise, approved of by the Government, who will be required to declare to the accuracy of his work, to the best of his belief'. The surveyor was to deposit certified copies at the Surveyor-General's office prior to a Crown grant being prepared.
- Deeds of transfer were to be lodged at the Surveyor-General's office as soon as practicable:

> in order that the necessary inquiries may be made, and notice given in the Maori, as well as in the English Gazette that a Crown title will be issued, unless sufficient cause should be shown for its being withheld for a time, or altogether refused.

- The Crown reserved the right of constructing roads and bridges for public purposes 'through or in lands so granted'.[85]

FitzRoy also warned that Crown grants would not be issued if the above regulations were contravened; and that settler claims to land would be invalid unless confirmed by a Crown grant. Other conditions related specifically to the European applicants. One specified that all purchasing was to be at the buyer's risk until allowed and confirmed by a Crown grant. Another warned that old land claimants, whose land either had been, or may be, recommended by a land claims commissioner for a Crown grant, would have the right to be given a grant over a pre-emption waiver claim for the same land. Yet another specified that owners would be compensated with equivalent land if the Crown took land (granted under a pre-emption waiver) for public purposes such as roads and bridges.[86]

It is unclear what role Clarke played in formulating the intended safeguards for pa, urupa, and the land around them, in the provision for tenths, or in ensuring the reservation from purchase of the block of Auckland land between Tamaki Road and the sea. Remember that Clarke was already required to assess what reserves he considered necessary for Maori benefit, out of land the Surveyor-General

84. This was to encourage long term relationships between purchasers and Maori.
85. This condition was later overlooked by Grey in his criticisms of FitzRoy's waiver scheme (see Grey to Earl Grey, 4 December 1847, BPP, vol 6, [1002], pp 43–44).
86. Proclamation, 26 March 1844, in encl P in FitzRoy to Stanley, 15 April 1844, BPP, vol 4, p 202

recommended for colonization.[87] Clarke may have at least been responsible for suggesting that the land between Tamaki Road and the sea be reserved. Gibbons notes that Clarke wrote to the Colonial Secretary, Sinclair, on 22 March 1844, suggesting that a block of land near Auckland be reserved, and surmised that Clarke had made the suggestion at the council meeting and had then been asked to submit it officially so that it may become a matter of record.[88] But importantly, although the term 'reserve' is used here, FitzRoy's proclamation did not require the area to be a defined (that is, surveyed) reserve as such. The proclamation merely exempted this area from purchase by settlers by stipulating that waivers would not be given over that land, as it had also done for land required by Maori for their present use. FitzRoy appears to have sought this effect for pa, urupa, and the land about them also.[89] Of these other 'reserves', Gibbons notes: 'they were all orthodox ones falling within the accepted pattern of Imperial benevolence' toward Maori, and would have been familiar to all involved in the discussion'.[90]

FitzRoy also explained the proclamation in a speech given to Maori on Government House lawns, on the same day as the publication of the waiver.[91] FitzRoy (with Clarke translating) told those present that the conditions allowed them to sell any parts of their land they wished, as long as it did not injure them now, or cause injury and injustice to their children. He explained his view of pre-emption again:

> The chief reason why the Government interfered in your selling land, was to prevent Europeans from buying great quantities at once from you, before you knew the value of it, and that a consequence of your selling so much land would have been, that you would have left none to cultivate for raising food for yourselves and your children.[92]

He noted that there was no longer any objection to Maori selling small portions of land which they could well spare, again stressing the Crown's role as protector:

> provided that my permission is previously asked, in order that I may inquire into the nature of the case, and ascertain from the protectors whether you can really spare it, without injury to yourselves now, or being likely to cause difficulties hereafter.[93]

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87. Connell to Clarke, 29 December 1842, Turton's *Epitome*, c 152
88. The Internal Affairs register for this year recorded that Clarke wrote a letter to the Colonial Secretary on 22 January 1844, which was noted to have been received on 23 March, in which he reported that Maori were selling their lands and recommended certain reserves be made in Remuera. The letter itself cannot be located. Clarke would have been aware of the value Auckland Maori placed on Orakei land.
89. The proclamation had specified that no Crown title would be given for any pa, urupa, or the land about them. It had not stipulated that pre-emption would not be waived in those areas. While this difference may have resulted in very different outcomes (pa, urupa, and the land about them, if purchased by settlers, would presumably have become Crown rather than remained native land) the wording of FitzRoy's proclamation itself suggests that he may have meant them to have had the same effect. Later, Governor Grey did not require Commissioner Matson to identify pa, urupa, or the land about them, so that they could be excluded from Crown grants (see ch 7).
90. Gibbons, fol 39–41
91. He had promised to do this on 19 March (see 'Copy of Minutes of a Meeting of Native Chiefs ... at Government House ... on 26 March 1844', encl o in FitzRoy to Stanley, 15 April 1844, BPP, vol 4, p 197); see also ch 5.
92. Ibid, pp 197–198
93. Ibid

He advised Maori not to sell hastily, only to sell what they could well spare, to sell for the best price not simply the first offer, and to be cautious while bargaining, so as to ensure that they could abide by their transactions honestly. This advice implied what FitzRoy later confirmed – that he had intended that Maori should benefit from competition between purchasers. FitzRoy stressed to Maori that they should look to their future needs when selling land.[94]

As to 'reserves', FitzRoy told the chiefs that, in addition to their pa, sacred places, and any surrounding land which they wanted for their own purposes, in the arrangement he had made for allowing Europeans to buy land from them, he had made distinct conditions that one-tenth of all land purchased was to be 'set apart for, and chiefly applied to, your future use, or for the special benefit of yourselves, your children, and your children's children'. This was not strictly so. The tenths were to be 'for public purposes', albeit 'especially the future benefit of the aborigines'. But FitzRoy clearly intended that the tenths be used for the purposes he stipulated in his address on Government House lawns. FitzRoy continued:

> [t]he produce of that tenth will be applied by Government to building schools and hospitals, to paying persons to attend there, and teach you not only religious and moral lessons, but also the use of different tools, and how to make many things for your own use . . .
>
> The management of the reserves would be entrusted to a board or committee of Crown officials, consisting of the Governor, the Anglican Bishop, the Attorney General, the Commissioner of Crown Land, and the Chief Protector of Aborigines.[95]

As Parsonson points out, FitzRoy's 'tenths' were to be a long-term endowment, the use of which may change over time. At least initially, the Governor saw them as being managed by trustees, producing revenue to be used for hospitals and schools, and their staff.[96]

Although not fully elaborated upon in the official report, '[m]uch explanatory conversation' is said to have followed between FitzRoy, Chief Protector Clarke and the chiefs. Te Matua expressed approval of the regulations, noting that securing land to Maori was very important, and that 'the further provision for reserves is also very good'. But he also noted that Maori would still look to FitzRoy as their guardian, warning him that 'it will be necessary for you to have a very watchful eye over your own people, as well as for the chiefs over their people'. Perhaps this is indicative of the chiefs' belief that the Crown's role was an administrative one, with particular regard to controlling Pakeha, while Maori controlled Maori.

The proclamation was published in the (English) *Gazette*[97] and *Te Karere*, the Maori *Gazette*.[98] News of the proclamation, and the *Gazette* itself, reached Port

94. Ibid
95. Ibid
96. Parsonson, 'Otakou Tenths', p 15
97. See *New Zealand Gazette*, 26 March 1844; BPP, vol 4, pp 618–619
98. See Alan Ward, 'Supplementary Historical Report on Central Auckland Lands', Wellington, CCJWP, 1992, p 31

Nicholson in time for publication in the *New Zealand Gazette and Wellington Spectator* of 10 April 1844.[99]

The proclamation's publication in *Te Karere* may have at least ensured that Maori throughout New Zealand, not just in Auckland, received details of the pre-emption waiver policy. Although Charles Creed, a missionary at Waikouaiti (on the east coast of the lower South Island), wrote to the Protector in Wellington, in December 1844, thanking him for copies of the 'Maori newspaper' and asking for a regular supply, he suggested that, in many cases, *Te Karere* was not regularly received and perhaps only reached certain places after the news of the proclamation was issued.[100] Perhaps this goes some way to explaining why most pre-emption waiver purchases were made in and around Auckland. But a key reason was no doubt that Auckland (being the capital, and therefore considered more valuable) attracted most European land purchasers. Company settlers were going through a different, but parallel, process in the new settlements further south.

For those who did receive *Te Karere*, FitzRoy's pre-emption waiver regulations were front page news in the 1 April 1844 issue. The regulations and accompanying explanation took up most of the paper. But despite this publicity, Parsonson questions whether Maori would have been enlightened by it. Based on a translation by Te Aue Davis, she suggests it was 'clearly translated into Maori by someone who had a poor knowledge of the language', and that Maori relying solely on it 'would have had a hard time making sense of it'.[101]

The example given from this *Te Karere* issue by Parsonson is the 'tenths' clause. Translated literally by Te Aue Davis it reads:

> The residences sold by the Maori people because of the law of the Queen was discarded which says for her to buy (or, sell) – to the Queen or to the King or Queen of the future (the heirs), or the person paid the tenth of the acres he paid for public purposes, for things (purposes) for the future of Maori people.

And in explanation of the proclamation, on page 1 of *Te Karere*, wrongly referring to the third rather than the fifth clause:

> In the third (article) of the Proclamation you will see that the ten acres of every soil bought (or sold) will be given by the purchaser to the Governor, the revenue derived

99. Parsonson, 'Otakou Tenths', p 16

100. Ibid, p 20. In August 1845, McLean asked Clarke to send him more copies of *Te Karere*, describing them as being 'excessively useful' in providing information about 'the occurrences in the North'. McLean was glad to see a 'very good article' advising Maori about bargaining with Europeans, giving an instance of Maori being cheated in a transaction for a vessel (McLean to Clarke, 27 August 1845, McLean papers, MS-copy-micro-535, reel 045, folder 215, ATL Wellington).

101. Parsonson, 'Otakou Tenths', pp 16–17. As noted above, the translations would possibly have been done by Charles Davis – someone whose interpreting skills Clarke Jr, a fluent Maori speaker, did not have faith in (Gibbons, fol 116; Clarke Jnr to Clarke, 29 September 1842, George Clarke, letters and journals, qMS-0469, ATL Wellington). Davis, as well as being the interpreter who was largely responsible for writing and editing copies of *Te Karere* at about this time, was one of the interpreters involved in the pre-emption waiver purchases (see ch 5).

from that (the ten acres) will be used to build hospitals, to educate the Maori people and for other purposes.

Parsonson noted that the translation of the pre-emption waiver proclamation's fifth clause 'bears only a faint resemblance' to the English version, while the explanation was more specific than the clause itself – mentioning hospitals and schools for Maori – more reminiscent of FitzRoy's speech on Government House lawns. She suggests that insufficient care had been taken to ensure a competent translation of this important change in Government policy. Maori who did not have the benefit of FitzRoy's personal explanations would have remained confused as to what the Government policy was.[102] Those were, at the very least, Maori outside Auckland. Perhaps this helps to explain why fewer pre-emption waiver purchases were made outside the Auckland region (see below).

4.5 THE PROCLAMATION'S PROTECTION MECHANISMS

Was a departure from pre-emption in itself a breach of the Treaty? As we have seen above, the British Treaty negotiators do not appear to have explained the meaning of pre-emption as the Crown's sole right to purchase Maori land (or extinguish Maori title) in 1840. Instead, pre-emption was explained, at these early hui, as a means to protect Maori land from speculators. The exercise of the Crown's right of pre-emption was not an end in itself, but a way to enable the Crown to achieve the principles set down in Normanby's instructions, in light of the prevailing circumstances. It was these principles, not the means of achieving them, which were portrayed to Maori, and which needed to be upheld.[103]

Maori were told at the Treaty-signing hui that the purpose of pre-emption was to protect Maori in land dealings – to prevent them from being cheated, to check imprudent sales without sufficiently benefiting themselves or obtaining a fair equivalent, and to foster the establishment of Pakeha in their communities. This understanding of the purpose of pre-emption was reiterated by FitzRoy when he arrived in New Zealand. Other purposes were not explained at the Treaty debates, including the conception that pre-emption would provide the Government with cheap land to be sold at high prices, and fund the Government and settlement of the colony.

In 1839, Normanby had limited the Crown's purchasing of Maori land, under its pre-emptive right, by four key principles.[104] The first was that all land purchase be conducted with sincerity, justice, and good faith. The second specification was that Maori were to be prevented from entering contracts 'in which they might be the ignorant and unintentional authors of injuries to themselves'. Hobson was not, for

102. Parsonson, 'Otakou Tenths', p 18

103. The Tribunal has favourably noted the contra preferendum rule (that when a document is ambiguous the words are to be interpreted against the party who drafted it) on a number of occasions. See, for example, Waitangi Tribunal, *The Mohaka River Report 1992*, Wellington, Brooker and Friend Ltd, 1992, p 34.

104. See ch 2

example, to purchase land essential or highly conducive to their comfort, safety or subsistence. The third specification, was that acquisitions were to be limited to land Maori could alienate 'without distress or serious inconvenience to themselves'. And the fourth required that a Protector be appointed to ensure the above.

These principles were the guidelines under which the Crown was to exercise its pre-emptive right of purchase. There is no reason to assume that they should not equally be applied to any purchases the Crown allowed under a waiver of that right. Crown pre-emption was not entirely abandoned. It was only modified. The settlers' 'privilege' of purchase under a pre-emption waiver was a limited one. It was one which involved only 'certain limited portions' of land. It was one which was intended to be vetted by the Governor and Protector in each instance. And it was one which was considered (in Britain at least) to be a temporary measure; with a reversion back to Crown pre-emption when circumstances allowed.[105]

These points were not lost on the colonial land and emigration commissioners. Elliot and Villiers were concerned about FitzRoy's May 1843 proposal to waive pre-emption precisely because they believed that, by allowing pre-emption to be waived in favour of private individuals, the Government would become 'mixed-up' with, and therefore responsible for, the purchases those individuals undertook. The commissioners commented that, contrary to a waiver of pre-emption freeing the Crown from responsibility, any deviation from pre-emption 'must greatly enhance the responsibility of Govt for any unforeseen ill-consequences to the Natives'.[106] Their opinion would seem to imply that the principles Normanby outlined as limiting Crown purchases of Maori land, would be the very least the Crown had an obligation to uphold with respect to private purchases of that land.

Stanley too commented as if to warn of this effect.[107] In approving the March proclamation, he referred for the first time in this context to the Treaty of Waitangi, noting that FitzRoy had taken 'the serious responsibility of waiving, on the part of the Crown, an important stipulation of the original treaty, and of permitting the direct sale, by natives, of portions of their land'.[108] But Stanley's primary concern was 'whether the new policy would still yield sufficient funds for Government purposes, and for emigration', rather than the Crown's responsibilities toward Maori.[109]

At first glance, FitzRoy's requirements under the 10-shillings-an-acre proclamation appear generally to relate well to these principles. For instance, Normanby's first specification, that land purchase be conducted with sincerity, justice, and good faith, appears to be catered for in FitzRoy's requirement that the acreage of the intended purchase be specified and the land be described as accurately as possible, and his specification that he would himself consider fully the Maori owners' position and consult the Protector. It would also be indicated by his

105. Parsonson has also argued that 'the Crown had an equal duty when it waived its right of pre-emption' (Parsonson, 'Otakou Tenths', p 117).
106. Unsigned report of colonial land and emigration commissioners, attached to FitzRoy to Stanley, 16 May 1843, marked 'recd from Mr Elliott June 23(?)/43 G W H[ope]', CO 209/24, pp 137–138B, NA Wellington
107. See ch 6
108. Stanley to FitzRoy, 30 November 1844, BPP, vol 4, p 209
109. Parsonson, 'Taranaki', app 3, p 208

requirement that the deeds be gazetted in Maori and English, and that long-term relationships between Maori and Pakeha be encouraged by a 12-month lapse between issuance of a pre-emption waiver certificate and the issuance of a Crown grant.

The stipulation that no Crown title would be given for any pa, urupa, or land about them, and that no waiver would be given for any land required by Maori for their present use 'however desirous the owners may now be to part with them', particularly responds to the second and third requirements that the Crown not purchase lands essential for Maori comfort and convenience. FitzRoy's considerations of (with the description of the land) the nature of the locality, the state of 'neighbouring and resident' Maori, and their abundance or deficiency of land, and again his consultation with the Protector, also point to these being carried out.

The appointment of a Protector, the fourth specification, had already occurred. But FitzRoy officially built the Protector's role into the Governor's assessment of an application. The fact that each application was to be vetted by the Governor also ensured that Normanby's instruction, that all future dealings were to be with the Governor who would 'provide for and protect Maori interests', was carried out. FitzRoy had elaborated on this point further in his speech announcing the proclamation to Maori. He explained that he would ascertain from the protectors whether Maori could really spare the land in question 'without injury to yourselves now, or being likely to cause difficulties hereafter'.

Despite FitzRoy's seemingly protective proclamation, he did not put adequate procedures in place to give effect to the protective ideals it upheld, or to the commitments he subsequently made to Maori on Government House lawns. FitzRoy's provisions did not provide specific, independent, procedures for determining these and other important factors. Taking the Tribunal's measures of the fiduciary duties the Crown entailed in exercising its pre-emptive right, and applying them to the waivers, makes this point most clearly. The same argument which allows Normanby's guidelines for Crown purchases to be applied to the Crown's system for waiver purchases, can be used to apply the Tribunal's interpretations of those guidelines to the waiver provisions.

The Orakei Tribunal found that the Crown's exercise of its pre-emptive right of purchase was limited by two principles.[110] The first, stated in the *Orakei Report*, was that the Crown had a duty 'to ensure that the Maori people in fact wished to sell'.[111] The *Ngai Tahu Report* took this point further. That Tribunal held that, in ensuring Maori wished to sell, the legitimate owners of the land had to be ascertained, the boundaries of the area to be sold had to be established (so that the Maori owners 'knew with reasonable certainty' the area they were being asked to sell), and the land which the Maori owners wished to retain 'by express exclusion from a proposed sale or by way of reserves out of land agreed to be sold' needed to be 'sufficiently identified'.[112]

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110. See ch 1
111. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 1st ed, Wellington, Department of Justice: Waitangi Tribunal, 1987, pp 137–147
112. *Ngai Tahu Report*, pp 240–241

These questions may require a different weighting if applied to purchases made under a pre-emption waiver. The consideration of reserves, for instance, may be less important because pa, urupa, and the land around them, and any land required by Maori for their present use, were to be exempted from purchase or granting, as was the area between Tamaki Road and the sea; and purchases were to be 'limited in extent'.[113] It would depend on how effectively these provisions were carried out. But the Tribunal's questions clearly indicate that FitzRoy's provisions do not provide specific, independent, procedures for determining these and other important factors.

For example, FitzRoy did not specifically require a process for identification of the legitimate owners. This may have been inherent in the considerations the Governor would take into account. How could the Governor properly assess the state of the neighbouring and resident Maori, or their abundance or deficiency of land, without identifying who the legitimate 'owners', or even the legitimate occupiers, were? He would also have needed to know the clear boundaries of the area to be sold. But FitzRoy's proclamation did not require the survey of land until after his assessment and consent to a waiver; prior to his consent, only its description was necessary, and then only 'as accurately as possible'. And while surveys were to be completed before a Crown grant was prepared, FitzRoy did not require them to be published in the English and Maori *Gazettes* (unlike the deed or deeds, which were to be provided as soon as practicable for inquiry and publishing by *Gazette* notice).[114]

One would expect, also, that determination of who the legitimate owners were would form part of the Protector's duties. But how thoroughly the Protector was to carry out that role, again is not elaborated upon in the proclamation or, apparently, in the instructions to follow.[115] As will be seen below, Clarke appears to have relied on his own personal knowledge of Auckland Maori to determine whether pre-emption waiver applicants were dealing with the correct parties. This begs the question whether this approach was adequate in the circumstances. By failing to put procedures in place for determining these factors (theoretically, in the case of surveys, at the appropriate point in the process), FitzRoy failed to ensure that his policies had the effect he intended them to have. He did not provide watertight procedures to protect Maori interests.

The second principle which the Tribunal (in its *Orakei Report)* found limited the Crown in exercising its pre-emptive right, was that the Crown was responsible for ensuring that Maori 'were left with sufficient land for their maintenance and support, or livelihood' (or, as in its *Waiheke Report*, each tribe should be left with 'a sufficient endowment for its foreseen needs').[116] The Ngai Tahu Tribunal further addressed what may constitute a sufficient endowment for the tribe's foreseeable needs. It suggested that the Crown would need to take into account a 'wide range of

113. This itself needed to be specified as coming within 'a few hundred acres' before it held any real protection.
114. Where relatively small blocks of land were involved, and where their descriptions were precise, there may have been little room for misunderstanding between vendor and purchaser.
115. See ch 5.
116. *Orakei Report*, pp 137–147; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Waiheke Island Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1987, p 38

demographic factors' such as the size of the tribal population; the land they were occupying (or over which various members enjoyed rights); the principal sources of their food supplies and location of such supplies; and the extent to which they depended upon fishing of all kinds, and on seasonal hunting and food gathering.[117]

The exclusion, in FitzRoy's pre-emption waiver proclamation, of an area of Auckland land from purchase, and the provision of tenths to provide schools and hospitals, was obviously intended to ensure that Maori were left with some land (as well as education and health services) for their foreseeable needs. So was the exclusion, from purchase or granting, of pa, urupa, and the land about them, and any land required for the present use of Maori.

FitzRoy's considerations here overlap with those suggested by the Tribunal in the Ngai Tahu case. Although the execution of his scheme is not spelt out, FitzRoy was less concerned with where food supplies were traditionally obtained (as the Tribunal's consideration in the Ngai Tahu instance above were), and more concerned with the position those Maori would occupy in the new community, including the new economy. The new community he appears to have envisaged was an idealised one, in which Maori were to be brown Britons – Christian, 'civilized' and living in the new (British) colonial community.

The concept of tenths, or some provision for Maori benefit, had existed for some time. The 1840 select committee on New Zealand recommended that one-tenth of the lands sold or granted by the Crown be reserved for Maori.[118] In January 1841, Russell had instructed Hobson that each time land acquired from Maori was re-sold, 15 to 20 percent of the price received was to go to the protectors to fund their positions and 'all other charges' which 'the governor and executive council may have authorized for promoting the health, civilization, education and spiritual care of the natives'.[119] He had also wondered 'whether to reserve lands for the Maori, to be held in trust, or to set 15 percent of the purchase money aside for their benefit, or a combination of the two'.[120]

James Stephen, the British Permanent Under-Secretary, preferred a scheme where Maori, in addition to the purchase money, would get a certain percentage of the price the Government received for 'each successive purchase' of the land. In addition to this, Stephen thought certain crucial Maori lands should be declared absolutely inalienable and held in trust for their benefit.[121]

In June 1841, Russell directed that 50 percent of the produce of land sales would be retained for survey, aborigines, and local government charges.[122] In September 1842, Stanley instructed Hobson that, of the remaining half of the proceeds from the sale of

117. *Ngai Tahu Report*, p 239
118. Report from the Select Committee on New Zealand, 3 August 1840, BPP, vol 1, [582], p ix
119. Russell to Hobson, 28 January 1841, BPP, vol 3, p 174
120. Parsonson, 'Otakou Tenths', p 48. Alan Ward has suggested that FitzRoy's tenths provision 'was an attempt to implement the additional instructions of 28 January 1841, providing for an endowment *in the Crown* to fund Maori purposes expenditure. . . . The question of Maori retaining adequate land for their subsistence and development purposes therefore also remained at issue' (emphasis in original)(Ward, p 31).
121. Parsonson, 'Otakou Tenths', p 48
122. Vernon Smith to Somes, 4 June 1841, BPP, vol 3, p 358

Crown lands not earmarked for emigration, some, 'not exceeding in the whole 15 percent of the gross proceeds of the Land Sales', may be applied 'for the benefit, civilization and protection of the Aboriginies'.[123]

FitzRoy's intended reservation of a tenth of the land purchased under the waiver provisions, to be conveyed by the purchaser to the Crown (not Maori) 'for public purposes, especially the future benefit of the aborigines', was reminiscent of the 1840 select committee's recommendation. He appears to have been attempting to ensure that Maori would gradually participate in the benefits of British settlement. FitzRoy had elaborated on his intentions to Maori in his address on Government House lawns. He had explained that the tenths were to be 'set apart for, and chiefly applied to' their future use, 'for the special benefit of yourselves, your children, and your children's children'. FitzRoy had also indicated that the tenths would be managed by a committee of Crown officials, and that the income obtained would be spent on building schools and hospitals and on 'paying persons to attend there'. But his proclamation did not bind the Crown to use the proceeds of that tenth for the benefit of Maori. It merely bound the purchaser to make the land over to the Crown. As Parsonson notes, FitzRoy gave a 'very clear message' to Maori about what the tenth was for, but did not provide any safeguards to ensure the tenth was used as he intended.[124]

There were other deficiencies in FitzRoy's scheme. For example, he did not specifically ensure that the contracts obtained were 'fair and equal' as Normanby's instructions had required of Crown purchases, and as the Crown's Treaty negotiators had argued pre-emption was to allow the Crown to ensure. There was no provision made in FitzRoy's proclamation for assessment of the amount paid in waiver purchases, although FitzRoy had indicated (in Britain) his desire to encourage payments of at least £1 an acre.

FitzRoy's March pre-emption waiver proclamation was an experimental compromise, based on the perceived wishes and needs of the colonial community. As Parsonson points out, FitzRoy 'did not consider the waivers of the Crown's right of pre-emption would compromise the Crown's capacity to protect Maori interests. On the contrary, he considered that they would increase the Crown's capacity'.[125] FitzRoy attempted to continue the Crown's role as 'protector' and the Governor's (or colonial administration's) role as 'mediator' between Maori and Europeans. And he sought to distance the Crown from the criticism that it may be acting in its own interests.[126] FitzRoy intended the protective aims of pre-emption to remain.[127]

As Parsonson states: 'FitzRoy did his best to ensure that a system of direct purchase would not harm Maori interests' – by consulting the Chief Protector on each waiver application, making provision for areas to be reserved from purchase, as well as

123. Stanley to Hobson, 15 September 1842, CO 406/2, pp 247–248, NA Wellington
124. Parsonson, 'Otakou Tenths', p 66
125. Parsonson, 'Taranaki', app 3, p 205
126. Te Matua (cited above) agreed with FitzRoy that he would still be needed as a guardian, to watch Pakeha dealings.
127. Parsonson, 'Taranaki', app 3, p 208

tenths, and setting up a system whereby the Crown grant was not issued until a year after application was made for a waiver.[128] But there was a gap between intention and execution. For all its complexity, the protection of Maori interests promised in FitzRoy's proclamation was limited. It would depend on how conscientiously his protective provisions were put into practice.

128. Parsonson, 'Otakou Tenths', pp 115–117

CHAPTER 5

THE PRE-EMPTION WAIVER EXPERIMENT IN PRACTICE: THE FIRST WAIVER, 1844

5.1 Introduction

This chapter looks at FitzRoy's pre-emption waiver scheme in practice. There were around 250 pre-emption waiver claims under FitzRoy's March pre-emption waiver and his subsequent October pre-emption waiver proclamation (see below).[1] General information was collated on all these claims. Around a quarter of these claims were looked at in detail. Although it was originally envisaged that all pre-emption waiver claims would be studied in depth, and tables of the results provided, the data remains incomplete at present.

5.2 The March Pre-emption Waiver Certificates and Deeds

5.2.1 The procedure

On 4 April 1844, just over a week after his 10-shillings-an-acre pre-emption waiver proclamation, FitzRoy set out the 'routine' to be followed when an application for a pre-emption waiver certificate was received.[2] He based his scenario on an application by Charles Moffitt, the first pre-emption waiver certificate holder:

> Mr Moffitt writes a letter to the Colonial Secretary, in whose Office the application is registered and from thence sent to the Governor.
>
> Any remarks the Colonial Secretary may think proper to make will be noted on the letter.
>
> The Governor refers the application, if it appears to be a correct one, to the Chief Protector of Aborigines, whose opinion will be noted on the letter. Any further reference thought necessary by the Governor, will then be made before his decision is given.
>
> The Governor will write his answer on the original letter and send it to the Land Office for registry – whence it will [be] forwarded, accompanied by a Certificate, filled up ready for signature, to the Colonial Secretary.

1. These comprise OLC 1/1050–1/1299, NA Wellington.
2. FitzRoy later specified what a pre-emption waiver application was to contain, see *New Zealand Gazette*, 7 December 1844, notice in end 1 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 403.

> The letter will be kept in his office – the Certificate sent – when signed – to the Colonial Treasurer – by whom it will be signed – and delivered to the proper applicant – as soon as he has duly paid the fees.
>
> Any alteration can be made in this routine if found necessary after a trial, but I wish it to be put in practice at present. . . .
>
> At the Land-office the letter of application must be copied – that is, the material parts of it – namely: date, – signature, – quantity – situation and description of land – using the words of the applicant.[3]

In practice, the routine followed by the colonial officials was close to FitzRoy's intended one. Applications for the waiver of the Crown's right of pre-emption over specific areas of land, defined both in terms of their acreage and physical description of boundaries, and indicating who the potential vendors were, were made to the Governor by settlers, via the Colonial Secretary, Andrew Sinclair. Sinclair would note receipt (usually only one day after the date of the application) and then forward the application to the Chief Protector for his comment. The application was then sent to the Governor for his consent.

Once the Governor's consent to waive pre-emption over a particular parcel of land was given, a certificate was forwarded to the Colonial Treasurer. A letter was sent (by Sinclair) to the applicant, advising him or her that the certificate could be picked up from the Colonial Treasurer after he or she had paid the four-shillings-an-acre fee (over nine-tenths of the land) due on receipt of the certificate.

Once a certificate was obtained, the applicant was free, in theory amongst other purchasers, to negotiate with the appropriate chiefs (whose names were indicated on the application) for purchase of the land for which a pre-emption waiver certificate had been obtained. FitzRoy envisaged that the issuing of the pre-emption waiver certificate for a particular area of land would open up the land in question for purchase, not only by the original applicant, but by anyone who chose to negotiate for the purchase of that land.[4]

The deed of purchase was to follow the acquisition of a pre-emption waiver certificate. Although this was implied in the March proclamation, it was not clearly specified. But this sequence of events was subsequently reiterated by FitzRoy as an essential part of the procedure.[5]

FitzRoy's 'routine' did not extend past the issuing of a pre-emption waiver certificate. But the overall scheme was outlined in his pre-emption waiver proclamation. Once the purchase was made, the deed was to be sent to the Surveyor-General, so that 'inquiries' could be made. Notice was then intended to be given in the Maori and English *Gazettes*. A Crown title would be issued 'unless sufficient cause should be shown for its being withheld for a time, or altogether refused'. According to the proclamation, a year was to pass between the time of issuing of the certificate and

3. FitzRoy's instructions, 4 April 1844, M44/62, IA2, 44/167, NA Wellington (see Wai 27 ROD, doc R36(A), pp 190–193)
4. As noted above, this was made clear in December 1844 (see below, *New Zealand Gazette*, 7 December 1844, notice in encl 1 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 403).
5. Ibid

the issuing of a Crown grant. This was to encourage long term relationships between purchasers and Maori. At some stage prior to the preparation of a Crown grant, a survey was to be completed and lodged at the Surveyor-General's office. But subsequent events, including FitzRoy's dismissal, and Governor George Grey's appointment, intervened. The procedure beyond FitzRoy's 'routine', at least, did not follow FitzRoy's original plan.[6]

5.2.2 The results

FitzRoy reported to Stanley around three weeks after the March waiver had been proclaimed. He stated that only 600 or so acres had been bought under the March waiver provisions. In fact, pre-emption waivers had been granted over only around 350 acres of land by that time under 13 certificates. This suggests that FitzRoy may have been aware of the body of purchases which had already been negotiated prior to the proclamation (see below). FitzRoy described the purchases as being 'in small quantities varying from three to 50 acres each' at 'about £1 an acre, in addition to the sum payable to Government, and all other expenses, making the total cost of these lands at least 35s an acre'. This appears reasonably accurate, although none of the certificates up to that date had been for as low as three acres but, of course, the acreages stated on the pre-emption waiver certificates were not always consistent with those found on later survey.[7] FitzRoy assured Stanley that speculators in land (from which Normanby clearly intended to spare New Zealand) were excluded by these regulations. Only bona fide settlers, he claimed, were profiting by them.[8]

(1) Acreages purchased

By the end of the 10-shillings-an-acre waiver period, 57 pre-emption waiver certificates had been issued for a total of around 2337 acres.[9] The areas sought ranged from 9½ perches to 200 acres. Just over a half of these certificates were waivers for areas of 20 acres or less (a third were for areas of land 10 acres or less). Just over a quarter of the certificates were for areas of land between 21 and 50 acres. Only six certificates (amounting to nearly 1011 acres) were for areas between 100 and 200 acres (see fig 2). But these figures should be viewed merely as an indication of the acreages involved. Although the certificates contained a description of the 'natural

6. See ch 7
7. The fact that FitzRoy states this begins at three acres suggests that perhaps he was aware of differences between the estimated and the surveyed area, or he was aware such a purchase had already been negotiated prior to a certificate being issued. While none of the certificates up to that date had been for as low as three acres, an area for which one five acre certificate had been issued, when later surveyed, was required to be altered to three acres. Of course he may also merely have been giving a rough estimation.
8. FitzRoy to Stanley, 15 April 1844, BPP, vol 4, p 179
9. These were OLC 1/1050–1072, 1/1074–1081, 1/1085–1090, 1/1094–1096, 1/1100–1101, 1/1104–1112, 1/1115–1116, 1/1118–1120 and 1/1122, NA Wellington. Although waiver certificates for OLC 1/1073, 1/1126 and 1/1179, NA Wellington were given following the March waiver period, these claims were also dealt with under the March proclamation provisions. (Grey later incorrectly noted there to be 47 claims under the March proclamation, for about 1800 acres, and 101 claims under the October proclamation, bringing the acreage for which pre-emption waiver purchases up to 'something less than 100,000 acres' (see below), see Grey to Earl Grey, 11 November 1847, and encls, BPP, vol 6, pp 13–14).

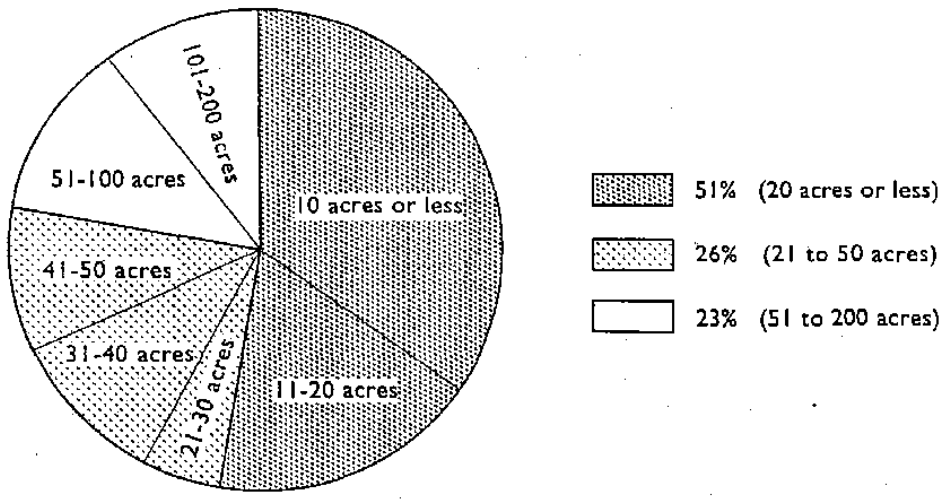

Figure 2 : Acreages sought under the March pre-emption waiver proclamation

boundaries' over which the right of pre-emption was waived, the actual acreage on survey often varied from the original estimation. Also, some individuals were granted a number of waivers, others bought land from other Europeans to expand their lot, and some (belonging in some cases to the same family) combined to purchase large blocks of land on separate certificates. This will be discussed further below.

(2) Certificates issued

There was an initial rush of applications for waivers, with a third of the certificates being issued within the first month of their availability. Thereafter, the numbers steadily dwindled until October 1844, when a second, more lenient, general waiver was issued by FitzRoy. Three certificates issued after this date were still dealt with under the March proclamation. One was an extension of an existing claim made by a settler named Robert Austin for land around Mt St John, bought from Wiremu Wetere of Ngati Maho.[10] Another was a claim by Taylor, Campbell, and Brown, for Pakihi and Karamuramu Islands, near Waiheke (estimated to total 100 acres). These islands had been bought from Ngati Paoa in August 1844.[11] The third, for 8 acres 2 roods at Mt St John or Epsom, bought by Henry Hayr from Wiremu Wetere and Aperahama (Ngati Maho), was presumably included in the March waivers

10. OLC 1/1073 (for 2 acres 1 rood 19 perches), an extension of OLC 1/1072, NA Wellington. An additional receipt had been received by Wetere and 'Abel' on 14 June 1844.
11. OLC 1/1126, NA Wellington

because the first two of three adjacent purchases had pre-dated the pre-emption waiver certificate, having occurred largely within the March waiver period.[12]

(3) Areas of purchase: central Auckland

Almost all the 10-shillings-an-acre waiver certifi-cates were issued for Auckland land. By far the greatest number of these were for land in the much sought after area around Remuera and One Tree Hill (see fig 3). The land in the north of this general location was sold largely by Wiremu Wetere, Epiha Putini, and Aperahama, described as being of Ngati Maho (or Ngati Te Ata). The land in the south of this area was sold largely by Ngati Whatua chiefs Kawau, Te Hira, Keene, and others.[13] Kati (Te Wherowhero's brother), of Ngati Mahuta (Waikato), also sold land at Remuera (see below, the tripartite division).

The highly complex history of traditional occupation and rights in the Auckland area provides some indication of the myriad of tribal groups associated with the area over time.[14] Determining rights held by Maori in the area at 1840, for the Tribunal's purposes, is equally complex. It cannot be adequately dealt with in this report. But some background, subject to clarification by the iwi themselves, is necessary to provide context to land sales made in the pre-emption waiver period. The following summary provides this background. It is limited by its dependence solely on secondary sources – some of which, such as Judge F D Fenton's Orakei judgment, are contested, and need to be treated with caution.

(a) Auckland iwi at 1840: Tamaki-makau-rau was the site of much warfare in the 1820s and early 1830s – primarily between Ngapuhi, Ngati Whatua, Ngati Paoa, Ngatitamaoho (or Ngati Maho), and Ngatiteata (or Ngati Te Ata) – with the result that the isthmus was largely deserted during this period. But by around 1835, this changed.

According to Judge Fenton's subsequent Native Land Court records, Te Wherowhero of Waikato conducted Manukau iwi, including Ngati Whatua, back to their former residences at this time; Waikato having held its own against Ngapuhi and made peace with them. Te Wherowhero and his people settled at Awhitu (on the southern tip of the Manukau heads) as a guarantee of protection to the rest; Ngatiteata returned to their land at Awhitu; Ngatitamaoho returned to Pehiakura (south of Awhitu); Te Akitai (also Ngatitamaoho) to Pukaki (on the isthmus, just south of Mangere); and Te Kawau of Ngati Whatua returned to Puponga, where Ngati Whatua built a pa called Karangahape.[15]

The Manukau Tribunal were also told of the agreement, said to be in 1834:

12. OLC 1/1179, NA Wellington. The purchases were made on 17 February 1844, 29 April 1844, and 14 July 1845. The three claims with certificates issued after the October proclamation have not been included in my discussion of the March waivers.
13. Te Akitai also sold around the Manukau-Onehunga area.
14. See, for example, R Daamen, 'Tai Tokerau and Tamaki-Makau-Rau Iwi: An Initial Outline', in *Rangahaua Whanui District 1: Auckland*, R Daamen, P Hamer, and B Rigby, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), July 1996.
15. F D Fenton, *Important Judgments Delivered in the Compensation Court and Native Land Court*, Auckland, Native Land Court, 1879, pp 74–75

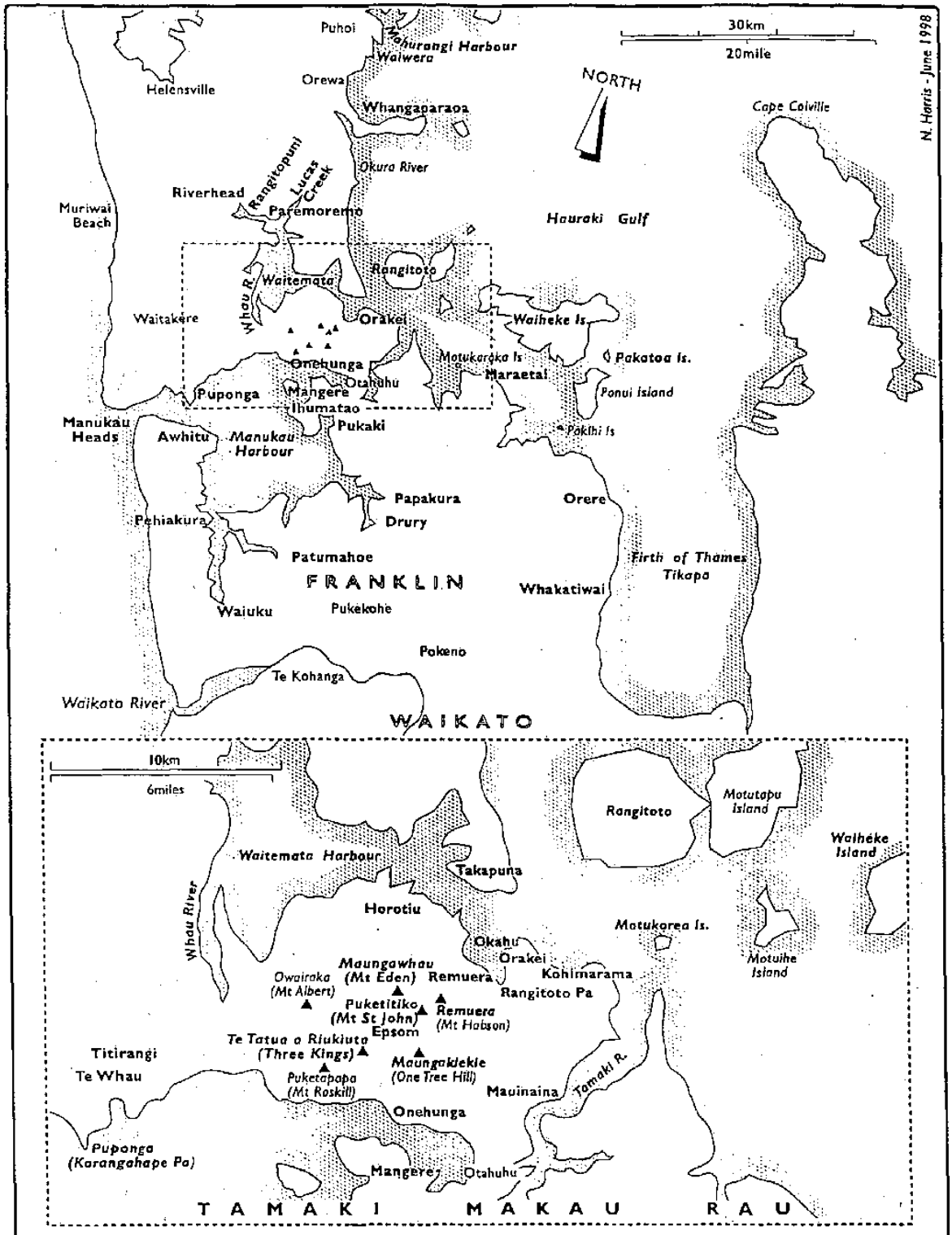

Figure 3 : Placenames in and around Auckland

> whereby the people returned to their homes after the invasions under the protection of the Waikato confederation, Te Taou of Ngati Whatua giving lands at Awhitu and Mangere to Ngati Mahuta of central Waikato to secure their presence and protection . . .[16]

George Graham (who recorded many traditional Maori accounts earlier this century) also noted Ngati Whatua's return to the isthmus, settling at Okahu (Orakei Bay) and at Mangere, where Kati and Matere Toha (of Ngapuhi, the niece of Hongi Hika) lived, and other villages on the shores of the Waitemata and Manukau.[17]

According to Fenton's informants, Te Kawau and his people were living at Karangahape (at Puponga) in 1836, and they had begun cultivating at Mangere. Later that year they built a pa at Mangere and another at Ihumatao (south of Mangere). Te Taou (Ngati Whatua) came to the shores of the Waitemata, and began to cultivate the land about Horotiu (Queen Street). Mauinaina (a former Ngati Paoa pa along the Tamaki River) was still unoccupied. And Fenton noted that Captain Wing's chart of Manukau Harbour, produced in court, showed Potatau's (Te Wherowhero's) people had commenced planting at Onehunga, while Te Tinana, of Te Taou (Ngati Whatua), had cleared land for cultivation at Rangitoto, near Orakei.[18]

According to one witness in Fenton's court, Ngati Paoa gave permission for Te Kawau to have undisturbed possession of Ohaku (Orakei Bay), following a peacemaking visit made by Te Taou, to Kahukoti (of Ngati Paoa), for their involvement in an attack upon Ngati Paoa at Whakatiwai (on the western shores of the Firth of Thames). But Fenton thought the Whakatiwai attack was 'to balance an "utu" account and in no way concerned the land'. Kahukoti was then living at Orere, on the western shores of the Hauraki Gulf.

Fenton recorded that Te Taou built a pa at Okahu (Orakei Bay) in 1837. By 1838, Te Kawau's principal residence was at Mangere, but Te Taou also had permanent residences at Onehunga, 'Auckland' and Okahu. Te Wherowhero (Ngati Mahuta, Waikato) took up residence at Onehunga. In 1839, Okahu tribes cultivated the land at Official Bay (Waiariki, to the east of Point Britomart) and:

> Ngatipaoa appear again in this district . . . Te Hemara saw two hundred of them at Maraetai, when he came up with Captain Clendon in the 'Columbine.' He also saw Apihai [Te Kawau], Te Tinana, Te Reweti, Paerimu, Uruamo, and Watarangi, and all the chiefs of Te Taou, Ngaoho, and Uringutu completely settled there. 'The food of that place,' he says, 'had been cultivated long before; the fences were made and the houses built.' He then describes going in a boat with Taipau, a relation of Heteraka's, to mark out the boundaries of land proposed to be purchased by Captain Clendon from Heteraka's tribes, Ngatikahu and Ngatipoataniwha. The boundary commenced at Takapuna and went on by the Wade to Whangaparoa.[19]

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16. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, Wellington, Government Printer, 1985, p 11
17. J Barr and G Graham, *The City of Auckland, New Zealand, 1840–1920*, Christchurch, Capper Press, 1985, pp 31–32
18. Fenton, p 76
19. Ibid, p 79

Fenton regarded Te Taou, Ngaoho, and Te Uringutu alone as owners of Orakei lands.[20] But a number of subsequent events illustrate a far more complex arrangement. On 28 May 1841, Ngati Paoa 'sold' 9600 acres at Kohimarama to the Crown.[21] In 1842, Ngatihura, a hapu of Ngati Paoa, went to live at Okahu. In March of that year, Clarke, 'Patene Puhata and William Hoete, and eight others of Ngati Paoa' went to Kohimarama in an attempt to 'run a line' around, that is survey, part of Orakei, but were opposed by Te Kawau's people. Ngati Paoa desisted and went away. In 1843, Ngatiteata commenced cultivating at Okahu. A second pa was built at Okahu by Te Kawau. Later that year, Remuera was gifted to Wetere, of Ngatitamaoho (or Ngati Maho). Ngatipare, a hapu of Ngati Paoa, came to Okahu and settled there.

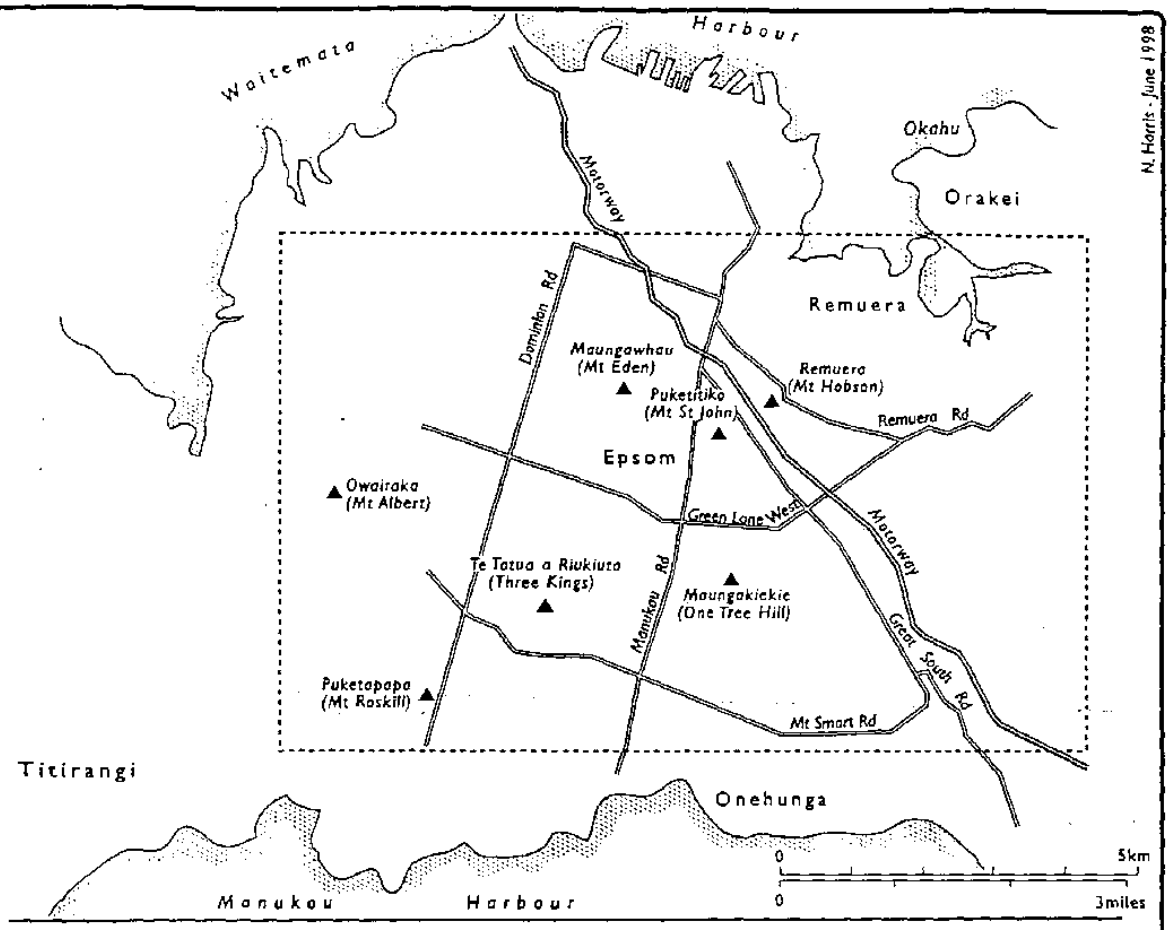
In 1844, Ngatiteata and Ngatitamaoho (or Ngati Maho) came to live at Orakei and Remuera. Fenton recorded that Wetere and Te Kawau sold parts of their land under FitzRoy's pre-emption waiver proclamations.[22] He also noted that both Ngatiteata and Ngatitamaoho were living on this land before Hobson's arrival, and that between 1840 and 1850, they came several times in parties, and sometimes settled at Okahu for a short period. But he placed no value on these acts of occupation.[23]

The Tribunal accepted in its *Waiheke Report* that, away from mainland Auckland, both Ngati Paoa and Ngati Maru had rights to Waiheke, although it was not certain of the relative position of these related iwi at 1840.[24] A more recent account of the South Auckland area of Franklin by Nona Morris has noted that Ngatiteata, Ngatitamaoho (Ngati Maho), and Ngatipou were dominant in the Franklin area in 1840. Ngatiteata were situated mostly around Waiuku and Ngatitamaoho claimed the Patumahoe to Drury area (between Waiuku and Papakura).[25]

The purchases of land around the Auckland area, under the pre-emption waiver proclamations of 1844, need to be seen in this context. More particularly, the greater body of purchases made around the Remuera and One Tree Hill area, from Ngati Maho (and Ngatiteata), Ngati Whatua, and Ngati Mahuta (Waikato), following FitzRoy's March pre-emption waiver proclamation, must be seen in this more complex context.

(b) The tripartite division: The tripartite division of the 'ownership' of this most sought after land amongst Ngati Maho, Ngati Whatua, and Ngati Mahuta, was due to an 1844 boundary agreement between these three tribes (see fig 4). The creation of this division is recorded by Edward Meurant, a settler and an interpreter for some

20. Ngaoho and Te Uringutu were earlier inhabitants of the Auckland area (see Fenton, pp 59, 65–66).
21. H H Turton, *Maori Deeds of Land Purchases in the North Island of New Zealand*, Wellington, Government Printer, 1877, vol 1, pp 269–270
22. Fenton, pp 80–81
23. Fenton, pp 81–82. Fenton stated it to be 'an ordinary custom for persons who have, or pretend to have, no claim whatever to the land itself, to come and reside upon estates of other tribes, when on terms of amity with the owners', especially when they are connected through intermarriage. He believed this to be the case here.
24. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Waiheke Island Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1987, p 8
25. N Morris, *Early Days in Franklin*, Auckland, Franklin County Council and Pukekohe, Tuakau, and Waiuku Borough Councils, 1965, p 19



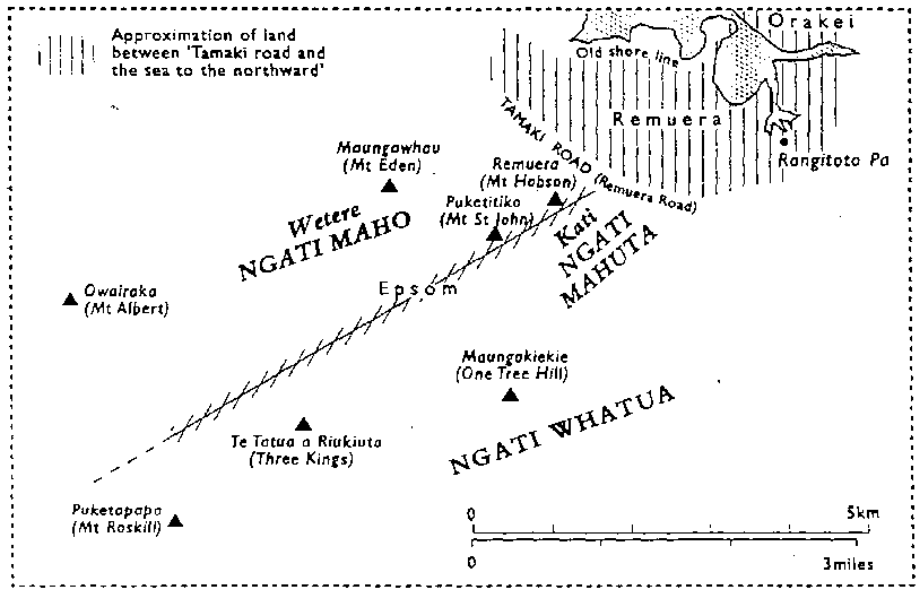


Figure 4 : Approximation of the 1844 tripartite division of central Auckland land between Ngati Maho, Ngati Whatua, and Ngati Mahuta

time employed by the Protectorate.[26] His diaries are an important archival source providing an interesting insight into how the proclamation operated on the ground. His accounts begin with the obvious dissension between the tribes on the issue of who held the right to sell in this area, prior to FitzRoy's March proclamation.[27]

On 5 February 1844, Meurant noted in his diary that 'the Natives still quarrel about thire [sic] claim to Remuera' and on 9 February 1844, that 'this Evening went to Remuera where I found the Ngatiwatua [sic] Tribe in strong Argument with Wetere about there [sic] claim to Remuera[;] they parted seeming on very bad termes [sic]'.[28] On 14 February, travelling to Waikato, Meurant 'met Kukutai Nini and thire [sic] tribe going to Waitemata to assist Wetere in [h]is quarrel with the Ngatiwatua's [sic]'. At Waikato, later that day, he heard 'that a messenger had ben [sic] sent to Wangaroa [Waingaroa or Raglan] to rase [sic] William Nailor [Wiremu Nera or Te Awa-i-taia, a principal chief of 'Te Ngate Mahanga Tribe'] and his Party to join (Wetere) against Ngatewatua's [sic]'. Meurant, thinking it prudent to prevent this happening if possible, set off to convince Wiremu Nera against the proposal – but Nera told Meurant 'he would assist no one to quarrell [sic]'.[29]

The death of Meurant's daughter, Corah, intervened in the crucial days leading up to, including, and immediately following the 26 March 1844 pre-emption waiver proclamation. But on 30 March 1844, Meurant noted that he 'went in company with the Ngatiwatus [sic] to treat [with] the Ngatiti Maho [sic] respecting the boundaries from Mount Hobson to Maungakiekie'. On 1 April, he went to Remuera and recorded that while there he 'decided some quarrels between the Ngatewatuas [sic] and Wetere'. Again on 2 April, he 'went to Remuera to settle the desputed [sic] boundarie [sic] of Ngatewatua [sic] and Tawerowhero [sic]'. On 8 April, he 'wrote to Mr. Clarke acquainting him how I succeeded in the boundaries between the Ngatiwatuas [sic] Ngati Timahi [sic] and the Ngatikerahaieta (Te Whero[whero)?]'. But two days later, he recorded that he 'rode to Remuera hearing that there was to be a quarrel with the Ngatiwatuas [sic]'. Again on 21 April 1844, he recorded 'Natives still quarrelling about there [sic] land and boundaries'.[30]

Clarke's account of tribal differences arising through the sale of lands under FitzRoy's March pre-emption waiver puts this account in more context. In July 1844, Clarke noted that:

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26. Meurant had been appointed in October 1841 as an interpreter in the Protectorate. Henry Tacey Kemp (at the time a Protector) later described him as being '[b]elieved to be an Australian of the Early Type – & was first heard of sealing in Feauvaux Straits & finally came to the Waikato & married a – Maori – Woman the daughter of one of the inferior Chiefs' (Kemp to Hocken, 8 July 1896, Thomas Morland, personal letters and documents, MS-0451, folder 5, Hocken Library, Dunedin). Peter Gibbons noted that Meurant remained an interpreter, not being promoted to the position of Protector, '[s]ometimes assisting in the purchase of land, at others attached to the Protectorate, or acting with Commissioner Spain, or the Surveyor General; during the Northern War he was attached to the troops' – but he 'never rose above administrative routine' (Peter Gibbons, 'The Protectorate of Aborigines, 1840–1846', MA thesis, Victoria University of Wellington, 1963, fols 20–21).
27. The Internal Affairs register for 1844 recorded receipt of a 10 January 1844 letter from Clarke, concerning 'Paul and Kawau denying Wetere's right to dispose of Remuera'. The letter is unable to be found.
28. Edward Meurant, 5 and 9 February 1844, diary and letters, MS–1635, ATL Wellington
29. Edward Meurant, 14 and 17 February 1844, diary and letters, MS–1635, ATL Wellington

> Considerable jealousy exists among the different tribes residing about Auckland; those whose possessions lie somewhat remote, and who cannot, consequently, compete with their more fortunate countrymen, look with extreme jealousy upon those whose lands, being situated in the vicinity of the town, find ready purchasers for all they are disposed to sell. We have had many little disputes arising out of these jealousies to adjust between the Ngatiw[h]atua tribe and the Waikatos, who reside upon and cultivate land at some distance from Auckland.
>
> The advantages possessed by the Ngatiw[h]atuas in consequence of the proximity of their lands to the capital, have raised them up many troublesome friends, who put in joint claims, thereby causing no little annoyance. Indeed the native tribes watch and guard against any encroachment upon their respective territories, either from friends or foes, with as much vigilance and anxiety as any independent civilized state; these feelings are carried to such a height, that they almost constantly distrust each other's movements, and can hardly give each other credit for pacific intentions when a meeting between two opposite parties takes place; and while each endeavours to engross to themselves the advantages to be derived from their own fortuitous position, either as it respects the quality or situation of their land, or their more immediate connexion [sic] with the seat of Government, they eagerly strive to defeat any undue attempts of the other to participate in the privileges they possess.[31]

How this problem was to be dealt with was a different matter. Although, as will be seen later, Clarke's 'investigations' of legitimate ownership were very limited, he stated, at this time, that:

> Owing to these causes existing rumours are constantly afloat, and letters contradictory in their statements are frequently received by the Government, dictated as the clashing interests of the writers may suggest; and it requires no little prudence, and a great deal of patience, to investigate and arrange these matters, which, however, is generally satisfactorily accomplished, as the Government are usually made arbiters in every dispute.[32]

Perhaps Clarke meant that the Crown assisted in 'agreements' being made amongst Maori on boundaries specifying the areas within which a particular tribe may sell land, rather than the Crown's role as an 'arbiter'. The eventual agreement on boundaries regarding the area around Remuera and One Tree Hill, reached amongst Ngati Whatua, Ngati Maho, and Ngati Mahuta, specifically for the sale of land in 1844 under the March proclamation, was described by Meurant, years later, as having followed a suggestion from FitzRoy. Meurant had been asked by the Governor to

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30. Edward Meurant, 30 March and 1, 2, 8, 10, and 21 April 1844, diary and letters, MS–1635, ATL Wellington. The boundary marking which Meurant describes (below) possibly took place in April 1844 (as is suggested by his diary entry of 8 April 1844). Evidence taken in Matson's inquiry (a commission set up in 1846 to settle the claims of Pakeha who had purchased Maori land under the pre-emption waiver proclamations) from Te Keene, of Ngati Whatua, revealed that the boundary had been marked out prior to Dilworth's purchase. Dilworth bought land in this vicinity on 18 September 1844 and 31 January 1845. Meurant was absent from Auckland from early June 1844 to 19 January 1845; so the marking would have to have been before or after these dates, probably the former.
31. Clarke to Colonial Secretary, 31 July 1844, encl 4 in FitzRoy to Stanley, 18 December 1844, BPP, vol 4, p 458
32. Ibid

assist Maori in marking boundaries between the tribes. He later explained his involvement in the division of this choice Auckland land as follows:

> I was instructed by the late Governor [FitzRoy], in the presence of Mr George Clarke, sen, Chief Protector of Aborigines, to inspect the boundaries of the several claims of 'Te Whero-whero,' 'Wetere,' and 'Kawan,' [sic] to obviate any dissensions which might arise hereafter.[33]

Meurant's role in the division of this central Auckland land for the pre-emption waiver purchases, although official (at FitzRoy's request), was not clearly part of his duties as interpreter for the Protectorate. He was apparently on the Protectorate department payroll at this time. But Thomas Forsaith, a Protector, claimed Meurant's connection to the Protectorate (inasmuch as his name was on the 'pay abstracts of the department') was misleading:

> Mr Meurant was Government interpreter, attached at one time to the Survey Department, at another to Mr Commissioner Spain's Court, and subsequently to the military force. At intervals he was employed on special services by the Government . . . but was never regarded as a member of the Protectorate.[34]

This will be discussed below. For now, it is enough to state that although on the Protectorate payroll, his duties were limited. He appears to have acted as an interpreter, not a Protector.[35]

In the 1844 division of Remuera and One Tree Hill land, Meurant had gone to Ngati Whatua and told them of FitzRoy's desire that they should lay the boundary line between the Ngati Maho, Ngati Mahuta and themselves. He stated that he had then attended the boundary marking. He was present the whole time, but claimed not to have interfered further than to see the line marked out. According to Te Keene, of Ngati Whatua, around 20 to 30 Maori were present at the marking of the boundary. Pegs were placed in a direct line from Tamaki Road (this appears to be Remuera Road) as far as 'Dilworth's' purchase went, and then continued on in a direct line leaving One Tree Hill on the left. West of the line belonged to Wetere of Ngati Maho. East of the line was allocated to Kati of Ngati Mahuta. South of Kati's land, Ngati Whatua held rights.[36]

(4) Areas of purchase: outside Auckland

But not all purchases under the March 1844 pre-emption waiver proclamation were for Auckland lands. A small number of certificates were awarded for land outside

33. Statement of E Meurant, encl in Grey to Earl Grey, 15 November 1847, BPP, vol 6, [1002], p 18
34. Forsaith to Colonial Secretary, 3 April 1849, encl 1 in Grey to Earl Grey, 23 May 1849, BPP, vol 6, [1136], p 156. This is corroborated by a letter Clarke wrote in December 1843 noting the Meurant's services had been transferred to another department but was now required by the Governor to carry out a task for Clarke (see Clarke to [Ligar?], 13 December 1843, in Edward Meurant, diary and letters, MS-1635, ATL Wellington).
35. The Protectorate could be very informal about roles. H T Kemp was appointed a 'sub-protector' in the Bay of Islands and Kaipara in 1841. When he went up to Mangonui in 1843, he described himself as Godfrey's 'interpreter'.
36. See OLC 1/1056, NA Wellington

Auckland. Two waivers were for areas of islands in the Hauraki Gulf: Pakatoa (from Ngati Paoa for 70 acres) and Motukorea (from Ngati Tamatera for 150 acres).[37] Three March waiver certificates were recorded for land north of Auckland: two in the Bay of Islands (one of these at Kororareka beach from 'Amoka' for only 13 perches) and one along the Mahurangi to Waiwerawera coast (from Ngati Rango chiefs for 20 acres).[38]

(5) Price paid to Maori

Payment for land purchased under a pre-emption waiver certificate was generally in the form of goods or money or, most commonly, both; some involved subsequent payments (see below). Based on the value the payment was calculated to be worth, the price range per acre over the March waiver period appears to have been wide – from around 3s 5d an acre to around £2 10s an acre (excluding the fee to be paid to the Government).[39] Initially prices paid were about £1 per acre. Toward the end of this period the price per acre tended toward the lower end of the scale. On average around 16 shillings (just under £1) an acre was paid.

There is need for caution in interpreting these figures. Some of the prices were calculated (in 1846) from goods, which the Colonial Secretary, Sinclair, later stated (no doubt under much pressure from Governor Grey) were 'in some instances estimated at a preposterously high rate, and in other cases the statements are made in such vague terms that it is impossible to ascertain what were the articles given or the prices put on them'.[40]

Alan Ward has noted that the 'price paid to Maori under the waiver purchases were generally much better than the early Crown purchases, but not uniformly so'.[41] At £1 per acre, the initial March proclamation purchases were generally higher than the price the Crown paid for Auckland land in the early 1840s (although FitzRoy paid Epiha and Ngati Maho £50 for 50 acres on 27 March 1844). But any comparison of prices paid by the Crown with pre-emption waiver purchasers is difficult. Turton's lists of Crown deeds often lack either the full price, the acreage, or both. His figures are not always correct. And even in those instances where both are available, and correct, considerations such as the quality of the land prevent meaningful comparisons from being made. The wide range of prices obtained under the pre-emption waiver scheme also makes more generalised statements less useful.

(6) Deeds signed

Some of the deeds of transfer under the pre-emption waiver scheme were written in Maori; others were written in English. The simplest provided a brief description of

37. These were OLC 1/1116 and 1/1122, NA Wellington. Note OLC 1/1126, NA Wellington, which was also dealt with under the March proclamation (see above), is not listed here.
38. These were OLC 1/1078, OLC 1/1094 and OLC 1/1108, NA Wellington
39. This calculation is based on 32 claims for which both acreage and payment value were available. Where the land was surveyed, the acreage on survey has been used to calculate the price per acre.
40. Sinclair to Grey, 12 October 1847, encl in Grey to Earl Grey, 11 November 1847, BPP, vol 6, pp 13–14. Sinclair also claimed that in at least 46 cases a portion, or the whole, of the consideration given, was in muskets, gunpowder, and so on.
41. Ward, 'Central Auckland Lands', p 53

the land, the acreage, the payment, and the parties involved, witnessed and dated. More complex deeds gave surveyed co-ordinates rather than a brief description, and they included details of what was being conveyed along with the land, such as mines, trees, waterways, and fish. As will be seen below, interpreters Edward Meurant and Charles Davis were involved in drawing up deeds, explaining them, and witnessing payments.[42]

(a) Deeds signed prior to the proclamation: Some of the deeds relating to March pre-emption waiver certificates actually pre-dated the pre-emption waiver proclamation itself.[43] Purchasers probably did this to avoid paying the four-shillings-an-acre fee (imposed on receipt of the certificate) before the purchase (their agreement with Maori) was ensured. But it may also indicate that they understood only too well that the waiver certificates, as FitzRoy intended, merely opened the land up to competitive bargaining, and sought to avoid that.

Meurant had a tough job fobbing off those who sought his assistance in land transactions prior to the proclamation. On 5 February 1844, he 'received several applications for land at Remuera'. The next day he 'went to Remuera and treated with the Natives (Watere [sic] Wata & Epiha) for a piece of land for Mr Graham'. And on 8 February he:

> rode to Epsom in company with Mr Hart – he purchased a piece of [sic] from Watere [sic] containing 50 Acres paid a deposit of five pound[s.] Watere [sic] signed a receipt he also sold another 50 acres at the same place to Mr [?] Wood for 50 pounds Wetere gave a receipt for deposit of 5 pounds[.] I rote [sic] an agreement for the Native chief Tara of a lease of Motu Tapu to Mr Williamson and Crummer for the term of 10 years.[44]

The negotiation of a lease, as well as purchases, at this time, is interesting. FitzRoy had stated at his levee, in response to Ngati Whatua and Waikato chiefs, that 'permission would as soon as possible be given for the occupation of Natives lands by Europeans upon short leases, for which they would pay a yearly rent to the native owners'.[45] But this seems to have got lost in the rush to allow direct purchasing, which most settlers probably preferred. (Williamson and Crummer later bought land at Motutapu, in April 1845, and were leaseholders over the remainder of the island, despite the island being subject to a former (deceased) purchaser's claim.[46])

Meurant appears to have had a change of heart about his involvement in the early land purchases by late February 1844. Having returned from his trip to Waikato and Waingaroa, on 26 February, he:

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42. See Turton's *Deeds*, part II, pp 433–518
43. These are OLC 1/1050, NA Wellington (the deed for which is dated 26 February 1844), 1/1074, NA Wellington (Turton's deeds records this as 3 June 1840 but the file records the deed as being dated 3 June 1844), 1/1122, NA Wellington (the deed for which is dated 22 May 1840), and 1/1179, NA Wellngton (17 February 1844, 29 April 1844, and 14 July 1845).
44. Edward Meurant, 5, 6, and 8 February 1844, diary and letters, MS–1635, ATL Wellington
45. 'Levee', *Southern Cross*, 30 December 1843, vol 1, no 37
46. For more details on this complicated claim see Paul Monin, 'The Islands Lying Between Slipper Island in the South-East, Great Barrier Island in the North and Tiritiri-Matangi in the North-West', report commissioned by the Waitangi Tribunal, December 1996 (Wai 406 ROD, doc C7), pp 36–38

> went to Remuera saw Epiha and others told them they where [sic] doing wrong in selling thire [sic] land till the Govr returned and gave them a Decisive answer. I found severel [sic] Pakehas here treating with the Natives for land wich [sic] I put a stop to . . .

At this time FitzRoy was in Wellington, but had intimated that he would waive pre-emption on his return. On 27 February, Meurant:

> attended Government in company with Wata and Kati where the officer administring [sic] the Govt told the Natives the impropriety of there [sic] proceedings During the Governor's absence in selling there [sic] land . . .[47]

The pressure on Meurant continued. On 4 March he recorded 'Severel [sic] pakeha's [sic] has [sic] applied to me about purchasing from the Natives. I told them I could not allow them to sell till [sic] they are allowed to do so'.[48] He followed this up with a letter to Clarke reporting that he had just returned from Remuera, where he had 'found natives & Europeans sill [sic] persiting [sic] in there land traffic'. He suggested a letter from Clarke to Wetere would 'have the desired effect of putting a stop to it at one [sic]'.[49]

Perhaps these settlers (and Maori) had taken their cue from the encouragement given in the *Southern Cross*. There were other cases of pre-proclamation land negotiations. Perhaps some purchases were negotiated but not formalised into deeds until FitzRoy's proclamation.

FitzRoy returned to Auckland from Wellington on 6 March, and on 16 March, Meurant 'received a letter from Epiha requesting me I would speak to His Excellency and till [sic] him the Desire of the natives to be allowed to sell there [sic] land'. Auckland Maori were, at this time, preparing for what Meurant describes as a 'native feast'. They had been alarmed at the delays in the Government's payment of land bought by it at 'Ramarama' and had frequently called upon Meurant to accompany them to make complaints about the delays. One of the delays had been prolonged because of FitzRoy's absence. Two days later, Meurant 'attended Government house in company with Wiremu Wetere and others' and on 19 March, he did the same 'in company with Epiha and other Native Chiefs'.[50] Perhaps he, or Epiha, passed on the crux of Epiha's letter at that time, because FitzRoy promised Maori, on 19 March, that he would make a public announcement on the matter.[51]

(b) Deeds signed prior to making application for a waiver certificate: Many applicants acknowledged that their purchases had taken place prior to applying for a pre-emption waiver certificate, despite the waiver provisions' requirement that the applicant acquire a certificate prior to purchase.[52] In other cases, prior purchasing had

47. Edward Meurant, 26 and 27 February 1844, diary and letters, MS-1635, ATL Wellington
48. Edward Meurant, 4 March 1844, diary and letters, MS-1635, ATL Wellington
49. Meurant to Clarke, 4 March 1844, diary and letters, MS-1635, p 89, ATL Wellington
50. Edward Meurant, 16, 18, and 19 March 1844, diary and letters, MS-1635, ATL Wellington
51. 'Copy of Minutes of a Meeting of Native Chiefs . . . at Government House . . . on 26 March 1844', encl O in FitzRoy to Stanley, 15 April 1844, BPP, vol 4, p 197
52. See, for example, OLC 1/1055 and OLC 1/1058, NA Wellington.

obviously occurred. Later (following both proclamations, and presumably including them both), Sinclair claimed that in '50 cases' purchases were made prior to the issue of the pre-emption waiver certificates.[53]

The pre-proclamation and pre-waiver certificate land transactions had the potential to negate competition amongst purchasers. FitzRoy had obviously intended Maori to benefit from competition based on his speech on Government House lawns. He made this even clearer in December 1844 (see below).[54]

However, while public notice and auctioning of parcels of land would probably have been more advantageous to Maori, it is not clear that these 'non-complying' land transactors actually negated competition. Maori entering land deals still had options. Meurant recorded on 25 April 1844, that '[t]he Stone mason and Wetere disegreed [sic] about there [sic] agreement. Wetere returned him the Money £2 0s 0d he gave Wetere as a Deposit'. Two days later, Meurant 'went to Remuera in company with Mr Langfor[d] and Gard[i]ner to purchase some land. Could not agree.' On 30 April, Meurant noted 'Mr Henry requested I would assist him in agruing [sic] with some of the Ngate Watua [sic] in paying them for some land this evening'.[55]

On 20 May 1844, Meurant noted that he had:

> appointed to meet the Native chief Te Kauwau [sic] and others at Mr Giddis respecting a Peice [sic] of land sold to that Person on the South side of Manukau a Mountain called Mangere. We could not agree about the price of the cow from Mr Giddis . . .

The next day he:

> went to Tamaki to Mr Giddis in company with Himerly [sic] the Native requested me to interpret between Te Kauwau [sic] and Mr Giddis respecting the payment of Mangere. The Native (Te Kauwau [sic]) agreed to receive Two brood Mares and one entire horse . . .

Later that month, on 31 May 1844, Meurant:

> went to Porewa [sic] Mr Giddis and Hemleys when I met with the Kauwau [sic] and other chiefs of the Ngatiwatus [sic] to chose [sic] the 3 Horses payment for Mangere. The chief Kauwau [sic] felt dissatisfied as saying Mr Hemley agreed to allow him to chose [sic] his Horses and would only take two of the three that was left for him. I drew out a receipt for Te Kauwau [sic] for the two Horses. It was agreed that Mr Geddis would deliver the third Horse on Monday next.[56]

These extracts suggest that if Maori were not happy about a transaction, they could pull out and deal with another purchaser, or demand that their 'price' be met.

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53. Sinclair to Grey, 12 October 1847, encl in Grey to Earl Grey, 11 November 1847, BPP, vol 6, [1002], pp 13–14
54. *New Zealand Gazette*, 7 December 1844, notice in encl in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 402–403
55. Edward Meurant, 25, 27, and 30 April 1844, diary and letters, MS-1635, ATL Wellington
56. Edward Meurant, 20, 21, and 31 May 1844, diary and letters, MS-1635, ATL Wellington. However, one claimant, Chisholm, is said to have threatened chiefs William Jowett and Ruinga for not consenting to sell Putiki (on Waiheke), the former incident in front of Davis. The sale (by chiefs of another tribe) still went through (see below).

(c) Deeds signed after the proclamation: Most of the deeds relating to land for which March pre-emption waiver certificates were sought, like the certificates themselves, were signed in the first three months following the waiver proclamation. A fourth of these included subsequent payments. Most of these subsequent payments were made late in 1844. (One subsequent payment was made in March 1845 and another in September 1846.)

From July 1844 to March 1845, one to three deeds were signed per month, for land for which March proclamation waiver certificates had been given. The occasional deed, obtained under the March proclamation, was signed between the latter date and September 1846.

5.3 THE PROTECTOR'S ROLE

5.3.1 Clarke's assessment of the legitimate owners

(1) The norm

Once the pre-emption waiver applications were received by the Colonial Secretary, Sinclair, they were referred to Clarke. In most instances, Clarke noted that he 'knew of no objection to', or 'knew of nothing to prevent', the purchase.[57] His comment was usually given either the day or a few days after the application's receipt by Sinclair. The timing, and the wording Clarke used, suggests (initially, at least) that he did not necessarily investigate the claims, but relied instead on his own personal knowledge (including contemporary boundary agreements, such as that in central Auckland).[58] No investigations of customary rightholding appear to have occurred.

(a) Clarke's background: Clarke's personal knowledge was considered by Governor Hobson to be relatively substantial. As a senior Church Missionary Society catechist, Clarke had worked in the Bay of Islands since 1824.[59] Hobson chose him to be the official Protector of Aborigines in April 1840 because he believed the Protector's duties bore a 'close affinity' to Clarke's existing work on behalf of the Church Missionary Society. Clarke's long residence in New Zealand (in comparison to other non-Maori), his respectability as part of the missionary clique, and what Hobson also saw as Clarke's 'intimate acquaintance with the Customs and Language of the natives', made him, in Hobson's view, 'eminently qualified' for the position.[60]

Clarke himself saw his new position as an extension of his mission work 'upon a more extensive and public scale'.[61] He believed mutual good feeling between Maori and Pakeha, and regaining 'confidence', was the key to the prosperity of the colony.[62]

57. See, for example, OLC 1/1052, 1/1054, 1/1059, 1/1063, 1/1074, 1/1079, NA Wellington.
58. Clarke may also, like Meurant, have been in constant contact with these key chiefs. Auckland was a small settlement and Meurant's diaries show just how much daily contact could occur.
59. Gibbons, fol 7
60. Hobson to Clarke, 4 April 1840, G36/1, p 61, NA Wellington; Hobson to Gipps, 6 April 1840, G36/1, pp 60–61, NA Wellington
61. Clarke to Mary Clarke, 7 August 1840, George Clarke, papers, MS-papers-0250, folder 12, item 38, ATL Wellington

In 1845, Clarke advised one of his protectors, Donald McLean, not to get mixed up in land purchases, but to assist Maori by giving them good advice.[63] McLean was to show Maori 'how much they injure themselves by becoming unreasonable' in making 'exorbitant' demands in the price they sought for their lands, and to 'only assist them in their just and equitable affairs'.[64]

Few have subsequently agreed with Hobson's inflated view of Clarke.[65] But FitzRoy, whose political and religious philosophies were akin to Clarke's, rated him particularly highly. In a private letter, FitzRoy enthused:

> A more discreet – judicious – and right minded person I have not met with in New Zealand. . . . No man understands the Natives – their conduct – their character and their country better than Mr Clarke – the Chief Protector – a man of extreme sagacity – prudence and discretion –[66]

FitzRoy's opinion did not go unnoticed by Clarke. He noted to Coates that he had:

> a substantial friend in our Governor Who if he had not unbounded confidence in me would have been as prejudiced and abstracted by unprincipled men that I could scarcely have kept my appointment.[67]

The *New Zealand Spectator and Cook's Straits Guardian* even claimed FitzRoy to have professed, in April 1845, that if he were to select whether he would 'lose the services of five of the most efficient officers under the Government, or dispense with the advice and assistance of the Chief Protector', he would prefer losing the former![68]

(b) FitzRoy's reliance on Clarke: It is not surprising then that FitzRoy's proclamation specified that he would consult Clarke before waiving the right of pre-emption 'in any case'. As Gibbons notes, the success of the proclamations – in practice – was in large part dependent on the quality of Clarke's advice on the waiver applications, and the extent to which he succeeded in affording a real protection to Maori interests.[69] Yet FitzRoy's consent, according to the proclamation, was to be given as he judged best for the public welfare, fully considering the 'nature of the locality; the state of the neighbouring and resident natives; their abundance or deficiency of land; [and] their disposition towards Europeans, and towards Her Majesty's Government'.[70] And

62. Clarke to McLean, 4 December 1844, Sir Donald McLean papers, MS-copy-micro-535, reel 045, folder 215, ATL Wellington
63. Clarke to McLean, 11 March 1845, Sir Donald McLean papers, MS-copy-micro-535, reel 045, folder 215, ATL Wellington
64. Ibid; Clarke to McLean, 6 January 1845, Sir Donald McLean papers, MS-copy-micro-535, reel 045, folder 215, ATL Wellington
65. Gibbons, fol 9
66. FitzRoy to Coates, 29 March 1845, Willoughby Shortland, Government letters, MS-0052, item 43, Hocken Library, Dunedin. FitzRoy repeated these views in 1846, stating that 'there is no man in New Zealand whose opinion – with reference to questions affecting the natives, or our countrymen in their relations with the natives of that country – is sounder than Mr Clarke's' (FitzRoy to Venn, 4 November 1846, Robert FitzRoy, papers, QMS-0794, ATL Wellington).
67. Clarke to Coates, 23 May 1845, George Clarke, letters and journals, QMS-0464, ATL Wellington
68. *New Zealand Spectator and Cook's Straits Guardian*, 19 April 1845, in Gibbons, fol 9
69. Gibbons, fols 45–46

according to his routine, any further reference he thought necessary was to be made before his decision. Despite the implication in these provisions that FitzRoy may conduct an independent assessment, he appears instead to have relied heavily on Clarke's recommendations. The considerations FitzRoy set out in his March proclamation were not ones which could readily be determined by someone who had (bar a brief visit in 1835) set foot in the country only three months earlier. So where Clarke noted that he 'knew of no objection to', or 'knew of nothing to prevent', a purchase, FitzRoy's consent to the waiver quickly followed.

The Muriwhenua Tribunal has interpreted the instructions of the British Government to indicate that it had in mind protection for Maori by an audit of the Government's policies and practices through the appointment of an independent Protector of Aborigines.[71] The necessity of the Protector's independence in carrying out his role was recognized by Clarke when he pointed out the incompatibility of his initial two roles as Crown land purchase agent and Protector of Aborigines. Yet, in the pre-emption waiver experiment, although without the same clear conflict of interest (but still assisting the process of colonisation), Clarke's role was again confused. FitzRoy's complete reliance on Clarke meant that the Protector was not an independent assessor of Government actions, but an integral part of that Government action. The Tribunal's prior query of 'who would supervise the State?', although made in light of the clear conflict of interest between augmenting State revenues and protecting Maori interests, may still be at issue.[72]

There is some indication in FitzRoy's 'routine' that he did not necessarily expect Clarke would conduct and record an investigation into customary rights either, but would instead rely on his own personal knowledge. The 'routine' stipulated that Clarke's opinion was to be noted on the letter of application for a pre-emption waiver certificate. This implies that FitzRoy intended Clarke's comment to be no more than the brief note or phrase it generally was. He does not appear to have intended separate reports of Clarke's enquiries to be filed.

Clarke did not concern himself with ensuring that the boundaries of the area to be sold were clearly established, or that the Maori vendors 'knew with reasonable certainty' the area they were being asked to sell (as the Ngai Tahu Tribunal thought necessary in ensuring Maori wished to sell).[73] Again, FitzRoy appears not to have required this of Clarke. In January 1844, before leaving for Wellington, FitzRoy told his Executive Council that surveys should be replaced with written boundary descriptions and 'eye sketches' so as to curtail 'the long protracted subject of land claims'.[74] And, in line with this decision, in his March proclamation, he required

70. There is no indication as to what either FitzRoy or Clarke considered an 'abundance' or a 'deficiency' of land, although, in late 1843, Clarke suggested to Sinclair that 10,000 acres for each hapu of Ngapuhi would leave only a small block of desirable land eligible for disposal to the Government (Clarke to Colonial Secretary, 1 November 1843, encl in Shortland to Stanley, 30 October 1843, in Report from the Select Committee on New Zealand, 29 July 1844, BPP, vol 2, app 9, no 4, p 360).
71. Waitangi Tribunal, *The Muriwhenua Land Report 1997*, Wellington, GP Publications, 1997, pp 389–390
72. *Muriwhenua Land Report*, pp 117–118
73. Waitangi Tribunal, *The Ngai Tahu Report 1991* (the *Ngai Tahu Report*), 3 vols, Wellington, Brooker and Friend Ltd, 1991, pp 240–241
74. Minutes of Executive Council, 8 January 1844, BPP, vol 4, p 312; Minutes of Legislative Council, 9 January 1844, BPP, vol 4, p 246

applicants to provide only boundary descriptions, for 'a certain number of acres of land at or immediately adjoining a place distinctly specified', to be done 'as accurately as may be practicable'. As noted above, his proclamation did not require surveys until the Crown grant was to be prepared.

As a result, the land descriptions which appear in the applications, and are repeated in the waiver certificates 'using the words of the applicant', were descriptive and often 'personal', in the sense that they identified land not only by key roads and geographical features, but by whose land it was bounded. For example, one of George Hart's claims at Remuera was described as nine acres at Epsom, bounded on the north by Hart's land, south by Hart, west by Wood, and east by Robinson.[75] And an area sought by Edward Other was described as 50 acres south of, and adjacent to, a swamp; lying directly between Mt Hobson and One Tree Hill; and about half a mile to the east of Epsom Road.[76] Some purchases were surveyed, and some may have been confined enough to be reasonably accurately identified, but most descriptions did not lead to anything other than an general indication of the boundaries of a purchase.

But again Meurant's diaries are helpful in providing further information. They suggest that at least some Maori vendors may have walked the boundaries of the land areas concerned. Meurant recorded that he was at times called to point out boundaries to surveyors, or to get Maori to point out the boundaries for the purchaser, or to go over the boundaries with both parties.[77] On 8 April 1844, Meurant recorded:

> This morning went to Remuera and met a Native (Epera [Epiha?]) who requested me to assist him to point out the Pakeha's boundaries as they had assembled on the Ground for that purpose. I did so, I was abused by some low character of woman saying I had stolen her land . . .[78]

Obviously not everyone agreed with his boundary interpretations.

(2) Exceptions to the norm

There were few exceptions to Clarke's brief approvals. Most of the known exceptions to his approvals were not outright refusals to approve a waiver as such. The files compiled on the pre-emption waiver purchases are based on those applications which received a certificate, so refusals to approve a waiver outright would not appear in these records.[79] In most cases, the exceptions were requirements to obtain a further consent (or consents) from certain chiefs before approval would be given. In other

75. OLC 1/1065, NA Wellington
76. OLC 1/1074, NA Wellington
77. See, for example, Edward Meurant, 14, 20, 24, and 30 May 1844, diary and letters, MS-1635, ATL Wellington
78. Edward Meurant, 8 April 1844, diary and letters, 1842–47, MS-1635, ATL Wellington
79. One instance I know of to date, which suggests that waiver certificates were refused in some cases – Meurant, who purchased land at the foot of Mt Hobson from Epiha on 9 April 1844, applied to FitzRoy for a waiver certificate on 28 May 1844, but was not issued with one. It may be that Meurant's case was a singular one, perhaps because of his position as an interpreter. Meurant refers also to making an after-payment for land he purchased in 1838 (see his diary entry for 21 May 1844), and again this purchase does not appear on the old land claims records.

cases, clarifications of existing settler rights were required. For example, McIntosh's claim to Pakatoa Island was problematic because partial payments for Pakatoa and Pakihi had been made by Captain Herd in 1825; and it was thought that a pre-emption waiver for this island, and neighbouring islands, may already have been granted to Brown and Campbell.[80] These two types of exceptions are consistent with Clarke's philosophy, outlined above, that prosperity could only result through mutual good feeling and 'confidence'.[81] It is also consistent with his later claim that his main concern with the March waiver proclamation was that the waiver provisions, despite preventing extensive purchases, did not adequately deal with disputed land (see below).[82]

Clarke's purpose in requiring applicants to obtain further consents appears to have been to ensure that the key chiefs he knew of with rights to a particular area of land were consulted. He also seems to have accepted that legitimate sales could be made by individual chiefs, without any need for wider consultation with the iwi as a whole.[83] In his rare comments, he referred applicants specifically to the particular chiefs whom he believed should be consulted. For example, in James Dilworth's application for a waiver over some Remuera land (east of Mt Hobson), intended to be purchased from Kati, Clarke required Dilworth to obtain Kawau's 'consent' as well before he would approve the application for a waiver certificate. FitzRoy's reaction to Clarke's minute on Dilworth's application, was: '[i]nform Mr Dilworth that he should procure the consent of Kawau (or Tawa)'. The next day there was a letter from Dilworth informing the Governor that Kawau had consented to the purchase.[84]

Clarke also initiated contemporary tribal 'agreements' as to ownership, such as the three-way division of central Auckland land assisted by Meurant. In April 1844, he sent McLean to Waiheke (before applications for certificates were sought, or pre-emption waiver purchases were made, on the island) to visit Te Ruinga and the chiefs of the Ngati Paoa 'to assist in adjusting their claims on Waiheke'. McLean had first called on the relatives of 'William Jowett' (the chief being absent), and informed them of his instructions. They told him that 'they had no other claim' than that which came through Te Ruinga, and that 'any time he (Te Ruinga) thought fit to waive his claims on the Island they would relinquish theirs'. McLean then proceeded to Te Ruinga's residence at Waiheke, and reported:

> while there he [Te Ruinga] decided on meeting the Ngatimaru and Patukirikiri Tribes at his Station on the Thames Where they held their consultation and it was there decided and unanimously agreed that a portion of the Island of Waiheke remain in the possession of the Ngatipaoas another portion to revert to the [N]gatimaru's and a third portion of the Island be considered the property of the Patukirikiris.[85]

80. OLC 1/1116, NA Wellington; see also OLC 1/1082, 1/1117, 1/1126, NA Wellington
81. Clarke to McLean, 11 March 1845, Sir Donald McLean papers, MS-copy-micro-535, reel 045, folder 215, ATL Wellington
82. Clarke to Colonial Secretary, 31 July 1844, encl 4 in FitzRoy to Stanley, 18 December 1844, BPP, vol 4, p 458
83. Matson also took this approach (see ch 7).
84. OLC 1/1056, NA Wellington
85. McLean to Clarke, 11 May 1844, Sir Donald McLean papers, MS-copy-micro-535, reel 2, folders 1–3A, ATL Wellington

McLean enclosed 'the agreements entered into by the chiefs of each tribe with a definition of their respective boundaries'.[86] But by November 1844, Clarke believed there were too many disputes about Waiheke to allow a sale by one tribe only, at least initially (see below).[87] Such boundary divisions appear to have been made between those on the ground at the time, and initiated informally by Protectorate employees. No wider notice, or actual, or thorough, investigation of customary rightholding appears to have occurred.

Clarke may have thought that the preliminary nature of his involvement (prior to the transactions occurring, and prior to the waiver certificate holder being given a Crown grant) did not warrant more than this cursory type of assessment by him. But even if Clarke ignored the pre-application land transactions going on around him, or had faith that the land they involved may not later be granted, and saw his role merely as a preliminary step, his approach was still very limited for someone who – as he did – professed to be concerned that the waiver purchases did not adequately deal with the issue of disputed lands. The considerations FitzRoy was to have taken into account, according to the proclamation, and according to FitzRoy's explanation of the proclamation to the chiefs on Government House lawns – particularly any assessment of the 'state of the neighbouring and resident natives', the 'abundance or deficiency' of land, or any assessment of land that Maori could 'really spare' – could not have been properly assessed within this approach.

But again, contemporary circumstances need to be taken into account. Maori and Pakeha alike had been affected by the lack of the colonial administration's funds to support the establishment of the colony. The economy had ground to a halt. Both Maori and settlers felt frustrated by the inertia Crown pre-emption created in the land market. Clarke and FitzRoy probably saw the broad-brush but quick assessment as necessary in these circumstances. They both shared a perception, alongside Shortland (and perhaps Clarke is the central figure in this view), that unless they acted immediately, rebellion may soon result. Clarke later wrote that FitzRoy's immediate measures 'succeeded by one act of justice in silencing in some measure the clamours of the disaffected'. He continued:

> By restoring to the Chiefs the unfettered right of disposing of their own Lands as they pleased, the Late Governor rendered nugatory many of the attempts which were made to augment the number and strengthen the hands of those who were too deeply imbued with the feelings of revolt to be reassured by any concessions; and Who were determined to rebel; and by thus demonstrating to the wavering Chiefs the disinterested intentions of HM Government he secured not only the Allegiance but the assistance of those Who if they had taken part with the malcontents, would have rendered the insurrection still more formidable but whose aid has saved the Colony.[88]

86. Ibid
87. See ch 6
88. Clarke to the Colonial Secretary, 30 March 1846, George Clarke, letters and journals, qMS-0468, item 26, ATL Wellington

Also, because FitzRoy's administration, including Clarke's department, was inadequately financed, Clarke was restricted in his ability to ensure that (time and personnel intensive) investigations into customary title took place. These two factors may well have affected the depth of Clarke's and FitzRoy's consideration of each case.

Clarke did not deal personally with every March pre-emption waiver application. Where he was unable to assess an application himself, or hand it on to a District Protector, he sought a local person from the area concerned to assess it on his behalf. He asked Major Bridge to inquire whether the land purchased at the Bay of Islands under the March waiver proclamation was 'fairly and fully purchased from the natives'.[89] This appears to be rather removed from the issue of determining that the purchasers had received the consent of the key chiefs of the area concerned. It appears to focus on the 'fair and equal' requirement of Crown purchases in Normanby's instructions. It also indicates that the purchase had already taken place, and that he knew it. This was not in accordance with the proclamation conditions either.

5.3.2 Reserves

Ensuring that there would be enough land left over for Maori to live on, both at the time and in the future, appears to have been FitzRoy's key concern. He repeatedly stressed that his role was to assess whether Maori could 'really spare' the land – at least in theory.

Clarke's approach to 'reserves' (see above) under the pre-emption waiver scheme appears to have been broad-brush also. He sought to exempt key blocks of land from purchase prior to his consideration of individual waiver applications. The reservation from purchase, in FitzRoy's March proclamation, of an area of land between Tamaki Road (Remuera Road) and 'the sea to the northward', was evidently made on Clarke's suggestion, prior to the Executive Council meeting discussing the proclamation and, of course, prior to his consideration of each individual waiver application. No doubt he did so in expectation that the majority of applications under the March proclamation would be for land situated in Auckland. There is some indication that Clarke took this type of approach in other areas too (see below).[90]

FitzRoy had also made provisions in the proclamation reserving from purchase or granting any pa, urupa, or the land about them, or any land required by Maori for their present use. Yet despite these provisions, there appears to have been no actual inquiry into whether the land sought contained pa or urupa, or was required by Maori for their present use. There is no indication that Clarke considered these factors in his assessments of the individual March pre-emption waiver applications. He appears to have left the question of reserves as a separate and former inquiry (such as the above Auckland 'reserved' area between Tamaki Road and the sea, and the divisions of land ownership were), independent from his day-to-day role in approving pre-emption waiver certificates. The proclamation provisions regarding pa, urupa, and land for the present use of Maori, may have been intended more as a

89. OLC 1/1078, NA Wellington
90. See ch 6

warning to Europeans that these areas were exempt, and that purchases of them would be at the buyer's own risk. It was apparently also left to the chiefs to ensure these areas were untouched, as Clarke's later instructions to Edward Shortland regarding Thames 'reserves', and his later dealings regarding land required for the present use of Maori, implies (see below).[91]

FitzRoy's provision to reserve a 'tenth' of the land 'of fair average value, as to position and quality', to be conveyed to the Queen 'for public purposes, especially the future benefit of the aborigines', has been discussed above. Discussion of what happened to the tenths will continue below. Clarke did not ascertain which areas might be suitable for establishing the tenths 'of fair average value, as to position and quality'. Identification of suitable tenths would only have been required later, once the purchase was complete and surveyed and nine-tenths of the land was to be granted.

Clarke's two key areas of focus appear to have been the identification of key ownership (in prior agreements or in his day to day application assessments) and the setting aside of areas to be reserved from purchase (in prior arrangements). These two key considerations may have been a reflection of the duties he inherited after December 1842 (in which he was to report on whether Maori were disposed to sell any land recommended by the Surveyor General for purchase, and what reserves he considered it necessary to be made for their benefit). Clarke's approach in the pre-emption waiver purchases appears to have been a progression from his role in Crown purchases.

5.3.3 Price paid to Maori

There was no inquiry by Clarke into the price to be paid to Maori vendors for their lands. He was not required by FitzRoy's proclamation to assess this. FitzRoy had made this point clear in his speech on Government House lawns (telling Maori that they should sell for the best price, not simply the first offer). The Governor's subsequent proposed form for waiver applicants (see below), also omitted any reference to stipulating what price would be paid.[92] This omission did away with Normanby's (Crown purchase) requirement that the Crown ensure purchases be 'fair and equal' – a requirement which the colonial land and emigration commissioners believed would continue, should pre-emption be waived.[93] It was also contrary to the Treaty negotiators' promises of a 'fair equivalent' or 'juster valuation' in land purchasing.

There is some indication that the price paid to Maori for their lands was a far less important consideration to Clarke than ensuring, to the best of his knowledge, that settlers negotiated with the 'correct' individuals and that adequate 'reserves' had been made. Clarke believed Maori 'injured' themselves by making exorbitant demands for payment for their land.[94] He had also previously stated, in 1841, that the 'sudden

91. Ibid
92. *New Zealand Gazette*, 7 December 1844, notice in encl 1 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 403
93. See ch 4

affluence' to which Maori had been raised had had 'an unfriendly influence on their moral improvement'.[95] At the heart of these views was the belief he shared with other missionaries, the early governors and Colonial Office bureaucrats, that the most important thing Maori gained through land sales was a position amongst British settlers in a new 'civilized' and Christian community.

5.3.4 Other influences

(1) The tripartite division, and other Maori 'agreements'

While a sense of urgency and a lack of funds may have generally influenced Clarke's broad-brush approach to determining ownership and ensuring sufficient land was 'reserved' for Maori, other considerations would have played a part in his approach regarding Auckland land. The agreement between Ngati Whatua, Ngati Mahuta, and Ngati Maho concerning the land around Remuera and One Tree Hill, made with FitzRoy's obvious encouragement, and at FitzRoy's or Clarke's initiation, was one. There was a great deal of cooperation between Auckland Maori on these sale matters generally. I have not yet come across a record of disputed ownership amongst Maori in the files I have surveyed of Major Matson's inquiry (set up by Governor George Grey in 1846 to resolve settler claims to land purchased under FitzRoy's proclamations, discussed below). Yet, even the limited description of land use and rights in Auckland provided above indicates that the situation, based on customary rights, was far more complex than this.

Of course, Meurant's diaries present a different picture, with disputes both before and after the tripartite agreement (see above), which is worth exploring further. Other instances of rights and boundary issues within and between iwi are also evident in his accounts. For example, on 18 May 1844, Meurant recorded:

> [t]he Native chief Te Tawa of Ngati Watua's [sic] and others requested me to call on them on Monday next to assist them in a dispute about a piece of land sold to a Pakeha named Thomas Henery [sic] by te [sic] Mahia [Mania?] and Wiremu Hopihona [Ngati Whatua] close to Maungakiekie . . .[96]

And on 29 May 1844, Meurant recorded that 'Te Awarahi, Wetere[,] [Ngati Maho] Te Reweti [Ngati Whatua] and others requested that [the] Governor would interfeer [sic] in a dispute about claim on land'.[97]

But to balance that, there are instances where Maori affiliating with a differing tribe from the vendor or vendors acted as a witness (in Matson's inquiry) in support of the transaction. For example Te Keene of Ngati Whatua was a witness in support of Dilworth's purchase of Remuera land from Kati (of Ngati Mahuta).[98] And Meurant's

94. Clarke to McLean, 11 March 1845, Sir Donald McLean papers, MS-copy-micro-535, reel 045, folder 215, ATL Wellington
95. Report from the Select Committee on New Zealand, 29 July 1844, BPP, vol 2, p 8
96. This looks like OLC 1/1081, NA Wellington
97. Edward Meurant, 18, 23, and 29 May 1844, diary and letters, MS-1635, ATL Wellington
98. OLC 1/1056, NA Wellington

diary entries also show that agreements, concessions, or support within and between iwi were not uncommon. On 20 May 1844, Meurant:

> went to Orake [sic] saw the Kauwau [sic] spoke to him respecting the desputed [sic] land at Maungakiekie sold to Mr Henry[.] Te Kauwau [sic] said he would allow te [sic] Maku to sell it and so offerd [sic] to return the deposit or give land in exchange . . .

On 21 May, Meurant 'spoke to Te Kauwau [sic] about his claim on the peice [sic] of land claimed by Wetere oposit [sic] Bevereges [sic] gate. He said he would give it up to Wetere'.[99]

Could Clarke rightly rely on this contemporary divisional agreement rather than customary rights? If he could, perhaps his approach was more appropriate than it first seemed. The relatively recent history of warfare and desertion on the isthmus, for example, may have influenced the chiefs' attitude toward land rights in the area. But even if this were so, the manner in which the agreement was carried out by the colonial administration – its relatively informal initiation, with no apparent public notice, made between those who happened to be on the ground at the time – makes it difficult to consider it an adequate basis for a reliable agreement.

(2) The interpreters' role

Clarke may also have relied in some part on the interpreters who assisted Maori and Pakeha in the pre-emption waiver land transactions. As noted above, at least two of these interpreters, Edward Meurant and Charles Davis, appear to have been on the Protectorate payroll at the time. They were not protectors. But even if they did not act in any way to protect Maori interests, they may have still have kept Clarke informed about what was happening; although there is no indication of this in Meurant's diaries. Clarke may still have gained some sense of security or comfort (whether warranted or not), or made assumptions about the fairness of transactions, as a result of an interpreter's presence. Davis indicated that Clarke had asked him to watch out for Maori interests. But it appears doubtful from their comments (and lack of comment) that they had instructions from Clarke on how they should protect Maori interests.

Meurant later explained his involvement in the pre-emption waiver purchases:

> When the sales took place under the ten-shilling and penny-an-acre proclamations, I acted as agent and interpreter for several Europeans who purchased land from the natives. I have made out deeds for several parties while in the employment of Her Majesty's Government. I received presents from the several parties for the services I rendered them. I made no regular charge, but £1 was generally given for drawing up a deed. Messrs Duncan, Forsaith, and Davis, Government interpreters, were employed in the like manner. All the officers employed in the Chief Protector's Department had permission to assist in negotiating these purchases, as an instance of which, Mr Clarke, senior, and myself assisted Messrs Williamson and Crummer in the purchase of the

99. Edward Meurant, 20 and 21 May 1844, diary and letters, MS-1635, ATL Wellington

island of 'Motutafur.' I was employed in the manner I have alluded to during the year 1844, and nearly all the year 1845.[100]

Meurant's involvement in the purchases was not in fact, as he stated, limited to acting as an agent and interpreter for Pakeha. Maori too sought his services. Meurant had been acting as a go-between for Maori and Pakeha, and for Maori and the colonial administration, for some time. Throughout April and May 1844, his diaries contain constant references to being asked by Maori to assist them in pre-emption waiver land sales and to assisting those who asked.[101] On 9 April 1844, Te Hira asked him to assist in selling some of his land to a Pakeha. On 17 April, Te Hira again 'requested I would interpret for him with some Pakehas', and 'The Ngati Paowas [sic] wished me to interpret for them'. On 30 April, Meurant 'went to Town to assist the Native Chief Tautari [Kawau's nephew] in arangeing [sic] with the sale of a piece of land. He sold to Thomas Henery [sic]'. On 2 May, he interpreted for Wetere and then for Te Reweti and others twice that day and twice again the following day. On 8 May, he assisted Katipa of Ngatiteata to pay land in lieu of a debt. On 16 May, he interpreted for Kati and on 22 May, he assisted Totara in selling land to Henry.[102] As is evident from the above extracts, Meurant did not limit his assistance to one tribal group.

Meurant also made deposits on behalf of purchasers and witnessed the receipt of payments in cash or kind. On 1 May, he '[p]aid Wetire [sic] £10 os od as deposit for a Peice [sic] of land sold to Mr Dilworth and got his Receit [sic]' and 'delivered to Epiha 20 Pairs Blankets in part Payment of som [sic] land sold to Mr Graham at Remuera at one Pound Per Acer [sic]'. On 22 May, Meurant assisted Wetere 'in receiveing [sic] the Ballance due to him by Mr Hay for the land sold to him on the South side of Mount Sant [sic] Jhon [sic]'. 'The chief Davis and others' requested that he 'assist them in receiveing [sic] payment from Mr Ring' on 25 May. He witnessed Wetere signing a deed of sale to J Gamble, the shoemaker, and translated a deed of sale from Te Katipa of Ngatiteata to Edward Foley on 27 May.[103]

The records of Matson's inquiry also show that Meurant acted on behalf of Maori as well as Pakeha.[104] While Meurant acted as an interpreter for Maori witnesses confirming land sales at the inquiry (as did Charles Davis, see below), he also appeared as a witness himself, to confirm that he had previously witnessed the purchases (often describing having been called upon by Maori to do so), that the Maori vendors had understood his translations of the transaction, and that the transaction was proper and complete.

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100. Statement of E Meurant, encl in Grey to Earl Grey, 15 November 1847, BPP, vol 6, [1002], p 18
101. Meurant left Auckland to assist Commissioner Spain in Wellington in early June. He was involved in land transactions up until the day before he left. He resumed his involvement immediately on returning to Auckland in January 1845.
102. Edward Meurant, 9, 17, and 30 April and 2, 3, 8, 16, and 22 May 1844, diary and letters, MS-1635, ATL Wellington
103. Edward Meurant, 1, 22, 25, and 27 May 1844, diary and letters, MS-1635, ATL Wellington. In only one instance seen to date does Meurant appear to record payment from Maori for his services. See diary entry for 13 March 1845, in which he records that Wetere received payment from two individual Pakeha and Meurant then notes: 'Wetere paid me £1 os od'. References to payment by Pakeha are equally as rare.
104. See ch 7

For example, Meurant recalled that for Hart's purchase of land at Epsom (near Manukau Road), he was called upon by Wetere to act as an interpreter around the beginning of June 1844 (from his diaries it appears this should be early May). Meurant confirmed that the deed then before the court had Wetere's signature on it and that he (Meurant) had fully explained the agreement to Wetere and had seen a gown and a sovereign handed to Wetere who appeared 'perfectly satisfied'. Meurant noted that the reason Wetere sold to Hart was because Wood did not have the money and could not pay him. He also claimed to be there when Wetere pointed out the boundaries, although Hart's witness noted that Meurant had pointed out the boundaries at the time of purchase.[105] In Graham's purchase of land on Tamaki Road near Mt Hobson, Meurant claimed to have been called, in 1844, by Jabez Bunting (Epiha) and Aperahama (whom Epiha claimed was merely 'a looker on' who signed only as a friend) to witness the sale and payment. He walked the boundaries with them and Graham, was present at several payments, and witnessed one deed.[106]

Another key interpreter involved in the pre-emption waiver purchases was Charles Davis who, as noted above, was largely responsible for writing and editing copies of *Te Karere* in 1844.[107] Davis was appointed to the Protectorate as interpreter-clerk on 4 March 1844, three weeks before FitzRoy's March waiver proclamation. He was discharged on 30 June 1844 (probably because the colonial administration had insufficient funds to pay him), but was reappointed in March 1845 and served until the abolition of the department. Like Meurant, he 'never rose above administrative routine'.[108] Protector Thomas Forsaith,[109] who was appointed in January 1842, and stationed at Auckland, later referred to him as 'an extra clerk, not even upon the establishment'.[110] Davis also made a statement regarding his involvement in the pre-emption waiver purchases:

> I was not engaged by any parties relative to purchases of land under the ten-shilling-an-acre system. Shortly before the proclamation of the penny-an-acre system, I was discharged from the Government service. I then publicly engaged in the capacity of interpreter; my stated fee was 20s per diem, which fee included all writings, &c. Subsequently, I was taken on by Captain FitzRoy; I used then to negotiate between parties at my own residence, or elsewhere, after office hours. Compensation was then generally given in the way of presents. Some individuals gave a guinea, some half that sum; I cannot say whether any sum exceeded £3 I kept no dates, I write from memory;

105. OLC 1/1065, NA Wellington

106. OLC 1/1067, NA Wellington. Meurant's witnessing of the deed is difficult to marry with his diary entries. The deed was signed on 17 June 1844 according to Turton. But Meurant's entry of 29 April 1844 records 'Epiha decided in Mr G favour' (G for Graham) and later that day he 'went to Mr Grahams received £5 0s 0d for the purpose of paying Deposit to Epiha for piece of land at the foot of Remuera show [sic] to me some 4 or 5 weeks since'. On 6 February 1844, he 'went to Remuera and treated with the Natives (Watere [sic], Wata [?] & Epiha) for a piece of land for Mr Graham'.

107. See ch 4

108. Gibbons, fols 25–26

109. Thomas Forsaith was a Kaipara settler and land claimant. He had been involved in a muru (of his store at Mangwhare, present-day Dargaville) which resulted in the Crown's virtual confiscation of almost 3000 acres at Te Kopuru. He was an advocate of direct purchases.

110. Forsaith to Colonial Secretary, 3 April 1849, encl 1 in Grey to Earl Grey, 23 May 1849, BPP, vol 6 [1136], p 156; see ch 4

> I received no authority to negotiate between parties purchasing lands, I acted in concert with other interpreters. I think I remember having been recommended by Mr Clarke to watch over the interests of the aborigines, as connected with these purchases. I drew my salary as Government interpreter part of the time that I was employed in making out the deeds for the several parties. I had no regular scale of charges. I acted as agent for several purchasers of land under the penny-an-acre proclamation. It was generally known that the Government interpreters were employed in the manner referred to. I know that Messrs Meurant and Duncan were employed in the same manner, and I think Mr Forsaith was also.[111]

Governor Grey, who replaced FitzRoy in November 1845, later used Davis's and Meurant's statements to criticise the Protectorate; in particular the department's objection to reinstating pre-emption. Grey claimed, in November 1847, that:

> at the time sales of land were permitted under the penny-an-acre proclamation, the officers employed by the Government in the Protectorate Department were permitted to assist in negotiating the purchases of lands from the natives, and that some of them were employed by the Europeans as agents in these transactions, not making fixed charges for their services, but receiving presents – generally, it appears, in the form of money payments. Their emoluments were thus, under this system, derived from two sources:–
>
> 1stly. From their regular and recognised salary and allowances as Government officers.
>
> 2ndly. From the amounts they received from Europeans for acting as agents in purchasing for them tracts of land from the natives.[112]

Grey pointed out the incongruity of interpreters being employed simultaneously 'to watch over and protect the interests of the natives' while 'acting privately as the paid agents of Europeans'. His Native Secretary, J Jermyn Symonds, added that reinstating pre-emption had thrown many of these land agents out of employment and ended 'the means of increasing the emoluments of the interpreters' resulting in 'much dissatisfaction among the parties interested'.[113]

There is some indication that Meurant's dual role may have caused some disturbance in the colonial administration at the time. This was despite his claim (above) that all Protectorate officers had permission to assist in negotiating the purchases, and Davis's claim (also above) that it was generally known that Government interpreters were so employed. On 22 April 1844, Meurant recorded: 'I received a letter from the C Seurety [Colonial Secretary?] requesting me to account for my acting as Native land Agent'.[114] He then recorded, on 4 May 1844, that he 'went to Town spoke to . . . Mr Clarke the chief Protector of Aboregines [sic] respecting my

111. Statement of C C [sic] Davis, encl in Grey to Earl Grey, 15 November 1847, BPP, vol 6, [1002], p 17

112. Grey to Earl Grey, 15 November 1847, BPP, vol 6, [1002], p 17. This is rather ironic, considering Clarke's former concern about his simultaneous roles as land purchasing agent and Protector.

113. J Jermyn Symon[d]s, 15 November 1847, encl in Grey to Earl Grey, 15 November 1847, BPP, vol 6, [1002], p 18

114. Edward Meurant, 22 April 1844, diary and letters, MS-1635, ATL Wellington. Two days earlier FitzRoy had asked him to prepare to travel south to join Commissioner Spain. Perhaps FitzRoy wanted to remove him from participating in the pre-emption waiver land transactions (Edward Meurant, 20 April 1844, diary and letters, MS-1635, ATL Wellington).

name being omit[t]ed in his abstracts. He promised to ar[r]ange it for me'.[115] It is difficult to tell whether this meant Meurant's name was omitted from the pay abstracts and he sought to have this put straight, or whether his name was still on the pay abstracts and he sought to have it omitted so that he could continue assisting in pre-emption waiver purchases as a private agent.

When Protector Forsaith discovered Grey's claims, he felt compelled to defend both his and the Protectorate's honour. He claimed Grey's 15 November despatch was 'misrepresenting the conduct of the officers of [the] Protectorate Department' and responded:

> I never acted, either directly or indirectly, as agent for a private purchaser under those proclamations; nor did I ever receive fees or presents, in any shape or form whatsoever, from private individuals. The records of these claims are in [the] possession of his Excellency; and the claimants themselves, as well as the accusers, are on the spot. I challenge all or any of them to come forward and prove that I assisted as a private agent to negotiate a purchase, or received in any shape whatsoever a fee or reward for so doing; and I am bold to assert the same for my colleagues in office at the time. I am confident that none of the Protectors of Aborigines are open to censure on this account.
>
> It is true that the Protectors were sometimes called upon to interfere between purchasers and natives, but it was invariably in pursuance of the orders of Government, on behalf of the natives, and in discharge of their legitimate duty. His Excellency has taken up the statements of Messrs. Davis and Meurant – doubtless true as far as they themselves are concerned – and has, inadvertently I hope, made it appear as though they were Protectors of Aborigines, which they were not, and consequently that their statements reflected upon, and were applicable to, the whole department.[116]

As noted above, Clarke's protectors were involved in assisting Maori to agree on tribal boundaries. Davis later stated that the protectors' help was given 'in disputed lands' and that in such cases they were merely performing their Government-appointed duties.[117] Clarke had also instructed his protectors to assist in the settlement of payments. Pakihi and Karamuramu Islands, near Waiheke, were purchased by Taylor, Campbell, and Brown, from Ngati Paoa, in August 1844. FitzRoy had consented to waive pre-emption over these islands on 17 June 1844. On 21 June 1844, Clarke instructed McLean to go with Taylor to see Ngati Paoa and inform them that he was soon to commence mining on Pakihi. But as 'some of the Natives have complained that the purchase of that Island was not complete' (presumably because Maori claimed insufficient payment had been obtained) McLean was to assist them to settle the question, so that Taylor could get on with his mining in peace.[118] Meurant's diaries indicate instances in Auckland where Clarke and FitzRoy had been sought by Maori to settle disputes arising from pre-emption waiver claims. On 23 May, he had

115. Edward Meurant, 4 May 1844, diary and letters, MS-1635, ATL Wellington
116. Forsaith to Colonial Secretary, 3 April 1849, encl 1 in Grey to Earl Grey, 23 May 1849, BPP, vol 6, [1136], p 156
117. Davis to Forsaith, 31 March 1849, sub-encl 1 in encl 4 in Grey to Earl Grey, 23 May 1849, BPP, vol 6, [1136], pp 158–159
118. Clarke to McLean, 21 June 1844 and McLean to Clarke, 1 July 1844, Sir Donald McLean papers, MS-copy-micro-535, reel 2, folders 1–3A, ATL Wellington

noted that 'Wetere and Mr Langford disputed about there accounts left to Mr Clarke to decide it'. And as noted above, on 29 May 1844, Meurant recorded certain chiefs of Ngati Maho and Ngati Whatua wanted FitzRoy to deal with a land dispute.[119]

Forsaith, in denying any unauthorized involvement in the pre-emption waiver purchases, added that he had never been absent from Auckland since he left Government service. He ventured to say that Governor Grey may easily have ascertained from him, if so disposed, whether the statements made were true or false. Knowing that Grey commonly used such tactics to further his ends, Forsaith's next statement was rather poignant. He surmised:

> The fact of his Excellency having taken no step to test the veracity of statements affecting individual character, although it would have been most easy to do so, leads the mind irresistibly towards the conclusion that his Excellency did not wish to discover any flaw in these statements; and that in forwarding them to the Home Government he was prompted rather by a wish to achieve a certain purpose than by a desire to communicate nothing but the truth.[120]

Forsaith claimed Davis and Meurant's statements were 'true only in a particular and limited sense'. Not only were they not protectors but, in Forsaith's view, they were not even members of the Protectorate Department, 'properly speaking'. He repeated that: 'the imputation, as far as I and the Protectors of Aborigines are concerned, is wholly unfounded and unjust'. He extracted statements from both Meurant and Davis stating that the protectors did not act in the capacity as private (fee-charging) agents in the pre-emption waiver purchases.[121]

5.3.5 Non-compliance with proclamation provisions

A number of the proclamation provisions were intended to be protective of Maori interests. Clarke and FitzRoy could have refused to waive pre-emption in instances where settlers failed to comply with those provisions. FitzRoy had great difficulty in getting purchasers to comply with the provision that purchasers were to have applied for a waiver certificate before they bought land from Maori. As noted above, had this procedure been followed, the land concerned may instead have been opened up to competitive bargaining. But both Clarke and FitzRoy turned a blind eye to this, in most cases, allowing waivers where this procedural point had been ignored. But FitzRoy later put his foot down, on paper at least, on this point (see below).

In each of the following cases, some blatantly stating the land had already been acquired, Clarke recorded 'no objection' to the purchases. Charles Moffitt and James Dilworth had already bought land at Remuera from Wetere (Ngati Maho) before applying for waiver certificates, the latter indicating this on his application forms.[122]

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119. Edward Meurant, 23, 29, May 1844, diary and letters, MS-1635, ATL Wellington
120. Forsaith to Colonial Secretary, 3 April 1849, encl 1 in Grey to Earl Grey, 23 May 1849, BPP, vol 6, [1136], p 156
121. Davis to Forsaith, 31 March 1849, sub-encl 1 in encl 4 in Grey to Earl Grey, 23 May 1849, BPP, vol 6, [1136], pp 158–159; Meurant to Forsaith, 2 April 1849, sub-encl 2 in encl 4 in Grey to Earl Grey, 23 May 1849, BPP, vol 6, [1136], p 159

S A Wood bought land around Onehunga from Matiu two days before he applied for a pre-emption waiver certificate.[123] Hart's land at Epsom–Remuera was bought from Jabez Bunting (Ngati Maho) after he applied, but before the Protector's approval or Governor's consent.[124] His land at Remuera, bought from Wetere, was also purchased prior to his application.[125] Edward Other's claim to Epsom land had been purchased from Kawau and Te Hira (Ngati Whatua) two days before his application for a pre-emption waiver certificate,[126] while Henry's claim to One Tree Hill land was purchased from Kawau, Te Hira, and others of Ngati Whatua also prior to the certificate application.[127] Philip Kunst's purchase from Wetere at Remuera and James Wilcox's purchase of Remuera land from Ngati Whatua chiefs also preceded their applications.[128] The failure to sanction non-compliance with the proclamation provisions did not encourage settlers to conform.

122. OLC 1/1050, 1/1055, 1/1058, NA Wellington. Despite Dilworth's open admissions, the deed produced in evidence in Matson's inquiry exhibited a date well after the proclamation. This appears often to have been the case.
123. OLC 1/1054, NA Wellington
124. OLC 1/1064, NA Wellington
125. OLC 1/1065–1066, NA Wellington
126. OLC 1/1074, NA Wellington. This was in April 1844, yet the deed itself is recorded as 3 June 1844 (Turton appears to have incorrectly cited 3 June 1840).
127. OLC 1/1081, NA Wellington
128. See OLC 1/1075 and 1/1079, NA Wellington

CHAPTER 6

THE PRE-EMPTION WAIVER EXPERIMENT IN PRACTICE: THE SECOND WAIVER, 1844–46

6.1 Local Response to the March Waiver

Glowing reports of the effect of the waiver of pre-emption soon came from the Chief Protector. By July 1844, Clarke reported that the waiver proclamation (and the conclusion of the Wairau affray, which FitzRoy had also been instrumental in) had resulted in 'tranquillity' in every district. He claimed the 'fears respecting the security of life and property' of the settlers, were gone. The March proclamation had been received with 'very general satisfaction'. Dissatisfied Europeans, who had expected a system more advantageous to themselves, had failed to prejudice Maori against it.[1] As noted above, Clarke later claimed that FitzRoy's actions had demonstrated that the Crown's intentions with regard to land purchase were 'disinterested', thereby quashing incipient rebellion.[2]

Some settlers complained about the fees imposed by the Government. The *Southern Cross* printed an article directly after the release of the proclamation expressing settler disappointment. It argued that the only good in the proclamation was the acknowledgement of the right of Maori to sell, and of the Europeans to purchase. But they already knew this was 'a right inherent in British subjects whether Maori or English'. It claimed FitzRoy was 'trifling' with both Maori and Pakeha:

> it is even worse than the old system, the land is dearer, and much more difficult to be obtained. The man who will expect to get land in New Zealand at a cheap rate, after having to pay the Natives in the first instance, to pay for the expense of Survey, and to give in the end Ten Shillings per acre to Government, will be miserably disappointed. Ten shillings, or even twenty shillings might have been asked for the lands within five miles from the town, but two shillings, or two shillings and six-pence, should have been the utmost for country lands.[3]

In its following issue, the *Southern Cross* continued its campaign for purchasers to ignore the conditions attached to the waiver, buy from the Maori owners regardless, and force the Government to recognize their titles. It claimed that settlers would have:

1. Clarke to Colonial Secretary, 31 July 1844, encl 4 in FitzRoy to Stanley, 18 December 1844, BPP, vol 4, pp 457–458
2. Clarke to Colonial Secretary, 30 March 1846, George Clarke, letters and journals, qMS-0468, ATL Wellington
3. *Southern Cross*, 30 March 1844, vol 1, no 50. This issue also commented on the reserve tenths policy.

> no occasion to trouble themselves just now about a Crown Title, or the payment of 10s per acre; there will be plenty of time to procure the Crown Grant when they wish to sell the lands, and before that time shall arrive, the Government will gladly give the Title for the price of the parchment and labour of writing it. The Native is after all, the best Title in New Zealand, and that which will ensure the most peaceable possession. When the Government discover that four or five hundred persons hold land in New Zealand by contract with the Natives, they will very quickly consent to give them Titles. . . . The Government are not now in a position to quarrel with the natives and Europeans at the same time; and we are quite certain the Home Government would much rather abandon New Zealand altogether than have at this time of day recourse to violent measures to enforce that which is in itself so manifestly opposed to reason and to common sense.[4]

It recognized the colonial administration's impotence – financially and militarily – and sought to encourage reliance instead on Maori title.

Despite Clarke's claims about the success of the waiver, he still looked upon it with 'considerable anxiety', and saw it 'merely in the light of an expedient'. Perhaps he, like the colonial land and emigration commissioners, thought of it as a temporary measure designed to appease existing problems. He noted that while the waiver responded to both Maori and Pakeha being 'clamorous' ('the one being desirous to have the privilege of disposing of their lands to whom they pleased, and the others the right of purchasing from the original owners'), it did not adequately deal with disputed land, which he thought would 'in all probability' be that offered first. He believed that the problems surrounding the sale of disputed land would only partially be solved by the regulations preventing very extensive purchases – something which FitzRoy appears to have had more faith in.[5] Despite the limited nature of Clarke's role in bringing about any improvement in this, his concern is apparent in his comments on waiver applications.

Clarke foresaw that Maori living outside Auckland would soon be dissatisfied with the proclamation. The waiver enabled Europeans to select the most favourable areas of land, which would 'tend to concentrate them' around Auckland, but the 10-shillings-an-acre fee to be paid by the purchaser to the Crown would prevent settlers purchasing land at a distance from Auckland. He predicted 'its value for some years to come would not be equal to the outlay of capital necessary to acquire it'. Clarke also warned, no doubt aware of the *Southern Cross*'s encouragement, that 'parties will acquire and hold large tracts of land on native title only, without complying with the Government regulations, which may hereafter create some embarrassment'.[6] The

4. *Southern Cross*, 6 April 1844, vol 1, no 51
5. Clarke to Colonial Secretary, 31 July 1844, encl 4 in FitzRoy to Stanley, 18 December 1844, BPP, vol 4, p 458. FitzRoy believed the 'intermixed interests of various tribes, families and individuals' was solved by the waivers being for small areas (FitzRoy, 'Memorandum on the Sale of Lands', encl 2 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 404).
6. Clarke to Colonial Secretary, 31 July 1844, encl 4 in FitzRoy to Stanley, 18 December 1844, BPP, vol 4, p 458. There is some indication in the penny-an-acre pre-emption waiver claim files that this may well have been the case.

reality of this concern is confirmed by FitzRoy's view expressed to the Colonial Office in October 1844.

6.2 THE COLONIAL OFFICE RESPONSE

FitzRoy's April 1844 despatch describing the steps he had taken to waive Crown pre-emption the month before, was referred in London to the colonial land and emigration commissioners. This time, the commissioners who wrote the report were Sir John George Shaw-Lefevre and Charles Alexander Wood. Commissioner Villiers had died, but Elliot remained, and Stanley ensured Elliot was aware of his views before forwarding FitzRoy's despatch.[7] Lefevre and Woods's report, instead of insisting on the importance of the Crown's right of pre-emption (as Villiers and Elliot had), emphasized that FitzRoy's waiver decision was a temporary response to local conditions. The colonial land and emigration commissioners apparently accepted FitzRoy's view that anarchy (still threatened by the *Southern Cross*) may have resulted had he not taken immediate action. They decided that they had no objection to the waiver as a temporary measure, concluding:

> We are not prepared to suggest to Lord Stanley any permanent measure as a solution of this difficulty, but as one of a temporary nature at any rate, we see no objection to the Plan being tried which Governor FitzRoy has promulgated, and which, with the exception of the land to be purchased by the Company, is we understand to be confined to the District around Auckland.[8]

They appear to have adopted Stanley's incorrect view that purchases were to be limited to Auckland district. They also noted:

> We are aware that this partial abandonment of the right of pre-emption tends to diminish the chance of Government being able itself to be a seller of Land, but having regard to the probable state of the Land market, we see very little probability of Sales to any extent being Effected by the Government; – And we should hope that the Governor will by other resources than a Land Fund be able to provide for the necessary expenses of his Government; and as a fee of 10s will be paid to the Crown on each Grant, that at some future period there will be a sum to be applied to Emigration without inconvenience to the Local Resources.[9]

The Colonial Office, however, were only very cautiously accepting of it.[10] Stanley commented:

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7. Ann Parsonson, 'Ngai Tahu Claim Wai 27 in Respect of the Otakou Tenths' ('Otakou Tenths'), (Wai 27 ROD, doc R35), p 82
8. Lefevre and Wood to Stephen, 19 November 1844, CO 209/40, p 256B, NA Wellington
9. Ibid, p 257B–258
10. Commissioners to Stephen, 19 November 1844, CO 209/40, pp 248–258, NA Wellington; Stanley to FitzRoy, 30 November 1844, BPP, vol 4, pp 203–204

> I entertain no doubt, but that the original intention of that provision of the treaty was to enable the Crown, as the sole purchaser, to obtain land on easy terms from the native tribes, applying a portion of the proceeds, when re-sold, to the importation of labourers, and the remainder to other public objects, but especially to the purchase of more land, to be again re-sold at a profit .... You will not fail to observe that this right of pre-emption is a point much insisted upon by the late Committee of the House of Commons, whose Report, however, had not been made at the date of your despatch.[11]

The 'Report of the House of Commons Committee on New Zealand 1844' had upheld Gipps's 'general principles' expounded in the debates on the New Zealand Land Claims Bill 1840 (NSW).[12] Stanley's interpretation of the intention behind pre-emption, unlike FitzRoy's, was at odds with the explanation given to Maori in the Treaty debates.

Stanley brought FitzRoy's attention to some objections to which he believed the plan was 'obviously liable'. He thought that the waiver was limited to the district adjoining Auckland, and therefore that it was liable to criticism for favouring Aucklanders. As noted earlier, this was wrong. He also warned that the Governor's absolute discretion in allowing or prohibiting any particular sale opened FitzRoy to the possibility of abuse of, and suspicions of abuse of, his power. Of course, the risk of this would be no greater than in the sole right to buy land, although Stanley's concern was probably that settlers may complain.

Despite these adverse comments, Stanley suggested that 'if large sums should be realized by the sale of land' the 10-shilling fee may be further increased. This further confirms his pre-occupation with obtaining funds. But he did not view this suggestion as necessarily detrimental to Maori. He continued:

> In proportion as the fee is increased, the amount realized by the natives will, of course, be diminished, and the market price which settlers will be willing to pay them (which is exclusive of the fee) will fall. I should be very unwilling to inflict any hardship upon them; but I very much doubt how far it will be to their real advantage to receive large money-payments for the mere sale of waste land, and I see no injustice in making such sales contribute largely to the support of the Government and the influx of settlers, by which alone value is given to the land.[13]

In effect these views were merely a re-statement of those made by Normanby to justify the difference in price pre-emption allowed between the purchase of land from Maori and sale of that land by the Crown. With these observations made, Stanley was prepared to sanction the step FitzRoy had taken in giving Maori the 'privilege of selling their lands directly to settlers'.[14]

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11. Stanley to FitzRoy, 30 November 1844, BPP, vol 4, pp 208–210
12. See ch 3
13. Stanley to FitzRoy, 30 November 1844, BPP, vol 4, pp 208–210. Stanley was less accepting of this general waiver than FitzRoy's New Zealand Company waivers of February 1844 (see ch 4).
14. Ibid

6.3 MOVEMENT AGAINST CUSTOMS AND PRE-EMPTION IN THE NORTH

Not long after the addresses from Ngati Whatua and Waikato chiefs at FitzRoy's levee, two Hokianga chiefs, Moses Mahe and William Barton, had written to FitzRoy in a similar vein. They claimed that Hobson had not proceeded in accordance with the Queen's intentions, as expressed at Waitangi and the other Treaty-signing meetings.

These chiefs also stated that the Treaty-signing meetings had provided no intimation to them that the Queen was to have the exclusive right to purchase their lands. Their understanding of it, consistent with that of the Ngati Whatua and Waikato chiefs, was that 'the Queen should have the first offer; but should we not come to terms, we should sell our waste lands to whomsoever would purchase them'.[15]

But they also objected to other restrictions, such as that imposed on felling kauri, which they believed was unjust. They asked FitzRoy whether he thought it 'a just act to seize the Kauri of the forests'. This was a valuable source of income and the restriction had resulted in their 'living in debt and distress' as 'the great quantity of goods we have obtained' was 'on credit and are not paid for'. They also had difficulty accepting that surplus lands were being 'taken' by the Queen. They had not understood at that time that any portion of the lands they had previously sold to Pakeha should be 'taken away from them for the Queen'. Again they asked FitzRoy whether he thought this 'a just thing'. They believed it to be 'entirely wrong'. The chiefs' confidence in Europeans had been shaken and they expressed fears that Maori would be turned upon next, and their land and lives taken.[16]

The subsequent March proclamation had 'helped' very few (other than perhaps those living in Auckland) to participate in, and gain income through, land transactions. Other restrictions (customs duties and timber regulations) meant that alternative forms of money-making, formerly available to (Northland) Maori, were closed off or frustrated.

Hone Heke's felling of the flagstaff flying the Union Jack, a symbol of British authority, at Kororareka (in the Bay of Islands), in July 1844, was yet another indication of this questioning of British sovereignty.[17] FitzRoy attributed this to the goadings of Americans and British settlers opposed to British authority. He believed they had urged Maori rebellion by telling Maori:

> that while our flag waved in New Zealand, they would be oppressed, – that we now prevented them from trading with ships as they pleased and as they used to trade formerly, and prevented them from disposing of their own property, their lands, as they wished (a proof, say they, that they are not treated as British subjects), and that we are only waiting till our numerical strength in New Zealand is sufficient to make all the aborigines slaves, and take from them all their land.[18]

15. *Southern Cross*, 17 February 1844, vol 1, no 44
16. Ibid. The analogy these chiefs made between their own plight and the plight of Pakeha settlers is perhaps an indication that many such Maori leaders were beginning to realise what the Crown meant by sovereignty, and its implications for rangatiratanga.
17. See BPP, vol 4, pp 304–310, 356–358; see J Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict*, Auckland, Penguin, 1988
18. FitzRoy to Stanley, 16 September 1844, BPP, vol 4, p 356

The *Southern Cross* argued that Maori were 'actually deceived into the belief that if they again erected their own flag, and destroyed that of the Government', their informants would 'assist them in obtaining and maintaining their independence'. But it claimed that the 'apparent and real' 'independent' reason for northern Maori unrest was:

> their present extreme poverty and depression, because of the restrictions on the sale of their lands, and more especially the injury which they had sustained since the whaling ships and other traders had ceased to visit their ports. In consequence of which they were now unable either to dispose of their produce, or to obtain those articles of European trade and manufacture to which they had been accustomed, and had so easily and cheaply procured before the establishment of the Government.[19]

Again, despite these protestations, settlers were less concerned with Maori interests than their own.

In September 1844, FitzRoy called a peace conference at Waimate. There he stated (with Puckey translating) that the flagstaff was 'in itself worth nothing; a mere stick, but as connected with the British flag, of very great importance'. It was under the protection of the flag that the British Crown protected New Zealand. Contrary to what they had been told by others, FitzRoy lauded the British flag as 'the signal of freedom, liberty and safety'.[20]

In a mode of appeasement, FitzRoy also announced that the Bay of Islands was now to be a free port, allowing Maori (and others) there to 'trade freely with all ships'. He stressed again the Queen's role as protector of land, property and life, and claimed again that Crown pre-emption had been sought at Waitangi to enable the Crown to protect Maori against 'those who would buy more from you than you could spare'.[21] The following day, FitzRoy met some of the chiefs 'anxious to obtain information on the subject of their lands, such as the right of selling to Europeans, and the decision as to who should obtain the surplus lands of the claimants'. This further indicates that information regarding the proclamation had not been widely distributed.

In later correspondence with Hone Heke, FitzRoy again emphasised the protective nature of pre-emption. It was because the Queen had heard that Maori were selling so much land to Europeans, and that in a short time there would not be enough left for them and that they would then want food as well as clothing, that she had asked for the right of pre-emption. Had it not been for this 'wise and parental regulation', he stated, very many chiefs would now be destitute. Of course, some northern Maori were claiming the opposite – that pre-emption, and customs duties, were causing their destitution – hence their interest in the proclamation provisions. FitzRoy essentially repeated the provisions in Normanby's instructions that the Governor was to buy only land Maori could well spare, providing good reserves and allowing settlers only small areas. He stressed that the Treaty, which contained the pre-

18. FitzRoy to Stanley, 16 September 1844, BPP, vol 4, p 356
19. *Southern Cross*, 7 September 1844, in encl 3 in FitzRoy to Stanley, 16 September 1844, BPP, vol 4, p 366
20. Ibid, pp 367–368
21. Ibid

emption 'regulation', was agreed to by the chiefs. The flag, the signal of freedom and security, he concluded, was a signal of great advantages.[22]

But the *Southern Cross* saw its chance. Unrest, it claimed, was not limited to the Bay of Islands:

> The same necessity which existed at Russell exists here. Justice at Russell is justice at Auckland and at Akaroa. The discontent is not confined to John Heki, neither are the symptoms of incipient rebellion manifest among the northern chiefs alone; the natives are discontented all over these islands . . .[23]

To some degree, FitzRoy appears to have believed this – as his October 1844 despatch to the Colonial Office was soon to indicate. But FitzRoy was not alone in this view. This type of sentiment (although to a lesser extent) also appears to have been on Shortland's mind during his year as Acting Governor. And Clarke (perhaps the link between the two) clearly believed in the danger of incipient rebellion and the urgent need for the colonial administration to respond to it.

Clarke met with the principal chiefs of Waihou, Mangamuka, and 'Uttakura' (on the upper Hokianga), in September 1844, to hear their complaints and report to FitzRoy so that he may 'take steps to remove any grievances which might exist amongst them'. The chiefs said that they were continually being told that they had been enslaved and that the Government was their oppressor. Clarke reported that:

> they said they were now extremely poor; a few years ago they were able to procure not only necessaries, but luxuries; now they were reduced, as I might see, to an old thread-worn blanket; and they had been given to understand that this was in consequence of their having signed the Treaty of Waitangi. . . . They had been told that the reason the Europeans could not now buy their produce was, that the demands of the Government for money were so great, that they had none to buy their produce . . .[24]

William Repa attributed the 'evil talk and ill-conduct' to the want of trade. He thought that 'if they could only find market for their timber, all would be peace'.[25] Clarke later attributed the complaints of Hokianga Maori to the fact that they were deeply in debt 'and had no means of extricating themselves but by selling some of their Lands'.[26]

FitzRoy and his Legislative Council responded by abolishing customs totally in early October 1844. He explained to Stanley that the additional levy on customs had 'brought about a crisis', which he described as 'the attempt to question Her Majesty's authority at the Bay of Islands, and the cutting down of the flag-staff'. The causes and effects of the new duties, he claimed, had been 'misrepresented'. He stated that

22. FitzRoy to Heke Pokai, 5 October 1844, encl 7 in FitzRoy to Stanley, 19 October 1844, BPP, vol 4, p 417
23. Extract from the *Southern Cross*, 14 September 1844, in encl 3 in FitzRoy to Stanley, 16 September 1844, BPP, vol 4, p 372
24. Clarke to Colonial Secretary, 30 September 1844, encl 11 in FitzRoy to Stanley, 19 October 1844, BPP, vol 4, p 419
25. Ibid
26. Clarke to Colonial Secretary, 30 March 1846, George Clarke, letters and journals, qMS-0468, ATL Wellington

'intelligent chiefs' now wanted to question and to 'prepare to oppose British authority'. Some complained that the motive behind customs duties was to force Maori to purchase goods at European shops only 'and pay nearly double for our tobacco and clothes'. Others claimed that allowing vessels to call at one port, and not another, was unfair. These grievances were 'causing extensive and deeply-seated discontent' among Maori throughout New Zealand, and particularly at the Bay of Islands where trade had dropped dramatically as 'a direct consequence of the customs' restrictions'.

FitzRoy believed that continuing the restrictions 'would injure the influence of Government' and reduce shipping contact even further. It 'would inevitably lead to insurrection, the fatal consequences of which it would not be difficult to foresee'. The principal motive of repealing the customs ordinance was, he claimed, the 'growing excitement, indeed insurrectionary spirit, among the aborigines'.[27]

This move was the opposite to that anticipated by the colonial land and emigration commissioners, who had noted following the March waiver proclamation that 'we should hope that the Governor will by other resources than a Land Fund be able to provide for the necessary expenses of his Government'. It was also a move contrary to Stanley's obvious predilection for the colony being self-financing.

6.4 FITZROY'S 'PENNY-AN-ACRE' PRE-EMPTION WAIVER PROCLAMATION, OCTOBER 1844

But FitzRoy was to sink even lower in Colonial Office eyes. On 1 October 1844, he had issued a proclamation stating that the terms and conditions of the March waiver had been disregarded, 'either by persons making purchases of land from the natives without first duly applying for and obtaining the Governor's consent' or 'by much understating [that is, greatly understating] the quantity of land proposed to be purchased'. As noted above, pre-purchasing was probably done to avoid paying the initial four-shillings-an-acre fee, should a sale not result, and it failed to allow the competition FitzRoy envisaged Maori would benefit from. But understating the quantity of land proposed for purchase was possibly not always intentional. Acreages were often overestimated as well. However, honesty had not been promoted on this latter point by FitzRoy's failure to require a survey until the Crown grant was being prepared.

FitzRoy declared that pre-emption would not be waived in any case where a person had not complied strictly with the regulations. He added the usual warning that all titles to land not confirmed by a Crown grant were 'absolutely null and void'. FitzRoy then listed a number of provisions designed to force compliance with the regulations. He specified that:

27. FitzRoy to Stanley, 29 September 1844, BPP, vol 4, pp 391–392. Finance was instead to be raised through the property rate ordinance, section 20 of which stipulated that Maori property and income was exempt (see Property Rate Ordinance, 28 September 1844, encl 1 in FitzRoy to Stanley, 29 September 1844, BPP, vol 4, pp 393–395).

- he would not allow 'more than 25 per cent for any mistake in the estimate of the quantity applied for; and in respect of which the fee of 4s an acre shall have been paid in compliance with such regulations';
- the 'quantity of land to be conveyed to the purchaser by the Crown grant' would 'in no case, exceed the number of acres in respect of which the right of pre-emption was first requested to be waived, except upon payment of double fees for the excess'; and
- the four-shilling-an-acre fee (for nine-tenths of the land over which pre-emption had been waived) was now to be paid within one month of the Governor's consent being obtained, 'or, in default of payment within that time, such consent will be cancelled'.[28]

FitzRoy included a proposed table, illustrating this last point, where one purchaser failed to pay the fee within one month of the date of consent, and earned a statement in the last column (entitled 'Forfeited for Non-payment') of 'Cancelled for non-payment within one month'. The table, showing lands over which the Crown's right of pre-emption had been waived, was to be published from time to time. But obviously, this measure did not satisfy FitzRoy.

On 10 October 1844, FitzRoy called a meeting of the Executive Council. Clarke was again present. The previous day, Clarke had written a 'confidential' letter to FitzRoy. His letter noted the 'increasing disquietude of the natives at the Bay of Islands, Hokianga and Auckland', the cutting down of the flagstaff, and the claims of Government oppression in establishing customs and claiming the sole right of pre-emption. While customs had been abolished, pre-emption had remained, and Clarke claimed to be:

> apprehensive that the peace of the country cannot be secured, without something being done to admit of their alienating such portions of their land as they can very well spare, without injury to themselves and their children.
>
> In my last report ... I alluded especially to this subject, and pointed out to your Excellency the disappointment manifested by Europeans and Natives at their being obliged to pay 10s an acre to Her Majesty's Government, to enable them to buy land from the Natives; that feeling on the part of the Natives is daily increasing, and applications are continually made to your Excellency for the removal of this impediment, in order that they may complete their engagements, pay their debts contracted before Her Majesty's Government was formed, and procure what appears to them essential and necessary.[29]

FitzRoy read Clarke's letter to the Executive Council as evidence of the 'very great dissatisfaction of the natives with respect to the restrictions placed on the sale of their land'. He proposed that 'an alteration' which he was anxious to introduce in the existing regulations be considered. A discussion of the subject ensued.

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28. See *New Zealand Gazette*, 1 October 1844, BPP, vol 4, pp 619–620
29. Clarke to FitzRoy (confidential), 9 October 1844, encl 4 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 406

The opinion of the council was formally recorded in the minutes through a series of questions put by FitzRoy, and answered by the members, following their discussion. The council agreed an alteration was desirable, and that the fee charged for waiving pre-emption should be removed. But it queried whether such a step should be taken immediately without confirmation first from the Colonial Office. It was willing to take the step if there was some 'pressing emergency', and it bowed to FitzRoy's greater knowledge of the present discontent of Maori, in which he was supported by Clarke.

When asked what the probable consequence of leaving the existing system unchanged for another year would be, the answers ranged from '[u]niversal discontent' or an increase in the 'extent and intensity of the present dissatisfaction', to Maori 'committing outrages; and perhaps that civil war' may result. This question was put to Clarke. Clarke replied that he would be 'apprehensive that the island would be in a state of anarchy and confusion'.[30]

FitzRoy concluded the session by stating that the decided step 'of allowing restricted and limited sales of land, without payment of direct fees' should be taken 'at once'. He claimed to be 'thoroughly convinced that such a step, taken now, will tend materially to the mutual confidence and prosperity of both races'.[31]

FitzRoy then immediately took the risky step of reducing the fee payable to the Government for a pre-emption waiver to one penny per acre. In the preamble of his 10 October 1844 proclamation, FitzRoy explained that he was taking this step for a number of reasons. First, because of the disregard displayed for the regulations:

> either by persons making purchases of land from the natives without first applying for and obtaining the Governor's consent to waive the right of pre-emption, or by much understating the quantity of land proposed to be purchased from the natives . . .

Secondly, because of the 'misrepresentation' of the objects and intentions of the Government in requiring that a fee should be paid on obtaining the Governor's consent (it being asserted as a 'mark of oppression, even of slavery'). Thirdly, because he considered Maori were now aware of the full value of their lands and able to look after their own present interests 'however indifferent at times to those of their children'.[32]

The proclamation itself was almost identical to the March proclamation. The most important difference as far as settlers (at least) were concerned was that no fees would be demanded on consenting to waive the right of pre-emption; and the fee payable on the issuing of a Crown grant was now reduced to one penny an acre.[33] But there were other important differences for Maori:

- FitzRoy extended the provision for 'reserves'. The relevant provision now read: 'The Crown's right of pre-emption will not be waived over any of that land near

30. Extract from minutes of the Executive Council, 10 October 1844, encl 3 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, pp 404–405
31. Ibid, p 405
32. Proclamation, 10 October 1844, in encl 1 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 401
33. Ibid, p 402

Auckland which lies between the Tamaki road and the sea to the northward, *or over any land reserved for the use of the aboriginal natives*' (emphasis added).

- As a general rule, no waiver would be given over land required by Maori for their '*own*' use (emphasis added), rather than their 'present' use, as it had appeared in the March proclamation. This perhaps extended Maori interests also.
- Surveys were now to be deposited at the Colonial Secretary's office, prior to preparation of a Crown grant, rather than the Surveyor General's office.
- Copies of the deed or deeds were to be lodged at the Colonial Secretary's office, as soon as practicable, rather than the Surveyor General's office.
- FitzRoy now required the lapse of 12 months before issuing a Crown grant to commence '*after the receipt at the colonial secretary's office of certified copies of the surveys and deeds of sale above-mentioned*' (emphasis added) rather than from the time of paying the fees on receiving a pre-emption waiver certificate. This was an important alteration. It meant that settlers, wanting to secure their Crown grant, could not leave the survey of their land until immediately prior to the issuing of the Crown grant. Nor could they get away with supplying deeds merely 'as soon as practicable'. This provision would have enabled FitzRoy to gazette purchases a year in advance of issuing a Crown grant, allowing objectors a reasonable chance of appearing.
- And, of course, as stated above, the fees changed. The provision now specified that '*on the issue of grants, fees, at the rate of 1d per acre, will be required by Government*' (emphasis added).[34]

There were a number of items present in the March proclamation which the October proclamation omitted. These were:

- In the March proclamation, the Governor was to give or refuse his consent to waive pre-emption '*to a certain person, or his assignee*' (emphasis added). This phrase was omitted from the October proclamation, presumably to clarify FitzRoy's intention not to provide a waiver to a specific person, but to open the land concerned up to competition (see below).
- The March proclamation had stated that the fees were being paid as a '*contribution to the land fund, and for the general purposes of Government*' (emphasis added). This was omitted from the October proclamation.
- The October proclamation also omitted to specify that the payment per acre was to be made over nine-tenths of the land for which pre-emption had been waived, and it did not state that the fees were payable to treasury.

FitzRoy's 10 October 1844 waiver represented a further attempt at tightening the reins which he had begun earlier that month.

Stanley had suggested that FitzRoy might consider increasing (rather than decreasing) the March proclamation's fee. FitzRoy's report to Stanley stressed that the penny-an-acre waiver was 'absolutely necessary' to prevent insurrection, to which Maori were being incited by settlers – a large reward having been offered 'for

34. The other alteration, probably a misprint, was that whereas the March proclamation stated that 'all transactions with the sellers' were to be at the buyer's risk, the October proclamation stated that 'all transactions with the settlers' were to be at the buyer's risk.

whomsoever should do most towards stirring up and informing the natives how to act together on this subject'. He explained that Maori had been told that 'te hokonga' was 'the option of purchase' not the exclusive right of purchase, and that the meaning of the exclusive right of pre-emption was 'not generally understood' by them. He stated that Maori would never have agreed to denying themselves the right to sell to private persons if the Government declined to purchase. He also repeated that Maori attention had been drawn to article 3 of the Treaty, and to the argument that while unable to sell their own land, they were 'no better than slaves'.[35]

FitzRoy included, in his despatch to Stanley, a memorandum on the sale of lands in New Zealand, in which he attempted to explain the fairness of this measure to all concerned. He argued that the measure would neither result in unfairness to those who had already purchased land at high prices, nor lead Maori to be speedily dispossessed of their lands. On the first point, FitzRoy reasoned that unless the colony prospered, the value of land already bought would 'fall to nothing' and that only if the land was easily attainable in small quantities, and land transactions and trade encouraged, would the colony prosper. This was his and Clarke's aim with both pre-emption waiver proclamations. He envisaged Maori would be part of this prosperous new community.[36]

As for the second point, FitzRoy argued that the last four years of contact with 'so many' British people had 'so completely informed the natives of the value of land, that there is not now any doubt of their ability to manage their own transactions of this nature, as far as relates to their own present interests'. This contact had included the land claims commissioners, the advice and explanations of the protectors, the missionaries, and those interested in Maori welfare, as well as the competition of Europeans themselves for land at auctions. Perhaps this explains further FitzRoy's limited requirement of Clarke's role. But he still held some reservations about what he interpreted as Maori 'indifference' to the interests of their descendants, and thought that they needed the provision of 'at least a tenth of all lands sold, besides extensive reserves in addition'.[37] FitzRoy's tenths, as explained to Maori on the Government House lawns, were to be 'set apart for, and chiefly applied to, your future use, or for the special benefit of yourselves, your children, and your children's children'. The reserves in addition appear to be those lands to be reserved from purchase.

Interestingly, FitzRoy also chose this opportunity to spell out his idea that pre-emption may be used as a punishment for those not complying with British law. This was forewarned in his consideration, in the March and October proclamations, of Maori 'disposition towards Europeans, and towards Her Majesty's Government'. FitzRoy noted that:

35. FitzRoy to Stanley, 14 October 1844, BPP, vol 4, pp 400–401
36. See ch 4
37. FitzRoy, 'Memorandum on the Sale of Land in New Zealand by the Aborigines', 14 October 1844, encl 2 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, pp 403–404. Dean Cowie also suggests that FitzRoy may have been using the penny-an-acre proclamation to subvert the £1-per-acre minimum price set by the Australasian Land Sales Act (Dean Cowie, '"To Do All the Good I Can": Robert FitzRoy, Governor of New Zealand', MA thesis, University of Auckland, 1994, fol 87).

> Permission to purchase land in certain districts, or rather consent being given to waive the Crown's right of pre-emption in certain limited places, is a power that may be used with the greatest advantage to the colony, as it at once enables the Governor to encourage those natives who treat the English well and adopt our laws, while it enables him to place under a ban, as it were, those tribes who act differently.[38]

This use was put into practice in January 1845, when FitzRoy proclaimed that he would not consent to waive the Crown's right of pre-emption over any land belonging to the Kawakawa or Whangarei tribes, or to any tribe that might assist or harbour chiefs Parehoro, Mate, and Kokou, until some property stolen from a European in the Bay of Islands (named Hingston) was returned, sufficient compensation made, and the chiefs 'delivered up to justice'.[39]

FitzRoy reported that the foundation upon which British authority rested in New Zealand had been secured by removal of customs and pre-emption restrictions. But he also felt that the peace of the country would only be maintained if the influence of principal chiefs was upheld as much as possible and if the military and the naval force was strengthened.[40] These sentiments closely resemble those of Clarke, expressed in March 1846, after Grey announced that the Protectorate was to be disbanded.[41]

6.5 THE OCTOBER PRE-EMPTION WAIVER CERTIFICATES AND DEEDS: THE RESULTS

Under the 10 October 1844 proclamation, 192 certificates were issued waiving the Crown's right of pre-emption over around 99,528 acres.[42] The waivers ranged from 13 perches to 3000 acres, but many purchasers submitted a series of applications for adjacent areas of land, or applied for adjacent areas for each individual family member, pushing up their claim to waivers for areas of around 2500 to 4500 acres.[43]

6.5.1 Acreages purchased

With the above in mind, almost three-quarters of the certificates issued under the penny-an-acre proclamation were for waivers of between 100 and 1000 acres; around

38. FitzRoy, 'Memorandum on the Sale of Land in New Zealand by the Aborigines', 14 October 1844, encl 2 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 404
39. Proclamation, 8 January 1845, BPP, vol 4, p 542
40. FitzRoy to Stanley (confidential), 19 October 1844, BPP, vol 4, p 412
41. See Clarke to Colonial Secretary, 30 March 1846, George Clarke, letters and journals, qMS-0468, ATL Wellington
42. These are waiver certificates for OLC 1/1073, 1/1082–1084, 1/1091–1093, 1/1097–1099, 1/1102–1103, 1/1113–1114, 1/1117, 1/1121, and 1/1123–1299, NA Wellington. This list includes the three OLCs (1/1073, 1/1126 and 1/1179) which received certificates after 10 October 1844, but were dealt with under the March waiver proclamation. The 15 OLCs listed (above) between 1/1073 and 1/1123 are interspersed throughout the 10-shilling-an-acre waivers. Some appear to be listed there to be linked to earlier waivers in favour of the same claimant settler. Others appear to be cases where the waiver application pre-dated the 10 October proclamation but the certificate post-dated it. These claims are dealt with under the penny-an-acre proclamation.
43. See for example OLC 1/1137–1139 and 1/1149–1154

a quarter were for waivers for areas less than 100 acres; and a small number were for waivers for areas between 1000 and 3000 acres (see fig 5). This was despite FitzRoy's December 1844 clarification (see below) that by the proclamation's allowance of waivers over 'limited portions of land', he meant 'only a few hundred acres'.

6.5.2 Certificates issued

Around two-thirds of the certificates under the penny-an-acre proclamation were issued from December 1844 to March 1845. Only a small number were issued before December 1844. The rest of the penny-an-acre pre-emption waiver certificates were issued after March 1845, with the last certificate issued in November or December 1845.[44]

6.5.3 Areas of purchase

Over three-quarters of the certificates under the October 1844 proclamation were for land around the wider Auckland area – including the islands, such as Waiheke, linked by sea and tribal rights, around it. Many of these 'Auckland' certificates were for blocks around the Waitemata at Riverhead, Rangitopuni, Lucas Creek, Paremoremo, and Te Whau. Nearly as many were for land around the Manukau at 'Manukau', Three Kings, Onehunga, Papakura, Waiuku, and Titirangi. There were still some certificates for Remuera and Epsom land.

A small number of certificates were issued for land in the Bay of Islands, at Whangaroa, around Ngunguru (near Whangarei) including the Poor Knights and Hen and Chicken Islands, around Mahurangi, in Hokianga, in Kaipara, at Coromandel or Thames, in the Bay of Plenty, and one in the Waikato.

6.5.4 Price paid to Maori

As with the March proclamation purchases, payment for land under the penny-an-acre proclamation was generally in the form of goods or money or both. And again, as with the March waiver, calculations estimating the value of goods given in payment for purchases made may be exaggerated (see above).

The price paid to Maori per acre in land transactions occurring under the penny-an-acre proclamation ranged from 6d an acre to £2 an acre (although one figure, probably inaccurately because it is so far removed from the other prices, puts the maximum price paid at £5 12s per acre).[45] Around three-quarters of the purchases involved payment of less than 10 shillings an acre. By far the largest proportion of these were payments of over one shilling an acre. Payment within this range (from 1 to 10 shillings per acre) made up over half of the purchases as a whole.

44. The last certificate was probably issued in November 1845. Governor Grey arrived in mid-November 1845, and by 10 December 1845 he had directed that no further applications for the direct purchases of land be received (see ch 7).

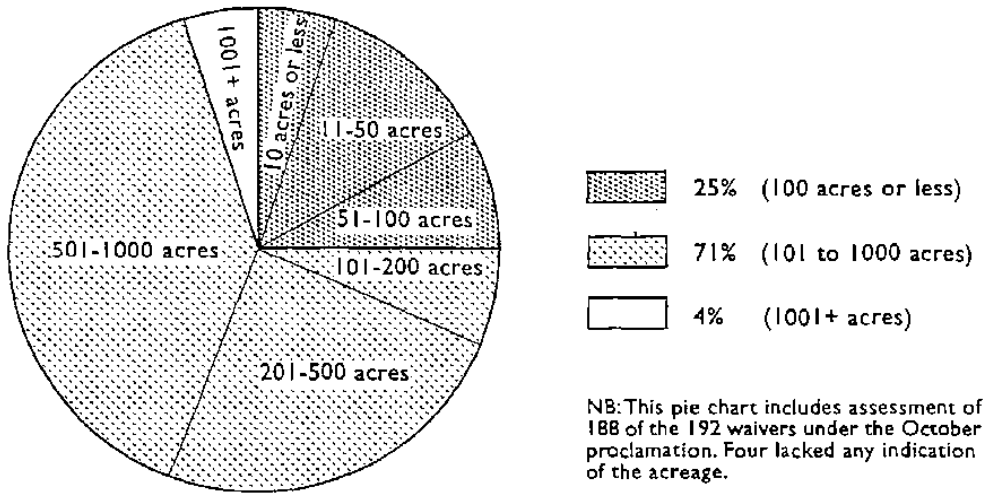

Figure 5 : Acreages sought under the October pre-emption waiver proclamation

On average only two shillings an acre was paid for the land purchased under the October proclamation. This was far lower than the prices Maori received per acre under the March proclamation. Land at Rangitopuni and Te Whau was the cheapest, ranging from 6d to 1s 8d per acre. Mahurangi land ranged from 10d to 2s 6d an acre (or £5 12s per acre if the above-mentioned maximum price paid is correct). Land in the Coromandel ranged from 10d to 5s 4d per acre. Land on the islands around Auckland ranged from 7d to £1 2s. Manukau land ranged from 6d to £1 2s 7d an acre. And Remuera land remained the most sought-after (expensive), ranging from 1s 5d an acre to £2 an acre. Calculating whether prices fell or rose during the October proclamation period is contradictory. There was a range of prices throughout.

6.5.5 Deeds signed

As with the March waiver deeds and the March proclamation, some of the deeds for land covered by October pre-emption waiver certificates were signed prior to the October proclamation.[46] Obviously these also preceded the issuance of their pre-

45. The figure comes from a purchase by Frederick Whitaker and Theophilus Heale. These two settlers are recorded to have paid Ngatai (Ngati Paoa) and Ruinga £1 and one pair of blankets to the value of 36s (respectively) for Taungamaro Islet, Matakana (Mahurangi). The purchase was described as consisting of two roods in the pre-emption waiver certificate (H H Turton, *Maori Deeds of Land Purchases in the North Island of New Zealand* (Turton's *Deeds*), Wellington, Government Printer, 1877, vol 1, part II, p 440; see also OLC 1/1288, NA Wellington). These figures were taken from 50 October proclamation waiver claims in which both acreage and price paid were available.

emption waiver certificates. Of these deeds, three were even signed prior to the March proclamation, suggesting that perhaps the purchasers, who had obviously followed the advice of the *Southern Cross*, had waited until the fee for a waiver was favourable.[47]

But the majority of deeds recorded were signed between October 1844 and March 1845, with a few purchases being made between April and August 1845 and a small resurgence in purchasing occurring again from September to December 1845 (with Governor Grey's arrival imminent).[48] Generally, only one purchase occurred per month between then and the final two deeds signed in September 1846.

A number of purchases involved subsequent payments or confirmations of earlier agreements.[49] Most of the subsequent payments were made within the above general time period. But one involved further payment in October 1846, another in June 1847, and another in July 1858. These may have come about through the Matson and Bell inquiries, set up to (amongst other things) grant land held to have been validly purchased under the pre-emption waiver proclamations (see below).[50]

6.6 THE PROTECTOR'S ROLE

Bishop Selwyn was one person resident in New Zealand who did not agree with the lowering of the fee paid to the colonial administration. He thought it compromised the Protectorate's ability to assess claims. Commenting to FitzRoy on the penny-an-acre proclamation, he stated:

> [t]he reference to the Protector's office could scarcely be more than nugatory, because the abolition of the tax upon such purchases deprived the Government of the resource by means of which a careful enquiry and survey might have been instituted in every case.[51]

Failing such careful enquiry and survey, he felt, disputes over boundary and title would arise between Maori and Maori, and Maori and European. He concluded that the proclamation was 'so fraught with mischief' to both races 'that not even the fear of insurrection should have induced me to advise it'.[52] Was Clarke's assessment scarcely more than 'nugatory'?

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46. OLC 1/1073 (deed June 1844), 1/1082 (the file notes purchase prior to application for certificate in August 1844, possibly April 1844 – FitzRoy would not consent until it was clear there were no previous claims to the same land; by the time the certificate was allowed it was past 10 October and dealt with as a 1d per acre waiver), 1/1093 (deed 20 December 1844, January 1845, and June 1847), 1/1124 (deed September 1844), 1/1126 (deed August 1844), 1/1143 (deed 8 October 1844 and 20 December 1844), 1/1145 (deed May 1844), 1/1179 (deed February 1844, April 1844, and July 1845), 1/1198 (deed September 1844), 1/1237 (deed January 1832), 1/1253 (deed April 1844), 1/1254 (deed September 1844), 1/1262 (deed May 1844), 1/1294 (deed 1842).
47. OLC 1/1179 (deed February 1844, April 1844, and July 1845), 1/1237 (deed Jan 1832), 1/1294 (deed 1842)
48. See ch 7
49. See OLC 1/1093, 1/1117, 1/1126, 1/1130, 1/1143, 1/1149, 1/1151, 1/1179, 1/1215, 1/1247, 1/1258, 1/1288, 1/1295
50. See ch 7
51. Selwyn to FitzRoy, November 1845, G19/1, pp 96–97, NA Wellington
52. Ibid, p 98

6.6.1 Clarke's assessment of legitimate owners

Clarke's assessment of pre-emption waiver applications under the October proclamation proceeded, in many ways, much as it had done with the March proclamation. He continued to interpret his key role as being to assure FitzRoy that he knew of no objection to the sale proceeding if the land in question was bought from the proposed vendor or vendors. A common refrain was that he 'knew of no objection to' the purchase,[53] or, for example, that '[t]he chiefs herein named are I believe the proprietors of the land applied for and with their consent I know of no objection to the proposed purchase'.[54]

He also continued to require prospective purchasers to consult particular chiefs. For example, Clarke's comment on James Watt's application for a waiver over a block of land near One Tree Hill, from 'Wanganui' (of Ngati Whatua), was that he knew of no objection to the purchase:

> but would suggest to purchasers that in buying of land from Ngatiwhatua tribe, they should consult the Chiefs Kawau and Tiriaua [Tinana?] they being the two principal Chiefs of the Tribe . . .

Watt was 'sent for and informed verbally.[55] And as with the March proclamation, Clarke (and Protector Forsaith, who also assessed pre-emption waiver applications in the Auckland district) appears never to have actually objected to a waiver, as opposed to seeking further ratification for an intended purchase, or clarification if a previous purchase had taken place over the same area, or any part of it.[56]

But as the applications came in for pre-emption waivers over land beyond central Auckland, there were a few modifications to Clarke's approach. Perhaps emphasising the relevance of Bishop Selwyn's comment, Clarke appears to have been satisfied not to ascertain, in every instance, whether certain individual tribal members, listed as intended vendors, had the right to sell. For example, Clarke noted he had no objection to Jerry Waite's purchase of an area of land at the head of the Waitemata 'provided it is purchased from the Ngatiwhatua chiefs'. But when Waite informed the office that he intended to purchase from 'Horake', Clarke's reply was somewhat vague, noting that he had no objection to Hauraki selling the land 'provided he is the owner of the same, and disposed to sell it'.[57] Just who was to decide who the 'owner' was, and when this would occur, is unclear.

In another application, made by White and Wilson, for land between the head of the Waitemata River and Kaipara, from chiefs Taierua, Taraia, Tongariro, and Haki (of Kaipara), Clarke noted: '[i]f the grantees named are the right owners of the land I know of no objection to the purchase'. This led Sinclair to question whether Clarke

53. See, for example, OLC 1/1121, 1/1125, 1/1135, 1/1142, NA Wellington
54. OLC 1/1165, NA Wellington; See also OLC 1/1082, NA Wellington
55. OLC 1/1129, NA Wellington. Watt had actually concluded the deed with Wanganui the day before. See also, OLC 1/1141, 1/1149, NA Wellington.
56. See for example OLC 1/1082, 1/1117, 1/1126, NA Wellington. In OLC 1/1132, NA Wellington, Whitaker withdrew his application because Brown and Campbell had already applied for it and Ruinga had offered it to them.
57. OLC 1/1143, NA Wellington

might recommend that the applicants be asked 'for their own sakes' to take measures for 'better ascertaining the real owners'. Clarke's response is very telling. He noted:

> [i]f the applicant is satisfied as to having purchased from the right owners there need be no further caution – but he [the applicant] does not state where the land lies nor the name of the tribe from whom he proposing purchasing . . .

When the applicants replied, Clarke was still at a loss: 'I am not acquainted with the chiefs named by the applicant nor am I aware of any objection to this purchase provided the chiefs are the right owners'. It seems that purchasers were to determine who the legitimate owners were. FitzRoy's consent for a waiver over 1000 acres proceeded that day.[58]

Harris and Hatfield also applied for a waiver to purchase land near the head of the Waitemata; but they sought to purchase land from Tautari, Manihera, Wirihana, and Honepihama (Ngati Whatua). Clarke remarked that 'Haimona has been disputing lands in this direction with Tautari. If this forms none of the disputed lands I see no objection to the purchase'. Harris later claimed the land was undisputed and FitzRoy's consent followed.[59] So, it seems that the purchasers were also to determine whether their application may be for disputed land.

Perhaps Clarke was relying on FitzRoy's proclamations' provision that purchasing was to be at the buyer's risk until allowed and confirmed by a Crown grant. But who would decide who the legitimate owners were when the grant was to be issued is unclear. The proclamation had stipulated that once the deed was lodged at the Colonial Secretary's office 'the necessary inquiries' were to be made, and notice was to be given in the English and Maori *Gazettes* that a Crown title would be issued 'unless sufficient cause should be shown for its being withheld for a time, or altogether refused'. But it seems that no such inquiries were made, or *Gazette* notices published.[60] What was Clarke to do before a certificate was issued? His response to his own criticism that the waiver provisions did not adequately deal with disputed land, in this last instance, appears to have been to avoid those lands. If the applicant admitted that the land was disputed, Clarke may not have approved issuing a certificate. Clarke seems to have limited his involvement, in at least these October waiver applications, to ensuring that any 'reserved' land (see below), and possibly also any disputed land, was not purchased.

But in other instances of 'disputed' lands, where a number of groups held an interest, Clarke required the applicants to consult each group. He sometimes altered this requirement after having spoken to an individual chief, without conducting any wider investigation into customary rightholding. As Alan Ward has commented, with regard to these instances, Clarke 'proceeded in an ad hoc way, making new discoveries about Maori rightsholding [whether correct or not], day by day'.[61]

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58. OLC 1/1158, NA Wellington
59. OLC 1/1155, NA Wellington
60. Proclamation, 10 October 1844, in encl 1, in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 402
61. Alan Ward, 'Supplementary Historical Report on Central Auckland Lands', Wellington, CCJWP, 1992, p 41

In Charles McIntosh's intended purchase of Waiheke (where McLean had assisted in a boundary 'agreement' dividing the island into three in April 1844) Clarke thought the purchase from Ruinga (of Ngati Paoa) alone was 'unsafe' because there were 'so many disputes about the island'. It is difficult to know whether he was concerned about the safety of Maori or Pakeha, or the community as whole. In that instance (without any reference to the April 1844 'agreement') he thought it necessary for McIntosh to obtain the consent of Ngatimaru and Patukirikiri as well. Clarke also warned McIntosh about Ngatai, who had apparently sold one area of land to two parties. He suggested that McIntosh 'treat him [Ngatai] with much caution'. Later, Clarke's stamp of approval was obtained when the applicant added the acquisition of a 1½-acre island nearby. Clarke then recorded: 'I have seen the Chief Ruinga and his party', 'and have every reason to believe that he [Ruinga] has a right to sell this island to [the] applicant'.[62] Clarke appears to have been satisfied with Ruinga's claim based on Ruinga's own assurances. But in so doing, he may have set aside Ngatimaru, Patukirikiri, and perhaps other Hauraki-based groups as well; Ruinga (Ngati Paoa) had 'a right', but others may have had rights too.

Paul Monin, who studied all purchases involving the islands of the Hauraki Gulf (and beyond), noted that Clarke 'probably acted correctly enough' in the McIntosh instance, because 'the land in question was Te Patu, a part of the island where Ruinga's rights were strongest'. But Putiki was probably the place on Waiheke where Maori rights were most complex. Yet, a settler named Charles de Witte purchased from Ngati Paoa alone, ignoring the rights of Patukirikiri. Another settler, Adam Chisholm, purchased land there from Patukirikiri ignoring the rights of Ngati Paoa.[63] Both instances caused protracted disputes. In the latter case, Monin noted:

> the sale went ahead despite Clarke's having full knowledge of Ngati Paoa's opposition to it. In Auckland town, Chisholm had tried unsuccessfully to bully both Te Ruinga and Wiremu Hoete into consenting to the sale, even physically threatening the latter. Regardless, Patukirikiri went ahead and sold the land to Chisholm.[64]

These instances also confirm the error of FitzRoy's impression that small tracts of land could easily be validly obtained because they would not be plagued by 'the numerous, separate or intermixed interests of various tribes, families and individuals' (which he recognized were present in larger purchases).[65]

Frederick Whitaker's Waiheke claim provided an almost identical instance to that of McIntosh's (above) where Clarke's decision was based on an insufficiently wide

62. OLC 1/1117, NA Wellington
63. These were OLC 1/1140 and 1/1164, NA Wellington.
64. Paul Monin, 'The Islands Lying Between Slipper Island in the South-East, Great Barrier Island in the North and Tiritiri-Matangi in the North-West', report commissioned by the Waitangi Tribunal, December 1996 (Wai 406 ROD, doc C7), p 53
65. FitzRoy's impression was that small tracts (of up to 100 acres) would easily be obtained, whereas larger tracts (perhaps exceeding 1000 acres) would entail 'very great trouble, patience and expenditure of time ... besides an accurate knowledge of the native language, or the employment of a good interpreter'. A valid purchase of an area a tenth the size of those claimed by the New Zealand Company, he thonght 'would be quite impossible' (FitzRoy, 'Memorandum on the Sale of Lands in New Zealand by the Aborigines', 14 October 1844, encl 2 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 404).

investigation. Clarke again thought it unsafe to purchase any part of Waiheke from 'Ruinga apart from the Chiefs of Ngatimaru Patukirikiri'; yet a week later he noted 'I have seen the Chief Ruinga and his party and from him I learnt that the land applied for belongs solely to him therefore I see no objection to the sale'.[66] In a further instance, the prospective purchaser himself mentioned in his application that 'Mr Clarke has seen the native chiefs and is satisfied that they are the owners of the above land'.[67]

While Clarke does not record how he determined that the chiefs he was speaking to were the legitimate owners, his method was clearly inadequate. His conversations with individual chiefs indicate that he was perhaps more involved day to day with Maori than his brief comments imply. But they also confirm that he did not pay due attention to the complexity of Maori land rights, sometimes seeming to actively ignore them altogether (such as Chisholm's case above). Yet, at other times, when dealing with disputed land, Clarke did recognize multiple Maori rights in the land under transaction. Monin cites John Brigham's purchase on Waiheke, where both Ngati Maru and Ngati Paoa were involved.[68]

Clarke's acceptance of individual chiefs as vendors, without requiring wider consultation with the iwi as a whole, has already been illustrated (above). In fact, it appears he may have actively encouraged land transactions on this basis in another way as well. Monin, for example, has pointed to 'some cases' where 'the chiefs, as individuals, were invited to Auckland for negotiations at the Protector's office, at the expense of the hopeful European purchaser'.[69] And Davis's description (above) of negotiating 'between parties at my own residence, or elsewhere, after office hours', indicates that this method may not have been uncommon.

In a small number of cases it seems that Maori themselves applied for a waiver. (This is interesting, considering Governor Grey's (unrealised) waiver proposal had Maori applying for waivers.)[70] Wiremu Nera had an interview with FitzRoy, regarding 'Wangaroa' land, resulting in the Governor's consent to a waiver. Meurant's diary entries tell of other instances when Maori applied for a waiver themselves, on a Pakeha's behalf.[71] Clarke's involvement in these instances is not clear.

In October 1845, McLean wrote what appears to have been a draft letter (from the Wesleyan mission station at Waimate) to Clarke, asking him for:

> advice respecting the course I have to pursue with land purchasing or leasing from the Natives[,] or whether I have anything further to do with it than sanction or disapprove of either as circumstances admit, or rather as the justice and equity of the proceeding will devise, leaving the purchasers to enquire into the particular claims and make their own bargains instead of subjecting the Protector to the incompatible duty of parleying and bargaining on behalf of the settlers which would be in direct contradiction to your

66. OLC 1/1132, NA Wellington
67. OLC 1/1128, NA Wellington
68. See OLC 1/1216–1218, NA Wellington. He also cited McIntosh's purchase of Pakatoa (a March proclamation waiver) where Ngai Tai and Ngati Paoa sold land (OLC 1/1116, NA Wellington).
69. Monin, p 54
70. See ch 7
71. Edward Meurant, 5 and 7 March 1845, diary and letters, MS-1635, ATL Wellington

> instructions and advice as well as highly injurious in its effects[,] the natives would at once come to the conclusion that their Protector endeavoured to take advantage of them in their dealings rather than see them have a plentiful utu . . .[72]

In one or two instances, McLean had 'assisted Settlers in getting on their land and partly affected [sic] the purchase of 30 acres for one'. The issue was evidently just arising in some areas of the country when already the Colonial Office had decided to recall FitzRoy, and to discontinue his pre-emption waiver scheme.

6.6.2 Reserves

FitzRoy and Clarke ensured that land be reserved from purchase for Auckland Maori between 'Tamaki road and the sea to the northward' in the March proclamation. As noted above, this provision, which stipulated that pre-emption would not be waived over that area, was extended in FitzRoy's October proclamation to encompass 'any land reserved for the use of aboriginal natives' (see above).[73] Clarke appears to have sought such a 'reserve' to the east of Auckland, around Thames, when waiver applications spread more widely under the penny-an-acre proclamation. Clarke wrote to Edward Shortland,[74] instructing him to ask Taraia, Te Awhe, and the other Thames natives:

> What reserves they propose making for themselves and their families in the Waihou district, ascertain whether they are sufficient for their present and prospective wants and having satisfied yourself thereof you may proceed to inform the natives that His Excellency the Govr will not object to waive the Crown's right of Pre-emption over such portions as they may be disposed to alienate they having first made ample provision for themselves and families.[75]

He may have required other (district) protectors to do the same. This approach is consistent with that already apparent in the March proclamation. Although it is not clear whether Clarke consulted Auckland Maori about reserving the land between Tamaki Road and the sea from purchase, he did ensure that the area was exempted from purchase prior to any pre-emption waiver certificates being issued in Auckland. It seems that Maori, Maori and the protectors, or perhaps just the protectors, were to isolate what should be so 'reserved' (presumably including pa, urupa, and the land about them, and any land required by Maori for their 'own' use). And the protectors were to assess whether the 'reserves' chosen were sufficient for the present and prospective wants of the Maori concerned. Interestingly, in stating that the Governor

72. McLean to Clarke, 24 October 1845, McLean papers, MS-copy-micro-535, reel 045, folder 215, ATL Wellington
73. Proclamation, 10 October 1844, in encl 1 in Fitzroy to Stanley, 14 October 1844, BPP, vol 4, p 402
74. Edward Shortland was employed as Protector of Aborigines, Eastern District, in August 1842. In mid-1843, he was sent to the South Island to assist Commissioner Godfrey, but returned to the Eastern District position in early 1844. He resigned in August 1845 (Peter Gibbons, 'The Protectorate of Aborigines, 1840–1846', MA thesis, Victoria University of Wellington, 1963,fol 22–26).
75. Clarke to Shortland, 26 November 1844, George Clarke, letters and reports, MS-0288, folder 1, Hocken Library, Dunedin

would not object to waive pre-emption once the 'reserves' had been identified, Clarke makes it clear that FitzRoy's consent was a mere matter of form.

In at least one instance, Clarke noted, in his comment on the waiver application, that he had had a request from a chief to reserve land from sale. Harris and Hatfield's application for a waiver over land near the head of the Waitemata led Clarke to remark:

> The chief Haimona has made a request that land in this direction should be reserved for himself and the Ngatiwhatua living at Kaipara. If this land does not include a place called 'Pitoitoi' and the landing place of natives in going to and coming from Auckland, to Kaipara, I see no objection.[76]

Again, Clarke did not investigate the matter himself, but relied on the purchasers to state whether the land included these places (presumably at their own risk).[77] A few days later, the applicant informed Clarke that the land was to the upper side of the (Kaipara) landing place, not including it or the dragging place (Pitoitoi) which 'the natives having reserved that part referred to for their own use'.[78] Obviously, there was some use made (at least by Maori) of the provision that waivers would not be given as a general rule over land required by Maori for their 'own' (or present) use. As with the March waiver applications, Clarke did not independently assess whether individual applications included pa, urupa, or the land about them, or land required by Maori for their 'own' use, except if, as in the above October waiver application, 'reserves' of such areas had been requested (or made) prior to the application.

There are similarities between Clarke's broad-brush approach to 'reserves' and to boundary 'agreements'. Each was to be conducted prior to, and separately from, the day-to-day assessments of individual pre-emption waiver applications. And each was generally assisted by either a Protector or an interpreter attached to the Protectorate. The concurrence of each in relation to Clarke's key duties, inherited after December 1842, has already been noted (see above).

But each also appears to have overridden some of the intended protective provisions in FitzRoy's proclamations. We have already seen that Clarke's cursory, broad-brush, approach alone was not sufficient to adequately identify and give effect to legitimate ownership. His broad-brush approach was also insufficient in relation to the 'reserves' provisions. The proclamations' specifications that waivers would not, as a general rule, be given over land required by Maori for their present (or 'own') use, regardless of Maori desires to sell them, were not adequately carried out. Monin has noted, of the pre-emption waiver purchases of islands, or areas of islands, in the Hauraki Gulf:

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76. OLC 1/1155, NA Wellington. See also 1/1158, NA Wellington
77. This indicates that Clarke did not, as the Ngai Tahu Tribunal has suggested would be required in Crown purchases, ensure that the land which the Maori owners wished to retain 'by express exclusion from a proposed sale, or by way of reserves out of land agreed to be sold' was 'sufficiently identified' (Waitangi Tribunal, *Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, vol 2, pp 240–241).
78. OLC 1/1155, NA Wellington

> The total area of land alienated through waiver purchases was insufficiently large to have much effect upon the overall resource situation of the vendor Maori groups. Locally, however, some effects were significant. The sale by Patukirikiri to Chisholm of Putiki forced Wiremu Hoete, who had been resident there since the late 1830s, to move westwards to Te Huruhi Bay (Blackpool). This was a significant setback for this Ngati Paoa chief who had done so much to facilitate the survival of early Auckland. Indeed, through waiver purchases Ngati Paoa lost the central-southern area of Waiheke, Surfdale to Hekerua to Ostend, their first agricultural base for trade with Auckland.[79]

The lack of adequate procedures in Clarke's and FitzRoy's assessments of the waiver applications meant that the intended protective provisions in FitzRoy's proclamations were not realized. For Wiremu Hoete, that lack of protection was immediately felt. So, apart from lands exempted from purchase before pre-emption waiver purchasing took place (and Haimona's requested reserve of Pitoitoi and the Kaipara landing place appears to have been treated by Clarke as that), the provision that would most ensure Maori retained sufficient resources 'to be full participants in the projected new economy' and 'provide an economic base for the future' (as the Muriwhenua Land Tribunal has suggested the instructions of the British Government indicate it had in mind) were the pre-emption waiver tenths.[80]

6.6.3 Price paid to Maori

As with the March waiver, Clarke was not concerned with assessing the prices Maori obtained for their lands.

6.6.4 Non-compliance with the proclamation's provisions

The elimination of the fee upon receipt of a pre-emption waiver certificate did not result in any change in the settlers' decision to ensure a deed of purchase was signed before applying for, or obtaining, a certificate. A large number of deeds signed following the penny-an-acre proclamation still preceded the certificate being granted.[81] With no fee upon receipt of the pre-emption waiver certificate, one wonders why. Had they taken the advice of the *Southern Cross* and ignored the proclamation? Was it difficult to organise two meetings with the chiefs? Was it too time-consuming to apply? Probably it was just a practical way for the purchases to operate. It may indicate that the purchasers did understand that FitzRoy intended this order of procedure to allow competitive bargaining, with settlers vying for specific areas of land, and Maori gaining the advantage – and that the purchasers sought actively to avoid such competition.

If they were not yet aware of this, they were made aware of it in early December 1844, when FitzRoy again tried to crack down on non-compliance with the

79. Monin, p 55
80. Waitangi Tribunal, *The Muriwhenua Land Report 1997*, Wellington, GP Publications, 1997, pp 389–390
81. OLC 1/1093, 1/1129, 1/1132, 1/1134, 1/1135, 1/1137–1139, 1/1140, 1/1141, 1/1148, 1/1150, 1/1151–1154, 1/1158, 1/1161, 1/1163, 1/1165, 1/1167, 1/1183, 1/1215, 1/1217, 1/1222, 1/1235, 1/1246, 1/1256, 1/1260, 1/1262, 1/1288, NA Wellington

proclamation regulations. FitzRoy instructed Sinclair to issue a notice informing pre-emption waiver applicants that in order to obtain the Governor's consent they must comply 'scrupulously' with all the relevant proclamation's conditions. Sinclair was also to give publicity to some 'explanatory cautions'. These were:

- No waiver would be given if a purchase had been made prior to the Governor's consent being formally obtained in writing.
- Waiving the Crown's right of pre-emption 'merely suspends the right of the Crown, without conferring such right on any other body, unless so specified distinctly (as in the case of the New Zealand Company), and in itself conveys no title to any land'.
- A limited portion of land meant 'not more than a few hundred acres'.
- Only a Crown grant gave legal title and:

> any unauthorized occupation of, or intrusion upon land set apart or reserved for the aboriginal natives, or belonging to the Crown, whether owing to any misunderstanding or otherwise, will be dealt with rigorously according to law . . .

- A waiver 'without distinct specification in favour of anybody, has the effect only of opening that portion of land to public competition'. It was therefore 'advisable for those who make application to the Governor for the said right to be waived, to make their purchases as soon as may be practicable after the consent of his Excellency is obtained'.
- Lists of applications to the Governor to waive the Crown's right of pre-emption, 'showing the particulars of each, and stating the answer given by the Governor' would be 'published from time to time in the Gazette'.[82]

All these provisions supported the possibility of greater competition between purchasers, and consequently greater benefit for Maori.

Despite all this, as with the March proclamation, these transgressions do not appear to have resulted in a refusal to give a consent for a pre-emption certificate to be granted.[83] FitzRoy did object to consent to a waiver certificate in one instance I came across – but only temporarily. Charles Ring had obviously already purchased land at Mapau from Te Keene and Te Rangi. But a re-wording of the application, to state that the applicant 'proposed to purchase' the area from certain chiefs, allowed for his consent to be given – suggesting that FitzRoy's notice was just show.[84] It may also indicate that FitzRoy aimed to promote a peaceful and prosperous community.

Governor Grey later criticized FitzRoy's scheme by alleging that in practice the waivers were 'done privately in favour of a certain individual, so that no competition did or could take place'. He suggested that:

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82. *New Zealand Gazette*, 7 December 1844, notice in encl in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 402–403
83. But as noted above, this is based on information from the OLC files which constitute the record compiled through subsequent inquiries. They would not record instances where a waiver was refused.
84. OLC 1/1121, NA, Wellington. The OLC files often reveal that a so-called deed post-dating the certificate was in fact based on an agreement and payments made earlier. See for example OLC 1/1125, NA Wellington.

> wherever such right involved the alienation of land, such right should be made a matter of public competition after due notice, formally given, so that all Her Majesty's subjects might equally avail themselves of their recognised privilege . . .

Sinclair stated, no doubt prodded by Grey, that:

> [i]n no case was public notice given by the Government of the Crown's right of pre-emption having been waived, and consequently competition on the part of the public to purchase, was thereby precluded . . .[85]

Although FitzRoy did not intend certificates to be in favour of an individual, this appears to have been the effect.

Grey also claimed that:

> the mode in which the exercise of the Crown's right of pre-emption has been carried out is neither in form nor extent that which the proclamation and notice set forth as the contemplated mode of proceeding; but is, on the contrary, totally different from it . . .[86]

This was, of course, an exaggeration. There was a gap between the intent of the waiver proclamation and its practical application. But Grey did nothing to shorten it.[87]

6.7 LOCAL RESPONSE TO THE OCTOBER WAIVER

Bishop Selwyn's comments (above) were not typical of the response to the October proclamation in New Zealand. An article in the *New Zealander*, in November 1845, better encapsulates settler responses. While it described the March waiver as an 'imaginery [sic] boon', 'clogged' with 'stringent accompaniments' and 'other vexatious unnecessary impediments to amicable arrangements between the Europeans and natives', it considered the October proclamation's fee of one-penny-an-acre to be a mere 'fraction'. While noting its objection to the proclamation's other conditions, the article identified the tenths clause to be the most objectionable aspect of the October proclamation. It stated:

> The system of the New Zealand Company, reserving every tenth town allotment and country section, as a native reserve, in the distribution of their lands, we presume was the example followed by the Protectorate here in framing these conditions; but as it will be obviously evident, the cases are widely different. In the one, every tenth portion is reserved:– in the other, one tenth part of each portion is to be conveyed to her Majesty.[88]

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85. Sinclair to Grey, 12 October 1847, encl in Grey to Earl Grey, 11 November 1847, BPP, vol 6, [1002], p 14
86. Grey, 'memo', 20 April 1847, encl 3 in Grey to Earl Grey, 19 April 1847, BPP, vol 6, [892], p 33. Note also that Grey implies Maori gave the Queen the right of pre-emption 'to be exercised for the benefit of her Majesty's subjects of both races'. This is rather different from the impression given to the chiefs at the Treaty-signing hui.
87. See ch 7

It foresaw 'endless confusion' would result 'if this senseless condition is carried out'. Instead, it suggested that Europeans could pay 'an equivalent' in money. And it proposed that if reserves of land were considered indispensable for the future maintenance of Maori, large blocks of tribal land should be prohibited from sale. Of course, this proposal ignored FitzRoy's belief that both extensive reserves and tenths were necessary for Maori (see above).[89] The article concluded:

> But we are of opinion that all restrictions regarding the sale of land by the natives, and the purchase by Europeans, must be very soon put upon a very different system, than that attempted by these two proclamations.
>
> Common sense dictates the future policy and measures,– and recent events declare that all enactments of the local government affecting, or assuming a dictation over the property of the natives, are perfectly nugatory.
>
> The natives will henceforth do as they please with their lands. The Government will neither be able to sell an acre of their own land at twenty shillings per acre,–or to exact any fee beyond the penny, for native purchases. In truth, we consider the whole colony will be much benefited by the adoption of the most simple plan and measures; considering the present relative strength and power of Europeans with the natives.
>
> The natives have been declared by the Treaty of Waitangi, British subjects,–*never mind the qualifications of the second article*, therefore let them sell their land to *other* British subjects,– and then let the question of good or bad title of purchase, be settled in the usual way.[90] [Emphasis in original.]

The settlers' concept of buying out the tenths was one which was later adopted by Governor Grey. But at this point, in late 1845, with Grey's arrival imminent and Crown grants as yet unissued, the still-experimental system of pre-emption waiver purchases had been put under review on the instructions of the Colonial Office. The pre-emption waiver vendors and purchasers were then left in the same confusion as the old land claimants.

88. 'Purchases of land from the natives under the proclamations for waiving the right of pre-emption', *The New Zealander*, 8 November 1845
89. FitzRoy, 'Memorandum on the Sale of Land in New Zealand by the Aborigines', 14 October 1844, encl 2 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, pp 403–404
90. Ibid

CHAPTER 7

RESTORATION OF CROWN PRE-EMPTION, 1846–62

7.1 Stanley's Instructions to Governor George Grey

Stanley had become increasingly concerned about FitzRoy's actions and decided to recall him in April 1845.[1] In Britain, FitzRoy had gained a reputation of 'showing too much respect for native customs. . . . in a manner inconsistent with good order and morality, and with the progress of civilization'.[2] Stanley believed FitzRoy had been wrong to avoid 'a line of policy respecting lands and revenue' unacceptable to Maori for fear of provoking their 'resentment and insurrection'.[3] The appointment of Governor George Grey, in place of FitzRoy, marked a shift in Crown policy, as Barry Rigby notes, 'away from the strictest economy, and towards direct assertion of Crown authority in Maori areas'.[4]

Stanley explained to Grey, in mid-June 1845, that colonisation had been 'forced' upon the British Government by the need to avert 'the evils with which unauthorized settlements of Her Majesty's subjects there appeared to threaten the inhabitants, whether European or aboriginal'.[5] He also stressed the importance of the Treaty, instructing Grey to 'honourably and scrupulously fulfil the conditions of the treaty'.[6]

Stanley emphasised to Grey the need for demarcation of Crown, Maori, and settler lands. He believed this would show the extent of 'surplus' land and make other lands available to be taxed. Stanley argued that 'if the right of pre-emption conceded to the Crown by the treaty of Waitangi, had not been waived on the terms in which it has been, the complexity of the case would have been far less than it actually is'.[7] He continued:

> I will not undertake to deny, nor have I evidence to justify me in admitting, that the refusal to waive the Queen's right of pre-emption would have involved the colony in insurrection and war; under this, as under the preceding heads, I am reduced to the necessity of acknowledging and of regretting that my information is in a state so

1. Stanley to FitzRoy, 30 April 1845, G1/13, NA Wellington
2. Report of House of Commons Select Committee on New Zealand, 29 July 1844, BPP, vol 2, [556], p 10
3. Stanley to Grey, 13 June 1845, BPP, vol 5, p 230
4. Barry Rigby, 'Empire on the Cheap: Crown Policies and Purchases in Muriwhenua 1840–1850', report commissioned by the Waitangi Tribunal, March 1992 (Wai 45 ROD, doc F8), p 71
5. Stanley to Grey, 13 June 1845, BPP, vol 5, p 229
6. Ibid, p 230
7. Ibid, p 232

> imperfect as to render it impossible for me to give you, with confidence in their applicability, any positive and specific instructions on the subject of lands. . . . I find no reason to retract the instructions on the subject which have already been addressed to your predecessors. It seems to me that you should still act on them, and carry them into effect, unless you should be clearly satisfied that the attempt would be either impracticable or unsafe. You will not, I am convinced, depart from them on any light grounds, nor fail to transmit to me an early report of the motives of any such procedure.[8]

Grey was therefore given discretion on the subject of land purchase, with the proviso that existing arrangements should be honoured.

In a separate despatch, dated two weeks later, Stanley expounded his displeasure at FitzRoy's penny-an-acre waiver (despite his previous endorsement) and suggested that Grey should not continue endorsing purchases under such a regime:

> You will, of course, recognize any sales which he may have sanctioned under his last proclamation, reducing the fee to one penny per acre; but, with my present information, I am bound to say that this appears to me to have been a most impolitic arrangement; and I should earnestly impress upon you the inexpediency of allowing such purchases for the future.[9]

In August 1845, Stanley informed Grey that he believed that the practice of issuing pre-emption waiver certificates under the October proclamation should be discontinued 'as soon as it is practicable safely to do so'. He wished the March proclamation to be clearly limited to the northern half of the North Island, though he preferred its discontinuance also. Stanley told Grey that he favoured maintaining Crown pre-emption and that if possible the Government should revert to the original plan of purchases.[10]

Grey himself was against pre-emption waivers. As Rutherford, his biographer, commented, Grey preferred to keep absolute authority in his own hands.[11] The pre-emption waivers, which fostered independent transactions between settlers and Maori, jeopardised this authority. Within a month of his November 1845 arrival in New Zealand, Grey 'directed that no further applications for the direct purchases of land' be received by the Government until he had 'had time to inquire into the subject, and to determine what line of policy, in reference to the sale of lands, shall be adopted'. He informed Stanley:

> I am inclined to think, that it would be most unwise on the part of the Government to waive the right of pre-emption secured to the Crown by the Treaty of Waitangi, as no more certain means of controlling the natives could be found than refusing to purchase any lands from those who conducted themselves improperly, and in whose intentions of surrendering their lands, no confidence could be placed. I find, moreover, that

8. Ibid
9. Stanley to Grey, 27 June 1845, BPP, vol 5, p 233
10. Stanley to Grey, 14 August 1845, BPP, vol 5, p 245. Stanley also suggested Grey might use the Land Sales Act 1842 requiring that settlers pay at least £1 per acre.
11. J Rutherford, *Sir George Grey KCB, 1812–1898; A Study in Colonial Government*, London, Cassell, 1961, p 119

of surrendering their lands, no confidence could be placed. I find, moreover, that various complicated disputes have already arisen between the natives and various persons who have purchased lands from them under the terms of my predecessor's proclamation, waiving the Crown right of preemption. . . . I have therefore refused, at least for the present, to sanction any purchases made from the natives by private individuals.[12]

But waiving the Crown's right of pre-emption in favour of the New Zealand Company was a different matter. Stanley had instructed Grey to take measures to assist the New Zealand Company in purchasing Maori land. In February 1846, Grey waived pre-emption in favour of the Company in the entire 'Company districts' as defined in the 1840 agreement between the Company and the Crown.[13] The Crown's desire to encourage land acquisition by the New Zealand Company, and to operate with the Company in colonizing New Zealand, was in marked contrast to its impatience with FitzRoy's general pre-emption waiver proclamations.[14]

In June 1846, Grey gazetted a list of 'penny-acre' waivers totalling around 100,000 acres. He criticized these purchases as having been made 'in a manner which appears to me to have been at once unjust to Her Majesty's subjects of both races, and improvident in the extreme'.[15] Grey claimed that FitzRoy had been coerced to act and that such coercion should not have been tolerated. He also claimed that various Government officers had taken advantage of the proclamation.

Grey's argument that the scheme was unjust to Maori, stemmed from his view that because the waiver was granted to an individual over a particular tract of land, Maori were not able to take advantage of 'competition'. As we have seen, this was not technically correct. Waivers were made over a specific area of land and did not grant any special rights to the individual who received the certificate.[16] But, as also noted above, in practice, Grey's criticism appears to have had some validity. Instead, Grey believed that the waivers should have been 'publicly notified, and the sale should not have been allowed to take place until a certain specified time after the issue of this notice; and even then I think it should have taken place by public auction'.[17] Of course reinstating pre-emption, as Grey did (below), did not provide competition either.

Grey claimed that the injustice of the scheme to settlers was threefold. He believed those who had purchased land from the Crown by public auction, before the waivers, were entitled to know about, and have the opportunity to purchase, lands being sold near their existing holdings. He thought every settler had a right to a public auction after due notice. And he claimed large blocks of land were going to speculators. Grey complained that the lists of pre-emption waiver applications and the Governor's

12. Grey to Stanley, 10 December 1845, BPP, vol 5, p 358
13. Proclamation, 21 February 1846, in Grey to Stanley, 14 April 1846, BPP, vol 5, p 549. Earl Grey sanctioned this waiver in December 1846 (see Earl Grey to Grey, 18 December 1846, BPP, vol 5, p 551).
14. See D Moore, B Rigby, and M Russell, *Old Land Claims*, Waitangi Tribunal Rangahaua Whanui Series National Theme A, July 1997
15. Grey to Stanley, 9 June 1846, BPP, vol 5, p 555
16. *New Zealand Gazette*, 7 December 1844, notice in encl 1 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 403
17. Grey to Stanley, 9 June 1846, BPP, vol 5, p 555

response, which was to have been published in the *Gazette* from time to time, had never been published and that 'most respectable individuals' were 'wholly ignorant' of the process. He stated that regulations restricting acreage purchased had been evaded and that some land had been purchased with firearms. He believed Maori might resist settlers taking possession of the land purchased. Grey also informed Stanley of a visit he had had from some Waikato chiefs, whom he claimed had been approached by 'landjobbers' who 'had incited them to write a letter to me, asking me to permit them to sell their lands to Europeans, and urging them at the same time to stand up for their rights as chiefs'. Grey claimed these chiefs were in fact ready to 'leave the whole subject in my hands'.[18]

7.2 GREY'S NOTICE, 15 JUNE 1846

The Governor resolved to call upon all those who had made purchases under the pre-emption waiver certificates to 'send in all the papers, whether deeds or surveys, connected with their claims, for examination within a period of two or three months, after which time no claims will be entertained'. He notified Stanley of his intention to appoint commissioners to investigate and report on each alleged purchase. And he stated that he would not issue any confirmatory grants on these claims 'except under special and urgent circumstances of justice' until he had received further instructions.[19] This was gazetted on 15 June 1846. It was highly unpopular amongst pre-emption waiver purchasers. The shortage of surveyors meant that few of the purchasers could meet the requirements.[20]

Grey then announced to settlers that no further pre-emption waivers, under FitzRoy's scheme, would be granted. But he would:

> endeavour to devise and introduce some system by which lands the property of the natives may be brought into the market, under such restrictions as are required by the interests of both races . . .[21]

He meant to return to the system of Crown purchasing of Maori land, which he could do because of the increased funds now available to his administration (as opposed to those which had been available to his predecessor). But he believed an interim arrangement would be prudent. So, six days later, he proposed a system of direct private purchasing thinking it may be necessary to 'allay the excitement' which might result from his halt on FitzRoy's scheme.[22]

Grey's proposal, although never adopted, was an interesting one. In keeping with his preferences, it retained Crown control of land transactions. His scheme required

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18. Ibid, p 555–557
19. Grey to Stanley, 9 June 1846, BPP, vol 5, p 556–557; see also Grey to Gladstone, 18 June 1846, BPP, vol 5, p 569
20. Sinclair, 15 June 1846, encl in Grey to Gladstone, 18 June 1846, BPP, vol 5, p 570; see also *Southern Cross*, 1 July 1846
21. Grey to Gladstone, 21 June 1846, BPP, vol 5, p 575
22. Ibid, pp 576–577

Maori to apply to the Government. They were to state the 'position and extent' of the land they wanted to sell, and name their own 'upset price' for it. The Maori owner (Grey used the singular) would then be required to prove his title to that land. If there was 'a probability' of it being sold, it would be surveyed by the Government and offered for sale at public auction 'after proclamation made in the manner prescribed by the Crown Lands Act'. Settlers were to pay a fee of 15 shillings per acre to the Government, with the full amount to be paid within a month of the sale, when a grant would be issued and the Government would pay Maori for the land. If the land was not purchased at auction, it may have been purchased at any time, on payment of the upset price and Government fees, unless withdrawn from sale by the Maori vendor. Grey aimed at placing Maori in 'exactly' the position in which the Crown stood under the Waste Lands Act of Australia – with the difference that fees were paid to the Government. These fees were to be used to pay: first, for the expense of determining Maori title and surveying the land; secondly, for roads and public works, employing as many Maori as was possible; and thirdly, for emigration purposes.[23]

Notably, Grey's proposed scheme did not involve any protective assessment of Maori interests, it did not make special provision for Maori reserves of any kind (pa, urupa, or the land about them, or blocks of land, or tenths 'especially for the future benefit of Maori'), nor did it limit the extent of the land sold. But (as noted above) he did not implement his proposal. Grey delayed taking action until he received a response from the Colonial Office.

Grey was, however, unrelentingly scathing of FitzRoy's scheme. He embarked upon writing, as Rutherford puts it, a series of 'didactic dispatches designed to bring the Colonial Office to his way of thinking'.[24] Grey's most vitriolic attack on the entire Church Missionary Society and Protectorate lobby went out in his 25 June 1846 'blood and treasure' despatch. His attack on pre-emption waivers was undoubtedly linked to discrediting both FitzRoy and the Protectorate. He argued, in a letter to Stanley's successor, Gladstone, that FitzRoy's system encouraged individuals to purchase land prior to receiving a waiver and that large areas had already been purchased in this way. With a moralistic tone, playing on ideals of the 'civilizing mission', Grey stated that land sales led Maori to abandon their economic pursuits, and encouraged them to part with land of which 'probably he is only part owner'.[25]

7.3 EARL GREY'S INSTRUCTIONS TO GREY

Earl Grey became the Secretary of State for the Colonies, following Gladstone, in mid-1846. As Lord Howick, he had chaired the 1844 House of Commons select committee which asserted the Crown's claim to unoccupied Maori land. On preparing instructions for Grey, in November 1846, Earl Grey sent the Governor several drafts to indicate the principles on which he would reformulate Crown land

23. Grey to Gladstone, 21 June 1846, BPP, vol 5, pp 576–577
24. Rutherford, p 123
25. Grey to Gladstone, 21 June 1846, BPP, vol 5, p 575

policy.[26] They reasserted Gipps's 'qualified dominion' doctrine, based on the imperial view that only by continuous cultivation and occupation could Maori create a property right. Since they had not 'subdued the soil' in the vast wasteland areas not used for cultivation and occupation, they could not claim property rights there, and such land should become the Crown's disposable demesne.[27] While aware that Maori may resist Crown claims 'to large tracts of wasteland which particular tribes have been taught to regard as their own', Earl Grey instructed the Governor to 'avoid as much as possible any further surrender of the property of the Crown'. He also reiterated the instruction to survey and register Maori and private land, with the remainder to be declared Crown demesne.[28]

Having received Governor Grey's reports, the Colonial Office appeared convinced by his arguments and endorsed his (15 June 1846) actions in calling for purchase details and in not issuing further certificates. But, Earl Grey explained in his (final) 10 February 1847 instructions, while FitzRoy's waivers had been issued 'plainly exceeding his lawful authority', and while it was therefore necessary to 'disallow and annul' the waivers, it was also necessary to recognize the waiver purchases. He reasoned that even though FitzRoy had exceeded his authority, his acts were done exercising powers conferred by 'Her Majesty's Commission'. It would be inexpedient and unjust to refuse to acknowledge claims made by individuals ignorant of this 'defective authority'. Nor would it be wise to imply that on principle, individuals could not safely rely on their Governors' actions. They should assume it was 'lawfully and properly done' until the contrary was declared to be the case 'by superior authority'. Because FitzRoy had 'disobeyed his instructions', and because his proclamations were so 'manifestly impolitic', the waivers should be disallowed and annulled, but this should not prejudice acts done 'in strict pursuance of the proclamations'. Grey was to refer all claims to the Attorney-General, who was to assess whether or not each claim was 'in exact conformity' with the proclamation under which it was made.[29]

In obvious response to the Governor's claims, Earl Grey also took steps to ensure that land had been purchased from the legitimate parties. He required the Attorney-General to certify that 'the natives from whom the purchases may have been made were, according to native laws and customs, the real and the sole owners of the land which they undertook to sell'.[30] Of course, how the Attorney-General was to do this is not clear. (Grey had already decided to disband Clarke's Protectorate.)

All evidence to support a claim was to be produced at the claimant's expense and any purchases made with firearms were to be refused a Crown grant. Earl Grey anticipated that most purchases would not be sustained. But where a grant was to be made, he specified that it should be done with 'no guarantee or warranty of the title

26. Grey to Earl Grey, 27, 31 November 1846, Draft Instructions, November 1846, Grey papers, f35, 36, APL Auckland, cited in Rigby, p 78
27. Royal Instructions, encl in Earl Grey to Grey, 23 December 1846, BPP, vol 5, pp 524–525, cited in Rigby, p 78
28. Royal Instructions, encl in Earl Grey to Grey, 23 December 1846, BPP, vol 5, pp 525–527, 543, cited in Rigby, pp 78–79
29. Earl Grey to Grey, 10 February 1847, BPP, vol 5, p 579
30. Ibid

to the lands'. The grant would merely transfer any right the Crown held, to the grantee (see below).[31]

It is questionable whether FitzRoy had acted contrary to his authority. While Stanley had not instructed him to waive pre-emption, he had authorized him to consider the matter, and report on it. FitzRoy had questioned him about waiving pre-emption and Stanley did not express disapproval of such a move. Stanley had, in fact, refrained from conveying the colonial land and emigration commissioners' objections to such a move. And he had even suggested two factors which he wanted FitzRoy to ensure occurred if FitzRoy did waive pre-emption. The first waiver, although done without prior sanction, was not without reasonable expectation of its acceptance.[32] But the second waiver was clearly in contravention of an express statement by Stanley, that perhaps the 10-shillings-an-acre fee could be increased.

7.4 THE NATIVE LAND PURCHASE ORDINANCE 1846

Before receiving Earl Grey's 10 February 1847 instructions, Grey took action on the question of land purchasing and pre-emption waivers. His Native Land Purchase Ordinance 1846, dated 16 November, reintroduced the Crown's right of pre-emption, as obtained in the Treaty, prohibiting all private purchases and leases of Maori land.[33] Claudia Orange has commented:

> While the move was designed to curtail settler and Maori excesses, there was some truth in the press claim that it was a 'stealthy violation' of Maori rights. Maori had agreed to the treaty mainly because it guaranteed their rangatiratanga over their lands, forests, fisheries, and other prized possessions. The Ordinance subtly undermined that rangatiratanga, it indicated a new firmness in government dealings with Maori in all respects and it paralleled a shift to bring Maori firmly within the compass of British law.[34]

Grey, of course, claimed that, contrary to any fears that the resumption of the Crown's right of pre-emption 'might cause much excitement amongst the natives', no such excitement had ensued. He professed: 'I believe that the measure has given general satisfaction to the mass of the native population'.[35] Yet FitzRoy believed that 'no other measure gave more satisfaction to Maori than the waiver of pre-emption did'.[36] If Grey's statement is to be believed, how did he achieve this? What altered Maori opinion on Crown pre-emption? It may have been because Grey's administration was better financed, and so was more equipped to purchase land from

31. Ibid, p 580
32. See ch 4; Ann Parsonson, 'Ngai Tahu Claim Wai 27 in Respect of the Otakou Tenths' ('Otakou Tenths'), (Wai 27 ROD, doc R35), p 112
33. New Zealand Statutes, 1846, no 19, pp 235-236
34. Claudia Orange, *The Treaty of Waitangi*, Wellington, Allen & Unwin and Port Nicholson Press, 1987, pp 105–106
35. Grey to Colonial Secretary, 7 October 1846, G25/2, p 231, NA Wellington
36. Robert FitzRoy, *Remarks on New Zealand*, Dunedin, Hocken Library, reprint/facsimile no 10, 1969, p 35

Maori who wanted to sell it, and to provide land for settlers who wanted to purchase it – but this would not have been clear for some time. Grey appears to have allowed leasing, and in some cases encouraged squatting, despite its illegality, and this would have given Maori access to revenue from rents and 'grass money'. It may have abated Maori discontent – although Grey's aim, as Alan Ward points out, was ultimately to overcome Maori resistance to Crown purchases.[37] Maori in districts claimed by the New Zealand Company tended to be in favour of Crown pre-emption anyway because they sought protection from the Company's vast claims. Auckland Maori, who had pressed for FitzRoy's pre-emption waivers, had already had an opportunity to sell land directly to settlers. And of course, by the time Grey arrived, the war had already begun in the north. This would have detracted from other concerns. This complicated issue requires further research.

7.5 THE LAND CLAIMS COMPENSATION ORDINANCE 1846

On 18 November, Grey issued the Land Claims Compensation Ordinance 1846. This ordinance stipulated that a purchaser may submit his claim to a commissioner, who would assess whether the claimant had complied with the relevant proclamation's conditions and the 15 June 1846 *Gazette* notice. If these conditions were satisfied, the claimant would receive a debenture for the amount paid for the land. If the claimant had, in addition, occupied the land by cultivating, building a house, or by fencing, he or she was allowed to purchase part or all of the land at a price of £1 an acre (later reduced to 5s), with a credit of the cost of such 'improvements'. The ordinance's preamble, however, noted that a Crown grant could not safely be issued until it was found that the alleged purchases had been 'made from the true Native owners of such land, and that the rights of all persons thereto have been extinguished'.

Land not sold to such claimants – the 'surplus' – became demesne land of the Crown 'saving always the rights which may hereafter be substantiated thereto by any person of the Native race'.[38] Perhaps the Maori rights referred to here were those rights of Maori who did not receive payment for the land. If a purchase was not confirmed by the commission, there was no 'surplus' to acquire.

Under clause 14 of the ordinance, the claimants retained a right to purchase the 'tenths' reserved under the pre-emption waiver proclamations for the sum of £1 an acre also. This sale was a 'private contract' with the Crown. The ordinance stated that the tenths were reserved for 'public purposes', omitting the addition, in the original provision, of 'especially the future benefit of the aborigines'. It claimed that 'such reservations cannot in many cases be conveniently made'. There appears to have been no plan to compensate Maori for the loss of the waiver tenths. The Governor also refused to gazette the Native Trust Ordinance 1844, thereby invalidating it (even

37. Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland, Auckland University Press, 1995, pp 72–91
38. New Zealand Statutes, 1846, no 22, pp 243–245

though London had approved it). This ordinance set up a trust which, among other things, would have administered the waiver tenths.

In December 1846, Major Henry Matson began his investigation of these claims.[39] The ordinance was not popular with settlers and only a few claimants took advantage of the provisions offered. Grey was disappointed. In April 1847, he wrote to the Colonial Office, explaining that he had hoped that the 'extremely fair and liberal nature' of the ordinance would have induced the majority of penny-an-acre proclamation claimants to use the provisions. Grey also claimed that the pre-emption waivers had caused various conflicts between Maori and settlers, and enclosed papers relating to Chisholm's threatening behaviour towards Te Ruinga and Wiremu Hoete (see above).[40] In a separate memorandum, Grey claimed to have had 'numerous instances' brought before him in which Maori had been 'most cruelly and unfairly dealt with' by certificate holders.[41] Given Grey's predisposition to exaggerate such stories to suit his ends, these statements cannot be accepted unreservedly.[42] But Clarke's hasty approvals, especially in the face of boundary and tribal disputes, suggest that further conflict may well have taken place. This requires more research. As noted above, Grey sought to discredit both FitzRoy and the pre-emption waiver scheme. He would also have sought to provide justification for his next move.

Grey next turned to another measure to resolve the question of pre-emption. He chose to submit the question of the legality of FitzRoy's pre-emption waiver proclamations to the local courts.[43] Grey claimed that 'nothing less than [a Supreme Court] decision, formally given, will satisfy many of the claimants that they had not obtained legal rights' over land purchased under the pre-emption waiver proclamations, and which they could not 'compel the Government to recognise, and, if necessary, to enforce'.[44]

7.6 *THE QUEEN V SYMONDS*

The Queen v Symonds is described by David Williams as 'a politically contrived piece of litigation between two officials of the Colonial Government which was brought in order to resolve a bitter wrangle within the circles of the settler community'.[45]

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39. Matson had commanded the first detachment which came to the Bay of Islands in 1845 and served under Colonel Despard in the northern wars. He was promoted for his services and was the first field officer gazetted to the Auckland militia. In 1849, he became a member of the Legislative Council. He represented the City of Auckland Provincial Council from 1856 to 1861), and was a member of the executive from 1857 to 1858 (see G H Scholefield (ed), *The Dictionary of New Zealand Biography*, Wellington, Department of Internal Affairs, 1840, vol 2, p 73).
40. Grey to Earl Grey, 19 April 1847, BPP, vol 6, [892], p 30; see ch 6.
41. Grey, 20 April 1847, in encl 3 in Grey to Earl Grey, 19 April 1847, BPP, vol 6, [892], pp 32–34
42. See, for example, Michael Belgrave, 'Pre-emption, the Treaty of Waitangi and the Politics of Crown Purchase', NZJH, vol 31, no 1, 1997, pp 31–34
43. Grey, 20 April 1847, in encl 3 in Grey to Earl Grey, 19 April 1847, BPP, vol 6, [892], pp 32–34
44. Grey to Earl Grey, 19 April 1847, BPP, vol 6, [892], p 30
45. David Williams, '*The Queen v Symonds* Reconsidered', Victoria University of Wellington Law Review, vol 19, 1989, p 388. Alan Ward (personal comment) believes that this is too critical and he notes that stating a case at law is a perfectly normal way of resolving a deeply contentious issue.

The reason for this statement is that the Attorney-General contrived a set of proceedings for the test case. A Crown grant was to be issued to '*some third person*' (emphasis in original) for land comprised within another individual's pre-emption waiver certificate. The person holding the pre-emption waiver certificate was to petition Grey, asking that the third person's grant be set aside 'on the ground that the petitioner had acquired a prior title and that a scire facias may be sued out in the name of the Crown'.[46]

The certificate holder was to plead that the Crown's right of pre-emption over the land in question had been waived in his favour by FitzRoy and that he had purchased the land from the Maori owners before the grant was issued to the third person. In support of the grant, it would be maintained that FitzRoy's pre-emption waiver certificate 'did not in fact waive the Crown's right, and that this right vests in and can be exercised by the Crown alone, thus the precise point would be put in issue'.[47] (The petitioner's purchase of the land, being bona fide, would have been held to have extinguished native title to the land and vested it in the Crown to grant to whomsoever it chose.[48])

The hearing was set for 4 May 1847, and a judgment was delivered on 9 June 1847. Unsurprisingly, Grey was vindicated. The court found that the Crown grant (held by J J Symonds) was superior to the purchase made under a pre-emption waiver certificate (held by C H MacIntosh). The judgment was based on two principles: first; the Crown is the sole source of legal title and, secondly; the Queen had the sole right to extinguish native title. This latter 'rule' was defined as one 'member' of a wider rule: 'that the Queen has the exclusive right of acquiring new territory, and that whatsoever the subject may acquire, vests at once . . . in the Queen'.[49]

This judgment meant that pre-emption waiver claimants could not find support in the courts and had to turn to the Government to acquire legal title to lands they had purchased. Grey was satisfied that 'the whole of the claimants under similar waivers of the Crown's right of pre-emption' were now convinced that they had acquired no legal rights by the waivers, and that he 'could not legally issue the grants which they have been so anxious to obtain'.[50]

7.7 THE THREE OPTIONS

Grey had taken the question to court without waiting for a reply from the Colonial Office to his earlier despatches. The court's judgment and Earl Grey's instructions to Grey, when they arrived, were at odds. The court had ruled that those who had purchased land using a pre-emption waiver certificate had no legal rights and must

46. Swainson to Colonial Secretary, 21 April 1847, BPP, vol 6, [892], p 35. A scire facias is a 'Writ to enforce or annul judgement [sic], patent, etc' according to J B Sykes (ed), *The Concise Oxford Dictionary*, Oxford, Clarendon Press, 1976, p 1014.
47. Swainson to Colonial Secretary, 21 April 1847, BPP, vol 6, [892], p 35
48. See ch 3
49. 'Judgment of Mr Justice Chapman' end in Grey to Earl Grey, 5 July 1847, BPP, vol 6, [892], pp 64–65
50. Grey to Earl Grey, 5 July 1847, BPP, vol 6, [892], p 64

rely on the Government's clemency. Earl Grey stated that because they had acted on the faith that they had a legal right (despite FitzRoy's actions being beyond his lawful authority) their claims rested on a legal right, but that they may expect no mercy from the Crown if they had not strictly complied with the proclamation provisions.[51]

The Attorney-General, William Swainson, advised Governor Grey on the effect of Earl Grey's decision. Swainson outlined a three-step procedure which he thought would be required in investigating a claim under Earl Grey's instructions. He suggested that first, it would need to be proven that FitzRoy's actions, in waiving pre-emption in the case concerned, were in 'strict pursuance' of the proclamation. If this test was passed, then secondly, it would need to be proven that the claimant himself, or herself, had complied strictly with the proclamation. If the claim passed these two stages of inquiry, then thirdly, the claimant would need to produce evidence proving that the land had been purchased from 'the true native owner, or owners, according to native law and custom'.

Although FitzRoy had later defined the meaning of the term 'limited portions of land' in the proclamations as 'a few hundred acres' (in his December 1844 'explanatory cautions' notice), Swainson thought that a less rigid interpretation of Earl Grey's instructions would allow a claim, valid in other respects, to remain so, even if the waiver was excessive. The claimant could receive a grant, but the grant still would not exceed a few hundred ('say 500') acres. The excess would become Crown land. But where the claimant had purchased the land before obtaining the pre-emption waiver, or 'wilfully understated the quantity of land', the claim would be invalid.[52] He also stated that claimants complying with all the conditions could only receive a deed that released any rights the Crown had over the land (as opposed to a Crown grant). Swainson believed such titles would be subject to suspicion in the market, and be liable to 'actions and claims by native claimants'.[53]

Using Swainson's advice, Grey told the Legislative Council that Earl Grey's instructions did not adequately solve the pre-emption waiver problem. He argued that 'rigid adherence' to the instructions would result in many claimants being unable to make good their claims, much expense and delay, and titles (of those who did comply with all provisions) which would be 'comparatively worthless'. It would be no more a complete settlement than there currently was.[54]

Grey noted that since requesting instructions on waiver purchases, the Supreme Court had given a formal decision declaring that the Governor had no power to waive pre-emption, and the legislature had passed an Act preventing any future land claims.

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51. Rutherford, p 127
52. These were two areas of non-compliance with the proclamations which FitzRoy was particularly concerned about (see ch 6).
53. Attorney-General's report, 7 August 1847, encl 1 in Grey to Earl Grey, 4 December 1847, BPP, vol 6, [1002], p 45. Domett's interpretation of the meaning of this was that 'any grants that, by the Proclamation, the claimants would legally have been entitled to, were only grants barring the right of the Crown, and not excluding or extinguishing the claims of any European or any native whatever' (see Alfred Domett, 'Report of the Select Committee Appointed to Consider and Report as to the Nature and Extent of Outstanding Land Claims and the Best Mode of Finally Disposing of the Same', 16 July 1856, AJHR, 1856, D–21, p 10).
54. Minute, Grey to Legislative Council, 7 August 1847, encl 2 in Grey to Earl Grey, 4 December 1847, BPP, vol 6, [1002], p 46

The Crown's right of pre-emption had been resumed already for several months (and, he stated, neither Maori nor European had disobeyed). The sale of arms and ammunition had been prohibited. The Government notice of 15 June 1846 had defined the exact extent of existing claims. And the illegality, impolicy, and injustice of proceedings connected with the claims had been fully recognized by the Government. (Of course, some of these points had been subject to Grey's exaggeration.) Yet Grey argued that each point contributed to the need for a new direction in policy.[55]

This new policy, presented to the Legislative Council on 7 August and gazetted on 10 August 1847, was to give pre-emption waiver purchase claimants three options:

- The claimants could choose to be subject to the provisions of Earl Grey's instructions. That is, their claims could be assessed on whether they were in exact conformity with the relevant proclamation (steps one and two), and whether the Attorney-General certified that the Maori vendors were 'according to native laws and customs, the real and sole owners of the land which they undertook to sell' (step three). This would not result in a Crown grant.
- The claimants could proceed under Grey's Land Claims Compensation Ordinance 1846. That is, they would be assessed for compliance with the relevant proclamation's conditions, and provision of 'all papers, whether deeds or surveys, connected with their claims, for examination within a period of two or three months' from the 15 June 1846 *Gazette* notice. If the purchaser had complied with all these conditions, but had not occupied the land, they would receive a debenture instead of the land. If the claimant had occupied the land by cultivating, building a house, or fencing the land, they would then have the option to purchase the land at £1 per acre (later reduced to 5s), with a credit of the cost of such improvements and the option to purchase the reserve tenths at £1 per acre. The 'surplus' would revert to the Crown 'saving always the rights which may hereafter be substantiated thereto by any persons of the Native race'.
- Or, the claimants could follow Grey's new set of regulations, dated 10 August 1847. The new regulations stipulated that claimants under the 10-shillings-an-acre proclamation, who complied strictly with the terms of the 15 June 1846 *Gazette* notice, would receive 'absolute Crown grants' if their claims, once investigated by the commissioner, were favourably reported on, and if they paid the remainder of the fees due within a month from the date of the commissioner's report. The grants were to include the reserved tenths (at £1 an acre) where the whole quantity granted did not exceed 200 acres.

  The rule would be extended to the penny-an-acre claimants for blocks not exceeding 500 acres (whether cultivated or not), on their paying 5s an acre within a month from the date of the commissioner's report. If claimants had received a waiver for over 500 acres, they would be under the same regulations but the land granted (and on which fees would be payable) would not exceed 500 acres. But this last restriction would not be required of claimants whose land was

55. Ibid

situated over 20 miles away from Auckland. The remaining title would be Crown land.[56]

Grey's new regulations distinctly specified that in no instance would they be applied, in penny-an-acre claims, should the native title be disputed. Nor would land be granted if it were required for public purposes, but any expenses such claimants may have incurred would be returned to them, and 'some compensation, in the form of land in the village or town' would be made to them.[57]

Concluding his presentation to the Legislative Council, in a further attempt to rally support and besmirch his predecessors, Grey claimed that these measures were based upon his:

> most sincere desire to terminate speedily and satisfactorily the almost inextricable mass of difficulties which have arisen with respect to these claims, and, at the same time, from a cordial wish to promote to the utmost the interests of the really industrious settler, with whom I always warmly sympathize . . .[58]

Commissioner Matson was to continue his investigation under the Land Claims Compensation Ordinance 1846, but the resolution of those claims could be made under any one of the above options.

In practice, Matson's report on his inquiry into each case (see below), was passed to the Attorney-General. In cases involving either of the last two options – the ordinance or Grey's regulations – Matson's report included his recommendation. If supportive of the claim, this recommendation was either for a debenture (for a specific amount of money) or a specific acreage (to be granted to the claimant). Matson's records also included the calculation of fees still to be paid. Where he recommended a grant to include the reserve tenth, the fee included a payment of £1 per acre for the tenths land. Based on the information provided through Matson's inquiry, Swainson (sometimes with Sinclair) would either approve, or not approve, of the debenture or the Crown grant being given. He did so on the terms of whichever option the claimant chose, noting whether it appeared to be in conformity either with the provisions of the ordinance, or with Grey's 'minute'.[59]

Where Matson's recommendation included the granting of the reserve tenths, Swainson considered whether the reserve tenth should, or should not, be included in the grant. Grey's opinion on this count was also sometimes noted. The reasoning behind the decision is not always stated. In some instances, it appears to have been based on whether the land may be required by the Government for the community as a whole (for example a hilltop, road, or roading reserve).[60] In others, the decision seems to have been influenced by whether the claimant had acted consistently with

56. Minute, Grey to Legislative Council, 7 August 1847, encl 2 in Grey to Earl Grey, 4 December 1847, BPP, vol 6, [1002], p 47
57. Ibid
58. Minute, Grey to Legislative Council, 7 August 1847, encl 2 in Grey to Earl Grey, 4 December 1847, BPP, vol 6, [1002], p 48
59. See, for example, OLC 1/1054, 1/1062, 1/1125, 1/1135, 1/1155, 1/1158, 1/1166, NA Wellington

the 'intentions' of the Government in the pre-emption waiver scheme (for example, whether the claimant had purchased the land prior to obtaining a certificate).[61] These 'intentions', which as noted above provided some protection of Maori interests, were not strictly stated in the proclamations' provisions. But the preamble to FitzRoy's October proclamation had referred to the disregard displayed for the regulations by settlers either purchasing land prior to applying for and obtaining the Governor's consent to a waiver, or 'much understating' the quantity of land proposed to be purchased from the Maori vendors.[62]

Obviously, Swainson approved some debentures or grants despite an inconsistency with the 'intentions' of the Government, otherwise he would not have been considering the reserve tenths provision at all. But in at least one case, where the claimant, William Potter, had purchased the land prior to receiving a waiver certificate, Grey objected to the tenth being granted on the basis that Potter had acted 'in direct violation of the intentions of the government'. Grey only reluctantly recognized Potter's claim at all.[63] Potter had chosen to be assessed under option three (Grey's regulations). This required the case to be determined on whether the purchaser had strictly complied with the 15 June 1846 *Gazette* notice. But it also required that Matson favourably report on the claim, and Matson's terms of reference, under clause 4 of the ordinance, included an assessment of whether the claimant had 'complied with the terms and conditions prescribed' by the proclamation under which the waiver had been given. Some consideration of compliance with the proclamation would have been required, but perhaps strict compliance with the Government's intentions in option three cases was not required by Swainson.

If a claimant chose the first option – Earl Grey's instructions – Matson appears to have made no real inquiry or recommendation, but merely forwarded the report to Swainson (after asking whether the claimant had taken possession of the land and which option he or she chose).[64] Swainson's decision in these cases seems to have been based solely on his consideration of whether the claimant had acted in strict conformity with the proclamation under which the waiver had been given. It appears also to have been based on compliance with the intentions of the Government with regard to the waiver proclamations, such as those specified in FitzRoy's subsequent 'explanatory cautions' notice.[65] In some instances, for example, Swainson stated that

60. See OLC 1/1070–1071, 1/1081–1084, 1/1115, NA Wellington. These instances are not clear cases. The hilltop was to be reserved along with the tenth, the road only took part of the reserve tenth (despite both proclamations having separate provisions enabling the Government to take land for roads), and the roading reserve was a swap for another area of the claim, initiated by the claimant, because a Crown road already separated off a portion of the claim).
61. See OLC 1/1112, NA Wellington
62. See ch 6; FitzRoy's 'explanatory cautions' notice has already been cited (above) as indicating the Government's 'intentions'.
63. OLC 1/1112, NA Wellington
64. See, for example, OLC 1/1150 (given in payment for the loss of the cutter 'Oropiu'), 1/1154, 1/1162, and 1/1165, NA Wellington.
65. *New Zealand Gazette*, 7 December 1844, notice in encl in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, pp 402–403; see ch 6

because the purchase had been made prior to obtaining a waiver he was 'unable to certify that the act was "in strict pursuance of and under the authority of the Proclamation" '.[66] As noted above, he had advised Grey that, under this option, where the claimant had purchased the land before obtaining the pre-emption waiver, or 'wilfully understated the quantity of land', the claim would be invalid.

In a further case assessed under the first option, Swainson refused a grant on the basis that the 'explanatory cautions' notice had specified that 'a limited portion of land' meant 'a few hundred acres', and the waiver over 1200 acres of land, received by the claimant after that notice, meant that it was not in strict pursuance of the proclamation.[67] He did so, despite having advised Grey that, under this option, he thought a claim valid in other respects would still remain so even if the waiver was excessive, and also that such a claimant could receive a grant not exceeding a few hundred ('say 500') acres.

By including FitzRoy's intentions, which were to have protected Maori interests, as part of his assessment when a claimant chose this first option, Swainson appears to have taken a harsher approach in assessing conformity with the proclamations under Earl Grey's instructions. His consideration of these matters in at least one of the other two options appears merely to have resulted in a claimant not being granted the reserve tenths (see above).[68]

Despite Earl Grey's stipulation that the Attorney-General assess whether the Maori vendors were, 'according to native laws and customs, the real and sole owners of the land which they undertook to sell', Swainson appears not to have assessed customary tenure at all. Had Matson's reports contained more information in these cases, Swainson may have considered the aspects of the commissioner's reports relating to the investigation of title (see discussion of this below). But only Clarke's comment on the original pre-emption waiver application would have been available, unless the claimant supplied further evidence. Swainson does not refer to considering who the real and sole owners were (according to native laws and customs) in his decisions involving first option cases I have seen to date. Yet his advice to Grey, that this was the third step in the process for assessing and granting a claim under Earl Grey's instructions, would imply that where he confirmed a grant, he had considered the matter and found the vendors to be the real and sole owners. But where Swainson's consideration resulted in a grant under this first option, he appears simply to have noted that it was 'in conformity with the Proclamation under which it was preferred'.

The resulting grant was specified to contain 'no warranty of title on the part of the Crown'.[69] This was an obvious drawback in choosing option one. This option was rarely chosen. It was also the only option which did not contain provisions for the settlers to purchase the reserve tenths.

66. See OLC 1/1150 and 1/1154, NA Wellington; see also OLC 1/1165, NA Wellington
67. OLC 1/1162, NA Wellington
68. OLC 1/1112, NA Wellington
69. See OLC 1/1149, NA Wellington. Alice Porter gave this grant to trustees who, wanting a better title, decided to use the power contained in the Land Claims Extension Act 1858 to 'surrender' the land to the Queen and obtain a new grant.

Allowing settlers to purchase the reserve tenths, under the ordinance or Grey's regulations, was clearly contrary to the commitment FitzRoy gave Auckland chiefs on Government House lawns on the day of the March proclamation. The tenths had constituted an important aspect of FitzRoy's policy, outlined to those Maori living in or immediately around Auckland who had attended the hui. FitzRoy had told those present that he had made distinct conditions that one-tenth of all land purchased was to be 'set apart for, and chiefly applied to, your future use, or for the special benefit of yourselves, your children, and your children's children'. He had also emphasised that the Government would look after the tenths for the benefit of Maori and that the tribes would be given a place in the growing settler community. The produce of the tenth, he stated, was to be applied by the Government to:

> building schools and hospitals, to paying persons to attend there, and [to] teach you not only religious and moral lessons, but also the use of different tools, and how to make many things for your own use . . .[70]

Yet Grey, through his options for settlers, as Parsonson puts it, quietly discarded the tenths. Despite the fact that FitzRoy had exceeded his 'lawful authority', settlers had been able to rely on the Government's clemency, or be taken to have a strict legal right as long as they had complied with the proclamations. Yet Maori, who may also have relied on FitzRoy's provisions, had no comeback. The tenths could be discarded because, strictly speaking, nothing in FitzRoy's waiver proclamations themselves prevented Grey from discarding them. The proclamations bound the purchaser to make over the land to the Crown, but had not bound the Crown to use the proceeds of the tenths for the benefit of Maori – only 'for public purposes', albeit 'especially the future benefit of the aborigines'.[71] While Grey was willing to take the Government's 'intentions' into account in assessing the settlers' title (at least to the entirety of their claims), he was not willing to do so to preserve the tenths for future Maori benefit. Grey did not apply the proceeds of the tenths in the way that FitzRoy had outlined. He either granted the land to the purchasers, or retained it for the Crown.

Most claimants who were awarded grants by the commission took advantage of this measure and purchased the tenths. Very little land was retained for Maori use and benefit in Auckland's growing settler community (see fig 6). Yet FitzRoy had stated his belief that Maori needed the provision of 'at least a tenth of all lands sold, besides extensive reserves in addition'.[72] Grey, on the other hand, had claimed that the tenths were 'inconvenient'.[73] As Parsonson has queried, given FitzRoy's emphasis on the tenths in his waiver scheme, and given the acreages to which the Maori title had been extinguished, presumably in expectation of tenths, 'one wonders how Grey

70. 'Copy of Minutes of a Meeting of Native Chiefs . . . at Government House . . . on 26 March 1844', encl 0 in FitzRoy to Stanley, 15 April 1844, BPP, vol 4, p 198
71. See ch 4; Parsonson, 'Otakou Tenths', p 66
72. FitzRoy, 'Memorandum on the Sale of Land in New Zealand by the Aborigines', 14 October 1844, encl 2 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, pp 403–404
73. New Zealand Statutes, 1846, no 22, pp 243–245

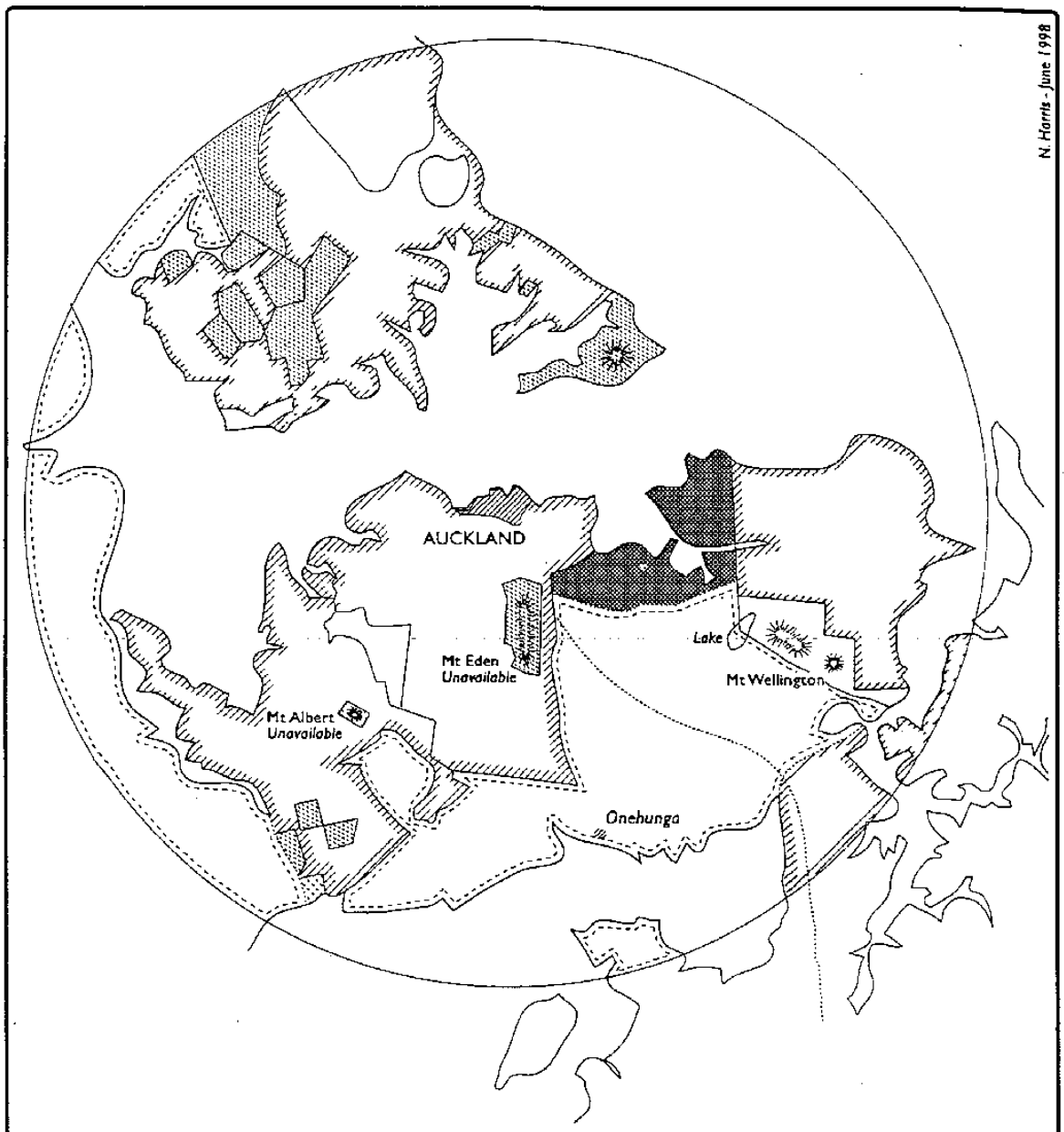

Figure 6 : Copy of 'Plan shewing in what manner the land within a radius of seven miles of Auckland has been appropriated'

Source : Grey to Earl Grey, 11 November 1847, BPP, vol 6, [899], pp 12-13.

reconciled this act with his own statements emphasizing the need to act justly toward the Maori'.[74]

Grey did not inform the Colonial Office of his actions until 4 December 1847. On 19 April 1847, he had reported that few settlers had taken advantage of the Land Claims Compensation Ordinance.[75] On 5 July 1847, he had informed the Colonial Office of the decision in *The Queen v Symonds*.[76] Then, on 11 November 1847, he had forwarded some tabulated returns of the pre-emption waiver purchases to the Colonial Office, making no mention of the actions he had taken in August. Grey did, however, continue to make criticisms of the pre-emption waivers.[77]

On 3 December 1847, having received Grey's 5 July report, Earl Grey, in Britain, approved of Governor Grey's resort to 'a fair trial'.[78] But he again stressed the need for equity and justice, favouring any European claimant who acted on the faith of the proclamations. His approval was, however, subject to two conditions. He repeated his instruction that a grant could only be issued if the purchase had been made from 'the real and sole owners of the land', stipulating that every native claimant was to be 'fully satisfied'. He also specified that the European claimant should not pay 'less in all than the established minimum price of land in the colony'.[79] Grey's 4 December despatch to the Colonial Office (enclosing the Legislative Council minutes outlining the three options) was written before this approval was received.

7.8 THE MATSON INQUIRY

7.8.1 Matson's reports

Matson's inquiry under the Land Claims Compensation Ordinance 1846 involved the investigation of all pre-emption waiver claims.[80] This section is primarily concerned with Matson's interpretation of the clauses which may have protected Maori interests. It does not consider his treatment of settler interests.

Under clause 8 of the Land Claims Compensation Ordinance 1846, Matson was required to report:

> setting forth the name and address of the claimant, the situation and extent of the land alleged to have been purchased, the evidence adduced in proof of the outlay found to have been incurred under the several heads of expenditure . . . together with the total amount in respect of such outlay to which the said Commissioner shall find such claimant to be entitled.

As noted above, the expenditure referred to included the price or consideration paid to Maori, the amount paid by the claimant for the deed, survey, and other expenses of

74. Parsonson, 'Otakou Tenths', p 67
75. Grey to Earl Grey, 19 April 1847, BPP, vol 6, [892], p 30
76. Grey to Earl Grey, 5 July 1847, BPP, vol 6, [892], p 64
77. Grey to Earl Grey, 11 November 1847, BPP, vol 6, [1002], p 13
78. Earl Grey to Grey, 3 December 1847, BPP, vol 6, [892], p 35
79. Ibid, p 36
80. Most of the records of his investigation are in the old land claims series 1 at National Archives in Wellington.

purchase; and that paid for improvements (including buildings, fences, and cultivations). These were set out in clause 4 of the ordinance as matters into which the commissioner was to inquire.

Consequently, Matson's reports included a summary account from the purchaser, with a description of the land, its acreage, the consideration paid (and to whom), whether the purchaser's possession of the land was undisputed, whether the land had been occupied, what improvements had been made and whether the claimant sought to purchase the reserve tenth. They also included a record of the statements made by a witness or witnesses to the transaction. A witness could be Maori or Pakeha. Many times the interpreter who had been involved in assisting the purchase appeared in this capacity. Witnesses generally confirmed that the plans and deeds provided by the claimant were the originals, that the purchase was fully explained and understood by the vendors, and that the vendors had received, and had appeared fully satisfied with, the payment. Record of confirmation given by the vendor (or vendors) was also made. The vendor generally confirmed that he was the proprietor of the land described and shown on the deed and in the plan; that he had full authority to sell that land; that he had sold it to the pre-emption waiver claimant; for the amount disclosed; and that he was satisfied with the price, which he had agreed to (see below).

The Domett committee, a parliamentary committee reporting on old land claims and pre-emption waiver purchases in 1856, summarised the results of Matson's investigation as follows:

> *Ten-shilling Claims* – The greatest part of claims under the first Proclamation may be considered as disposed of. For out of sixty-two original claims, –
>
> 49 have been settled by issue of grants by Sir George Grey under [the terms of the 10 August 1847 regulations]
>
> 9 were disallowed for non-payment of fees on certificate of waiver of pre-emption, which therefore could never have been issued; the land affected is about 280 acres in the aggregate.
>
> 2, of patches, not an acre together, were disallowed, on account of plans not having been sent in.
>
> The only dispute existing about these claims is as to the right of reserving lines of road through the lands.
>
> *Penny-an-acre Claims* – The preserving and exterminating processes had the following effects respectively on these claims.
>
> There were 189 original claims, affecting about 90,000 acres.
>
> 53 have been settled by issue of grants by Sir George Grey, under the 5s.-per-acre payment.
>
> 21 have been resigned, on receipt of compensation, or debentures, or money.
>
> 80 were disallowed, for non-compliance with the requisitions of 15 June, 1846, for sending in plans and surveys.
>
> 28 were disallowed, because certificates that the FitzRoy Proclamation had been complied with were refused by the Attorney-General. The particulars of non-compliance are not given in any case in the Attorney-General's reports of the fact.
>
> 7 were disallowed or abandoned. Reasons not given.[81]

Neither Matson nor the Domett committee compiled a full list of the acreages involved in the pre-emption waiver claims, nor did they establish exactly how much of the land would revert to the Crown, or how much (if any) would return to the Maori vendors. However, not all claims were surveyed, and these claims would have been accounted for in the 80 that were disallowed for non-compliance with the notice of 15 June 1846 (for not sending in plans and surveys – a requirement of both the ordinance and Grey's regulations), or the 28 disallowed by the Attorney-General. Commissioner Francis Dillon Bell, who investigated the pre-emption waiver claims (and old land claims) a decade later, provided an account of these disallowed claims and the result of his own investigation. But again the amount of land reverting to the Crown was not accurately recorded (see below).

As can be seen from the above, most claimants chose to be assessed under the ordinance or Grey's regulations. Ten-shillings-an-acre claimants fared well – most of them received grants. Penny-an-acre claimants fared less well. Matson disallowed many of their claims because they had failed to submit surveys and plans. Swainson disallowed some because they did not comply with the proclamations. None of the claims appear to have been disallowed because the land was purchased from Maori who did not have a right, or the right, to sell, or on the basis that insufficient payment was made to Maori (see below).

March waiver claimants, with land located close to the centre of Auckland, were the most successful in Matson's inquiry. Their land was valuable and readily occupied. James Rutherford (who chose the ordinance option), for example, purchased three acres from Jabez Bunting (Epiha Putini) of the Ngati Maho tribe at Remuera, south of Tamaki Road. Rutherford's evidence before the commission was recorded as follows:

> I have nearly the whole of the land in Cultivation, have been in undisputed possession since the purchase, have [a] House erected on the land and resided on it myself for a considerable time. Have a man and his wife living on it since that period, and the land fenced. I am desirous of purchasing the reserve tenths in Conformity of the 14th Clause of the Land Claims Ordinance, and have made an application to that effect.[82]

William Turner purchased 24 acres of land on Manukau Road in Remuera (Mt St John), from Wetere. He too took a claim under the ordinance provisions, and Matson recorded him to have said:

> I have been in undisputed possession of the land since the purchase, have a man residing on it, a considerable portion in cultivation, and the whole fenced in. I am desirous of purchasing the reserve tenths in conformity with the 14th clause . . .[83]

81. Alfred Domett, 'Report of the Select Committee Appointed to Consider and Report as to the Nature and Extent of Outstanding Land Claims and the Best Mode of Finally Disposing of the Same', 16 July 1856, AJHR, 1856, D–21, p 7
82. OLC 1/1059, NA Wellington
83. OLC 1/1070–1071, NA Wellington

These claimants complied with all the regulations, and although it may have been costly to have done so, the costs no doubt were outweighed by the market value of the land if it could be given a clear title. The fact that the claimants had occupied the land added to the strength of their claim. They did not carry the stigma of being 'speculators'. Furthermore, in most of the 10-shilling-an-acre claims examined, the Maori vendors appeared before Matson and gave oral confirmation of the purchase. At least some settlers seem to have covered the expenses of those Maori who appeared before Matson. One claimant complained that it had cost him more to keep Maori witnesses in Auckland for the investigation than his initial outlay.[84] Meurant's diary entries around this time indicate that he was often employed to find Maori and ensure their presence at the hearings. Vendor confirmation was valuable. In Rutherford's purchase, cited above, the commission recorded:

> Charles Davis sworn as Interpreter. Epiha Putini, alias Jabez Bunting, Principal Native chief of the Ngatimaho tribe being duly sworn, states, I was the rightful owner of the land sold to Mr Rutherford, and described in the Preemption Certificate and Plan now laid before the Court, had full power and authority to dispose of it, received the full consideration agreed on and have no further claim whatever.[85]

7.8.2 Matson's investigation of Maori title and protection of Maori interests

Each of the 'three options' given by Grey in August 1847 contained measures to ensure that the land had been purchased from the legitimate owners. Earl Grey emphasised the need to investigate the rights of Maori vendors more than the ordinance. As noted above, he instructed that the Attorney-General was to certify:

> that the natives from whom the purchases may have been made were, according to native laws and customs, the real and the sole owners of the land which they undertook to sell . . .[86]

The preamble to the ordinance, in comparison, stipulated that no Crown grant could safely be issued until it was found that the alleged purchases 'have been made from the true Native owners of such land, and that the rights of all persons thereto have been extinguished' – although there was no such reference in the body of the ordinance.[87] The third option, Grey's new regulations of 10 August, also provided some reference to determining that the vendors were the correct rightholders. Those regulations stated that where there was 'any probability of the title to the land being justly disputed by adverse native claimants' in the penny-an-acre claims, the Government would not 'extend the rules' to cover it.[88] This provision was probably

84. Hay to Colonial Secretary, 7 June 1842, in OLC 1/1240, NA Wellington
85. OLC 1/1059, NA Wellington
86. Earl Grey to Grey, 10 February 1847, BPP, vol 5, p 579
87. New Zealand Statutes, 1846, no 22, pp 243–245
88. Minute, Grey to Legislative Council, 7 August 1847, encl 2 in Grey to Earl Grey, 4 December 1847, BPP, vol 6, [1002], p 47

the reason for Matson's record of the purchasers' statements (above) that they had been in 'undisturbed possession' of the land concerned.

Despite these measures, Grey did not require any rigorous identification of the legitimate Maori owners of the land the claimants alleged to have purchased in the ordinance which set out Matson's terms of reference. This appears to contradict the frequent mention Grey made to the Colonial Office of the danger posed to the Government by settlers purchasing and occupying land from inappropriate parties, and the conviction that many claims could only be maintained by force. But it is consistent with his objections to Earl Grey's requirement that the Attorney-General certify that the vendors were 'according to native laws and customs, the real and the sole owners of the land which they undertook to sell'.

All the same, Matson's reports on claims being taken under either of the last two options included the results of his inquiries into the Maori vendor's title. If Swainson did consider this issue in his assessments of claims made under these two most popular options (although there is no indication that he did), his consideration would have been based on Matson's reports. The effectiveness of Matson's investigation into Maori title, therefore, is particularly important to assess.

Matson interviewed a number of Maori vendors during his inquiry. Typically, like the example above, the vendors gave affirmative answers about the pre-emption waiver transactions under question. For example, in William Turner's purchase from Wiremu Wetere (above), Edward Meurant appeared as a witness. Meurant stated that he 'was present when the Native chief Wetere sold the land described', that he fully explained the contents of the deed to Wetere, and that Wetere had 'expressed himself fully satisfied with having received the full consideration agreed on'. Matson then recorded:

> Charles Davis sworn as Interpreter. Wetere, Native chief of Ngatimaho tribe . . . I sold the land described in the Pre-emption Certificates No 12 and 32 and Deed of Conveyance now laid before the Court to Mr Turner. I was the sole proprietor of the land, had full power and authority to dispose of it, have received the full consideration agreed on, and have no further Claim whatever.[89]

This response was a formulaic one. Interestingly, its contents corresponds with one of Earl Grey's later (December 1847) 'conditions': that a grant could only be issued if the purchase had been made from 'the real and sole owners of the land' and that every native claimant was to be 'fully satisfied' (see above). But it probably actually sought to establish the stipulation in the preamble to the ordinance that a grant could not safely be issued until it was ascertained that the purchase had been made from the true owners and that the rights of all persons had been extinguished.

Although under custom no Maori was a 'sole proprietor' of land, this same mantra is repeated throughout the Matson inquiry files.[90] It is improbable that Maori actually

89. OLC 1/1070–1071, NA Wellington

90. In other instances, vendors were recorded to have stated that the tribe were the rightful owners (see OLC 1/1116–1117, NA Wellington); or that the vendor had acted with the permission of, or on behalf of, the principal chief of the tribe, who had full power and authority and gave his consent to the sale (see OLC 1/1120–1121, NA Wellington).

made such uniform statements. Perhaps Meurant and Davis, and the other interpreters, summarised what they had been told in the form Matson required or preferred. But it is more likely, considering the formulaic responses in the claimants' and witnesses' statements also, that Matson created the uniformity himself, stating what he felt was necessary for this section of the inquiry to be satisfied.

This uniformity makes it difficult to assess what Matson's investigation into Maori title actually involved. He may have relied, to some extent, on the supposed accuracy of Clarke's earlier assessments (before the waiver of pre-emption certificate was issued). Whether Matson relied on Clarke's input or not, provisions in each of the three options, as noted above, indicate that he was required to investigate the matter. Yet, just as Clarke had relied (in some cases) on individual purchasers and vendors to state who the legitimate Maori land owners were, so Matson appears to have relied on the vendors' (and witnesses') statements. Matson, like Clarke, appears not to have conducted any significant investigation into the customary ownership of the land concerned. And the content and wording of his records indicate that his understanding of Maori land tenure was deficient.

Maori tenure was, and is, very complex. The movement of iwi over Auckland land around 1840 (above) was the outer manifestation of this complexity.[91] Anne Salmond and Alan Ward have stressed that understanding the nature of customary tenure is essential to any examination of sales to Europeans.[92] Michael Belgrave has pointed to the 'skewing' of the colonial administration's conclusions, as a result of the 'overriding intention' in identifying legitimate ownership being 'to recognise in order to extinguish'.[93] This is aptly shown by Angela Ballara, who has provided examples of the way the evidence presented to the Maori Land Court gave a highly selective and politically determined view of customary rights.[94] She has shown, as Belgrave states, that the process 'simplified and ossified an extremely flexible and complex system of customary rights'. Belgrave summarised:

> Rights were based on whakapapa (genealogically based tradition) and on complex networks of hapu (family groups) and residential communities. Interests existed at different levels, those to use eel weirs, rat runs, weka (a native woodhen) grounds were often held by individual families. But on another level other groups had rights to share in these resources either by distribution or through reciprocal gift exchange. Rights could be diminished by a failure to exercise them, by migration or by conquest. Political authority rested with local communities, but they in turn coalesced and divided as the need arose. Leadership was held by senior rangatira (chiefs) who could speak for a cluster of hapu or communities. Authority was based on breeding but rose and fell on performance.

91. See ch 5
92. Anne Salmond, 'Tipuna: Ancestors in Maori', paper delivered at the conference of the Australian Society of Anthropologists, University of Newcastle, 1988; Alan Ward, 'A Report on the Historical Evidence: The Ngai Tahu Claim, Wai 27', report commissioned by the Waitangi Tribunal (Wai 27 ROD, doc T1).
93. Michael Belgrave, 'The Recognition of Aboriginal Tenure in New Zealand 1840–1860', paper presented to the American Historical Association, 1992, p 12
94. Angela Ballara, 'The Origins of Ngati Kahungungu', PhD thesis, Victoria University of Wellington, 1991

> Migration, intermarriage and conquest layered new rights over old and gave new complexity to the arrangements between and within communities. This process was heightened in the 1820s and 1830s as different tribes exploited the advantage that European crops and muskets provided. Hapu joined into larger social groups for defense and to raid their neighbours. Tribes migrated to new parts of the country, overwhelming the existing inhabitants, pushing them in turn to new regions. Sometimes these invasions were no more than raids for slaves or bounty or to avenge old grievances, but in other cases conquest was followed by settlement . . . [and] claims to ownership on the lands over which they had raided . . .[95]

Yet Matson's bland records show none of this complexity. Occasionally he was given evidence suggesting that the land in question was disputed. But he does not appear to have followed this up. For example, in the sale of 405 acres by Katipa to E Foley, Katipa told the commissioner that '[t]his land belonged solely to me and if the Native Chief Wetere, or any other makes any claim, do not believe them, send for me, and bring me face to face'.[96]

Matson did not inquire whether any grant included pa, urupa, or land about them; areas which FitzRoy's proclamation had specifically noted would not receive a Crown grant. Nor did he inquire whether Maori vendors retained sufficient land for their present and future needs. Grey did not require this of the commission, although it was something FitzRoy had promised Maori on Government House lawns and spelt out clearly in the pre-emption waiver proclamations.[97] Matson's task was limited to assessing settler claims under the proclamations, and to recommending the disallowance or settlement of those claims.

Matson does not appear to have cancelled a purchase because of insufficient payment, although some of the prices paid were obviously inadequate in Maori eyes, and the resale of some of the land purchased by Pakeha claimants under the waiver proclamations resulted in large profits.[98] Again, Grey did not require this of the commission, although Earl Grey stipulated later in December 1847 that every Maori claimant was to be 'fully satisfied' (see above). Matson did at times work to ensure that Maori were actually paid what was originally agreed to (see above) – but this was not making an assessment of sufficient payment. Other times Matson seems to have passed over cases where Maori did not receive even the agreed payment.

For example, Thomas Jackson purchased Puketuhi Island from Keene of Ngati Whatua for 'five pounds cash and 10 blankets'. The island was then sold to H Weeks for £200. A house was built on the island and Weeks employed 'a man' to reside and no doubt work there. Kawau, of Ngati Whatua, also appeared before the commission. He stated that Keene had sold the land with his full permission and that he did not dispute the sale. But he also said that the payment received was 'a very little payment'.[99] Matson awarded a Crown grant to Weeks for 479 acres. The remaining

95. Belgrave, p 13
96. OLC 1/1145, NA Wellington
97. See chs 5–6
98. See, for example, OLC 1/1052, 1/1062, 1/1064, 1/1067, 1/1074, 1/1095, 1/1120, 1/1148, 1/1189, 1/1200, 1/1213, 1/1256, 1/1277, NA Wellington
99. OLC 1/1256, NA Wellington

859 acres appears to have gone to the Crown as 'surplus'. Despite being informed of the original sale price, the resale price, and being told by the Maori vendors that the consideration was poor (and being required by clause 7 of the ordinance to be 'guided by the real justice and good conscience of the case') Matson issued a grant. In another sale, completed in 1846, the Maori vendor did not receive full payment for over five years, although he complained to Matson in 1848.[100] Matson approved the purchase without ensuring the outstanding money was paid.

It is difficult to know what Maori understood they were affirming before Matson. There was most probably a difference in understanding between Maori and settlers over the nature of a sale, although those who participated in the pre-emption waiver sales in Auckland in 1844 and 1845 may have better understood English notions of sale than those living outside the region. But whether they were conducted on the basis of an entirely British understanding is another matter. Ongoing relationships may have been part of some of the transactions, perhaps especially where boundaries were loosely specified. This may also have been so where sales would require Maori to leave their own residences, or where sales required Maori to abandon key tribal resource or strategic areas.[101] Certainly some purchases involved subsequent payments. This may suggest a continuing relationship between vendors and purchasers (except, perhaps, if those payments resulted from Matson's or, subsequently, Bell's inquiry).[102] In cases where the boundaries were clearly given, and the deeds were written and signed in Maori, and conveyed clear ideas of permanent alienation, Maori may have entered on the basis of the English understanding. But irrespective of whether 'sales' were understood to be exclusive and absolute possession, they were the means by which Maori built relationships with settlers. Social and economic benefits followed with marriage, trade, and other reciprocal exchanges – maybe even social rights and obligations, as well as a right to the land, were conveyed.

In a number of instances Maori objected to the Crown's assertion of rights over 'surplus' land which had not been granted under Grey's 'three options'. Alan Ward explains that:

> when the waiver purchases by Chisholm, Hart and Hay were disallowed by the Crown the Maori vendors from Ihumatao and Papakura did not recognise the Crown's right and interrupted the Crown's surveyors on the land in 1851. Ligar [the Surveyor-General] required 'repeated interviews' and additional payment before he would make any progress. ... [T]he taking of Crown surpluses in south Auckland, especially in regard to the Chisholm, Hart and Hay purchases was resented by Maori at the time and it is very doubtful if the actions taken by Ligar adequately addressed the Maori complaint.[103]

The *Southern Cross*, which publicised similar cases, perhaps with intentional naivety, asked:

100. OLC 1/1284, NA Wellington
101. See ch 6
102. See, for example, ch 6 (6.5.1(5))
103. Alan Ward, 'Supplementary Historical Report on Central Auckland Lands', Wellington, CCJWP, 1992, pp 71–72

> How can he [Grey] be sincere in his professions to maintain a Treaty that guarantees to the natives the undisturbed right to lands and forests, while he assumes and exercises a proprietary right over lands that the natives have not alienated to the Crown?[104]

No record has yet been found, in the research done for this report, of Maori objection to the settlers' purchases of the 'reserve tenths'. Maori objections to the results of the Matson inquiry centred on the question of surplus lands (above). It may certainly have been difficult, with poor surveys and the wholesale acquisition of 'surplus' land, to identify what had happened to FitzRoy's promises of tenths. Perhaps, as FitzRoy had stated that the tenths were to be vested in the Crown, Maori instead remembered his promise of schools, hospitals, and services, which the 'produce' from the tenths, managed by Crown officials, was to be used to provide. Similarly, the question of which land was reserved by the Crown from purchase or granting, as FitzRoy specified for pa, urupa, and land required by Maori for their 'present' or 'own' use, does not make a significant appearance in the records.

7.9 THE DOMETT COMMITTEE AND THE LAND CLAIMS SETTLEMENT ACT 1856

In 1856, the parliamentary committee chaired by Alfred Domett reported on the old land claims and pre-emption waiver purchases. It is referred to as the Domett report.

Domett did not support Matson's inquiry, criticizing the disallowance of the majority of claims because of the failure to send in plans by the deadline of 15 September 1846 (within three months of the 15 June 1846 *Gazette* notice). The committee argued that this was unfair and unjust to settler claimants. It recommended a second investigation of the 'unresolved' pre-emption waiver purchases and old land claims. These recommendations were adopted in the Land Claims Settlement Act 1856.[105] The Domett committee appears not to have considered the interests of the Maori vendors. It recognized the need for final settlement of settler claims. Since the Matson inquiry the land had been left in 'uncertainty of ownership'.[106] Some of the settlers with disallowed claims may have continued to live on the land they had purchased from Maori. But Bell's comments (below) suggest that this land, left unsurveyed, would have reverted to Maori ownership (at least in theory).

The provisions for further investigation and settlement of pre-emption waiver purchases under the Land Claims Settlements Act were sections 29 to 31. Section 29 provided that a claimant whose claim arose under the 10 October 1844 proclamation, for which no grant or compensation had yet been given, was to pay between one and five shillings an acre for every acre of land to be granted, the amount per acre to be as close as possible to one-fourth the estimated value of the land. Section 30 provided

104. 'Native land agitation', *Southern Cross*, 16 September 1848
105. AJHR, 1856, D–21, p 10
106. 'Despatches from the Colonial Secretary to Superintendents of Provinces Relative to the Disallowance of Provincial Laws', AJHR, 1858, A–4, p 13

that no grant could be greater than 500 acres, but commissioners could grant up to an additional 500 acres as compensation for damage sustained as a result of non-settlement of the claim, provided that did not make up more than the original claim. Section 31 stipulated that penny-an-acre claimants were to pay between one shilling and £1 per acre for any land granted as compensation. Again, the amount per acre was to make the payment as close as possible to one-fourth the estimated value of the land.[107]

The Act was designed to aid settlers who had not received compensation under the Matson inquiry. And as in previous Government investigations, any 'surplus' land above that awarded to the claimant would revert to the Crown. The Act was also designed to encourage surveys. It offered claimants a generous compensation scheme to complete such surveys. Section 44 provided that an allowance would be made in land for the charges of surveyors at the rate of one shilling and sixpence per acre; and that an additional quantity of land would be granted in compensation in respect of the allowance at the rate of one acre for every 10 shillings paid on account of such charges. This meant that the Crown would acquire less surplus, but the land would be surveyed. The survey-compensation mechanism may have tempted settlers to exaggerate the extent of their now 10-year-old claims. The greater the cost of survey and area surveyed, the greater the area of land given in compensation under the Act.

Section 46 provided that if a surplus was not available in a claim to provide compensation land, the Crown was to award other land, either from lands set aside specially for such purposes, or out of the wastelands of the Crown. Section 48 provided for the satisfaction of any opponent to a claim, except if those opponents were 'of the native race or a half caste'. No doubt this provision was an attempt to resolve overlapping settler claims.

No serious consideration appears to have been given to Maori who may have objected to claims. Section 12 allowed 'any person objecting to any claims or grants to be investigated' to have their objections heard – but on payment of a fee – and of course Maori were excluded from receiving compensation under section 48. The Act was silent on the tenths.

Francis Dillon Bell was appointed commissioner under this Act and after approximately five years had completed his investigations. Premier Edward Stafford reported to the British Government in 1858 that the inquiry was proceeding well:

> The operation of the 'Land Claims Settlements Act', 1856, has been even more satisfactory than was anticipated; – a very large number of claims have been brought before the Court, and many of them already adjudicated upon satisfactorily; large quantities of land, hitherto locked up from the uncertainty of ownership, have thus become available for active colonization, either from having been awarded to individuals, or from having reverted to the Crown.[108]

107. Land Claims Settlement Act 1856, BPP, vol 10, pp 614–621
108. AJHR, 1858, A-4, p 13

Stafford made no reference to the interests of Maori from whom much of this 'surplus' was derived. The underlying object of the Act was to open further land for settlement.

7.10 THE BELL INQUIRY, 1856–61

Bell tabulated a number of statistics on the pre-emption waiver purchases, as well as dealing with each claim individually. He found that a total of £6841 4s 2d had been paid to Maori under pre-emption claims. An additional £2520 8s 5d was expended by the pre-emption waiver claimants, including money paid under Grey's 10 August 1847 'minute'.[109] Bell calculated that 97,427 acres of land had been surveyed under the pre-emption claims (this was not the total of land allegedly purchased). He commented that the liberal survey allowances in the Land Claims Settlement Act 1856 had had 'a very beneficial effect', noting that:

> If the Government had attempted to survey the claims themselves, the claimants would have had no interest in the whole exterior boundaries being got, and would only have felt called upon to point out as much as was actually to be granted to them. The residue would, practically, have reverted to the natives, and must at some time or other have been purchased by the Government: and a large extent of territory must have remained, as it was before the passing of the Land Claims Acts, a terra incognita. But when the claimants were told they would receive an allowance in acreage to the extent of 15 per cent. on the area surveyed, it became their interest to exert all their influence with the native sellers to give up the whole boundaries originally sold. The result has been not only to produce a large surplus of land which, under the operation of the existing Acts, goes to the Crown; but to connect the claims together, and lay them down on a map.[110]

Such assertions of colonial (and cartographic) order, at the expense of Maori interests, can be seen in the pre-emption waiver claim of Whitaker and Du Moulin on Great Barrier Island, where an initial purchase believed to be in the range of 3500 acres, totalled 21,845 acres when surveyed. The vast majority of the claim (being in excess of the initial waiver of pre-emption and being more than the 500 acres prescribed by the Land Claims Settlement Act 1856) passed to the Crown. However, Bell granted Whitaker the absolute maximum area of land as compensation. This gave Whitaker a grant of 1000 acres. Whitaker had also funded the survey of his claim and the survey of the lands of two neighbouring Crown purchases. Bell accepted that the total of the entire survey could entitle Whitaker to land under the survey-compensation provisions. Out of a total of 28,608 acres surveyed, Whitaker received an additional 4291 acres to his 1000-acre grant. An additional 172 acres was added because of 'Divisional lines as per regulations'. Therefore, for £172 paid to Maori and

109. Francis Dillon Bell, 'Land Claims Commission, Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1862, D-10, pp 4–5
110. Ibid, p 5

£508 in survey and court costs, Whitaker received 5463 acres. The Crown, which had paid £520 to Maori for the two areas it purchased, acquired a surplus of 17,554 acres.[111]

The commissioner stated he had awarded as much as he felt empowered to do. He claimed he had 'sincerely endeavoured to satisfy the claimants while I guarded the public interest'.[112] No mention is made by Bell of safeguarding Maori interests. The focus was on settler grievances and Crown surplus. Bell calculated the total quantity of land awarded on settlement of pre-emption claims as being 25,300 acres, including land yet to be granted. He calculated the amount of scrip, money, or debentures issued to pre-emption claimants as £8137 9s 7d. This alone was more than the £6841 4s 2d he calculated Maori were paid for the purchase of lands under the pre-emption waiver certificates.[113]

Bell considered that:

> in the great majority of these cases the native title had been fairly extinguished, and that the Government took possession of and sold the land on the strength of the purchases made by the claimants, there can be no doubt . . .[114]

It appears that only where claims had lapsed, or were never referred to a commissioner, did the land revert to Maori. Bell suggested that there were many cases where bona fide purchases were made, but that he had been unable to 'recover' the land for the Crown.

Calculation of the 'surplus' land acquired by the Crown in pre-emption waiver purchases is complicated. Bell calculated a surplus of 204,243 acres, reverting to the Crown, in all cases (old land claim and pre-emption waiver claim) investigated by him. But he did not provide separate figures for the surplus in pre-emption waiver claims alone. His sum would have excluded land granted to Pakeha claimants under the survey-compensation provisions. It also excluded 'the land actually sold by the Government'. Most of the land taken under Grey's regime, close to Auckland, was probably sold; and much of the pensioner settlement at Onehunga was built on land from a pre-emption waiver purchase.

Three separate means of generally establishing the 'surplus' land acquired from the pre-emption waiver claims give very different returns. Bell stated that in total the 250 pre-emption claims covered 97,427 acres after being surveyed. He recorded that the total acreage of land awarded or granted from the pre-emption claims was 25,300. This suggests possibly 72,127 acres was the 'surplus' acquired by the Crown from pre-emption waiver claims. But it is not clear whether the figure of 25,300 acres granted to claimants refers to all awards made under Matson and Bell, or just those made by Bell. A second calculation can be made from the acreages recorded in Bell's return, published in 1863. Taking the area awarded in each case, totalling approximately

111. See report of Commissioner Bell in OLC 1/1130–31, NA Wellington; Paul Monin, 'The Islands Lying Between Slipper Island in the South-East, Great Barrier Island in the North and Tiritiri-Matangi in the North-West', report commissioned by the Waitangi Tribunal, December 1996 (Wai 406 ROD, doc C7) pp 47–48, 58, also outlines purchases on Great Barrier Island.

112. AJHR, 1862, D-10, p 6

113. Ibid, pp 6–7

114. Ibid, p 7

49,150 acres, from the area surveyed in those cases, 82,489 acres, a Crown surplus of 33,339 acres is suggested.[115] But these figures are taken from surveyed lands only, and a number of claims had not been surveyed; although Bell may have included his estimation of unsurveyed land in his calculations. Thirdly, the Myers commission, set up in 1946 to inquire into surplus lands, calculated that 16,427 acres of surplus land had been acquired from all pre-emption waiver claims (16,418 acres arising under the penny-an-acre proclamation alone). But this did not account for land granted by the Crown to claimants under the 'survey allowance' provisions of the Land Claims Settlement Act 1856.[116] Whitaker's claim (above) suggests that the amount of land granted under those provisions may be considerable. A comprehensive study of each pre-emption waiver claim would be required to assess these very different results.

Bell thought it 'nearly impossible' for most cases to comply with the regulations established for the purchases. For example, FitzRoy stated that 'a few hundred acres' was meant, and then issued certificates for purchases between 1000 and 3000 acres. Bell, however, believed that under no conditions could a pre-emption waiver claimant be granted more land than he had been given a certificate for. If the purchase was found to be greater than that allowed, the 'surplus' would revert to the Crown. Bell explained that if the pre-emption claimants were to be given all the land they had purchased (that is, including the surplus), Auckland province would have to refund a very large sum of money for the sale of lands under the waivers of pre-emption.[117]

Bell's investigation opened up a number of pre-emption claims that had been left behind by previous investigations. As noted above, Matson never gave an accurate total of the amount of land that would revert to the Crown after his investigation. A number of the claims disallowed by Matson would have reverted to Maori (temporarily) because they had not been surveyed. With the 1856 Act's encouragement to settlers whose claims had been disallowed to survey the land they had allegedly purchased, these areas were reclaimed. But the survey-compensation provisions of the Act were not matched by giving Maori any significant power to challenge the surveys being undertaken, the claimant's presentation of their claim, or the Crown's acquisition of the 'surplus'. Little evidence from Maori appears to have been presented to Bell.

The treatment of FitzRoy's 'reserve tenths' under Bell is unclear. Claimants do not appear to have been able to purchase these reserves under the Land Claims Settlement Act 1856. When the Crown granted land under this Act and retained a surplus, part of this surplus would have comprised the reserve tenths, just as it had when it recognized settlers' claims under Matson. But as part of the surplus, not distinctly identified and recognized as being land 'for public purposes, especially the future benefit of the aborigines', as FitzRoy intended in his proclamations (and promised Maori in his accompanying speech), the tenths disappeared.

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115. See 'Appendix to the Report of the Land Claims Commissioner', AJHR, 1863, D-14. These figures were calculated by Hutton (see introduction).
116. M Myers, 'Report of the Royal Commission to Inquire into and Report on Claims Preferred by Members of the Maori Race Touching Certain lands Known as Surplus Lands of the Crown', AJHR, 1948, G-8, pp 70–71
117. AJHR, 1862, D-10, p 19

Bell clearly saw the value of the Land Claims Settlement Act 1856 in satisfying settler claimants' demands and in acquiring further surplus for the Crown. He celebrated the fact that the land had been 'surveyed and secured' for public use. He was proud that: '[a] country which six years ago was almost unknown except to the few people residing there, has been mapped and made available for settlement'.[118]

He pondered, on the problem of the rights available to pre-emption waiver purchase claimants:

> I do not think that it ever can be said for certain what the rights of claimants under Governor FitzRoy's proclamations really were. Lord Stanley took one view of the obligation of the Crown, Lord Grey took another; the Supreme Court declared the proclamations were contrary to law; Governor FitzRoy said the waiver of pre-emption meant one thing, Governor Grey said it meant another.[119]

But he did not ponder on the rights of the pre-emption waiver vendors who, not only as subjects but as Treaty partners, were vitally affected by the Crown's failure to identify and properly act on its Treaty obligations, arising from the article 2 pre-emption clause.

118. Ibid, p 15
119. Ibid

CHAPTER 8

CONCLUSION

This report looks at one of the earliest practical expressions of British sovereignty in New Zealand – the Crown's right of pre-emption. Ian Wards highlighted the experimental waxing and waning of colonial minds on the matter when he described pre-emption as a 'matter of convenience, to be modified at will'.[1] But this description fails to acknowledge the fundamental importance of pre-emption in New Zealand. Others have emphasised the role of Crown pre-emption as a means (to various degrees) to achieve either the protection of Maori interests, or the exploitation of those interests by the Crown through its monopoly. Pre-emption provided the Crown with the potential to achieve both these things. But the Crown's exclusive right to extinguish native title by purchase also enabled it to establish its own system of land administration. Pre-emption allowed the Crown to gradually enhance its control of (or sovereignty over) the land – as the Native Land Court (a modification, rather than a full abandonment of pre-emption) continued to do from the mid-1860s.

The potential use of Crown pre-emption to protect aboriginal interests was identified in the seventeenth century in colonial North America. Crown pre-emption there was defined by colonial authorities as being introduced to protect indigenous peoples and their interests (as well as British interests generally) and to maintain the peace through control of British settlement in the new colonies. By the time the humanitarian movement reached its heights in the 1830s, its members agreed with the British Crown using its right of pre-emption to 'protect' native peoples, because it furthered the movement's aim to Christianize and introduce British civilization (which it believed was beneficial to those peoples), rather than leave native peoples to the mercy of private speculators.

These acknowledged purposes of pre-emption may have been more predominant in New Zealand if colonial officials had kept to their initial plans, to provide for the good government of existing British settlements, the promotion of trade, and the protection of Maori. But the Crown's decision to be actively involved in the colonization of New Zealand, using contemporary economic theories of 'organized immigration', undermined the protective possibilities of its pre-emptive right. Purchasing Maori land at a nominal sum, and on-selling it to settlers at a higher price, created a conflict of interest which Lord Normanby, the Secretary of State for the Colonies, failed adequately to acknowledge. He argued in August 1839, that paying a

1. I M Wards, *The Shadow of the Land, A Study of British Policy and Racial Conflict in New Zealand 1832–1852*, Wellington, Historical Publications Branch Department of Internal Affairs, 1968, p 28

merely nominal sum was justified by the Crown's unique ability to provide for community (including Maori) interests. He claimed that Maori would gradually participate in the benefits of the increased value of the land they retained, through the introduction of capital and settlers from Britain.

Normanby instructed Governor William Hobson to attain Maori agreement to both British sovereignty and the Crown's right of pre-emption. The positioning of the pre-emption clause in article 2 of the Treaty, behind the rangatiratanga guarantee, and the wording of the clause, indicated that pre-emption was a mere limit upon that essential guarantee. It was not directly linked to the article 1 cession of sovereignty. Had it been so, it may have alerted Maori to its value to the Crown, as a Crown 'right' and expression of that sovereignty. The translation of 'the exclusive right of pre-emption' as 'te hokonga' did not help to establish this link either. The term 'hokonga' does not clearly indicate that the Crown's right to purchase was an exclusive one. Emphasising this exclusivity may have drawn a similar reaction to that of Tuhawaiki and other Ngai Tahu chiefs, who would not sign the New South Wales Governor, George Gipps's, intended treaty in Sydney. Gipps's treaty had stipulated that the chiefs agreed not to sell their land to 'any person whatsoever except to Her said Majesty'.[2] The expression and translation of pre-emption in the Treaty of Waitangi may have been influenced by Gipps's treaty's lack of success.

Whether or not this was the case, chiefs being asked to sign the Treaty of Waitangi would have been less dependent on the Treaty text itself than on the explanations and discussion of the 'exclusive right of pre-emption' at the Treaty debates. Their understanding of this clause would also have been shaped by the explanations given of the Treaty's purpose as a whole. George Clarke (who became the Chief Protector of Aborigines) reflected years later, that the Treaty 'would never have been signed' had the British negotiators not assured Maori that the Queen's object was solely to protect Maori rights, suppress disorder, and increase commerce and prosperity.[3]

Records of the Treaty debates show that some specific discussions of the pre-emption clause occurred. The Crown negotiators stressed the protective purposes of pre-emption, as something which was purely for Maori benefit. Maori were told that the Crown would use pre-emption to prevent individual settlers from buying Maori land (and to hold invalid any purchases after Hobson's January 1840 proclamation). They were told that pre-emption would enable the Crown to prevent them from being cheated in land dealings and to check the 'importunities' of Europeans. They were told that pre-emption would enable the Crown to check any imprudent sales of their land 'without sufficiently benefiting themselves or obtaining a fair equivalent', to provide them with a 'juster' valuation, and to foster the establishment of industrious and responsible Pakeha in their communities.

Rumours that Maori who signed the Treaty would be no better than slaves, that their land would be taken from them, and that their dignity would be destroyed, led to assurances that the Queen 'did not want the land, but merely the sovereignty', so that she may be able to govern British subjects in New Zealand, and to punish those

2. E Sweetman, *The Unsigned New Zealand Treaty*, Melbourne, Arrow Printery, 1939, pp 61–65
3. Clark to Colonial Secretary, 30 March 1846, George Clarke, letters and journals, qMS-0468, ATL Wellington

of them who committed crimes. Maori were told that land would never forcibly be taken from them. The Queen was ready to purchase land Maori did not require for their own use, to dispose of again to responsible British subjects who would not 'injure' them. If she wanted land, she would purchase it. (Perhaps this was an early indication that the Queen may not have wanted to purchase land; although it was not clearly so. It followed a statement that land would 'never be forcibly taken'.)

But of equal relevance is what the Crown negotiators, including Hobson, did not explain. Records of the debates suggest that the Crown's negotiators did not explain the practical meaning (and effect) of pre-emption. They did not spell out that the Crown would have the exclusive right to purchase Maori land, or conversely that pre-emption would affect the chiefs' authority to sell to individuals. They did not explain the idea that pre-emption would provide the Government with cheap land to be sold at higher prices, which would in turn fund the Government and settlement of the colony. They did not explain that once the Crown bought their land, Maori customary law with regard to that land would no longer apply.

Instead, Maori 'agreement' to this aspect of the Treaty hinged on the statements which were made emphasising the protective functions of Crown pre-emption, and the implication with them, that the Crown lacked the economic self-interest of private purchasers. The Crown negotiators implied that the British administration of land transactions was to provide a protective cloak around land dealings, consistent with the Queen's object (see above).

The concept of British administration of land matters, to gain more controlled interaction with Pakeha, did not necessarily mean Maori submission to British authority. A Crown representative, halting or regulating unruly Pakeha actions, to protect Maori interests, would be useful to Maori whose tino rangatiratanga was kept intact. James Busby, and the missionaries before and during Busby's residency, had set precedents for such administering of British-Maori relations, without a lessening of Maori chiefly authority. There is some indication that Hobson's authority may have been seen by Maori as more substantial and significant than Busby's, but still restricted to controlling Pakeha. Maori were not told about, and did not realise, the effect Crown pre-emption would have on their chiefly authority. But pre-emption soon provided a more tangible illustration of the elusive British notion of sovereignty and the concepts which linked title to land, power, and authority.

Theoretically, pre-emption may have been limited to providing, as Normanby put it in 1839, 'at least some kind of system, with some degree of responsibility, subject to some conditions and recorded for general information'.[4] But one of the fundamental aspects of the Crown's right of pre-emption was its role in cementing and extending British sovereignty. This role was belied by its seemingly innocuous introduction through the control of land administration. The concept of a merely administrative Crown was a vastly different proposition from one which sought to gain ever-increasing control of its dominion – and to do so at a nominal sum to boot.

4. Normanby to Hobson, 14 August 1839, BPP, vol 3, p 86

The difference between these two concepts could only have been comprehended through an understanding of the British assumptions and theories underlying the Crown's right of pre-emption. These assumptions and theories were based on contemporary notions of the nature of sovereign title to land and the nature and extent of aboriginal property rights. British colonial officials believed that, by proclaiming British sovereignty, the Crown had acquired the radical title to, or ultimate dominion in, all New Zealand land. Native (or aboriginal) title was considered by them to be a lesser title – one of occupancy of the soil only. The Crown's right of pre-emption allowed the Crown the exclusive right to extinguish that native title by purchase, so that it may then 'perfect its own dominion over the soil, and dispose of it according to its own good pleasure'. Perfecting its dominion through pre-emptive purchasing allowed the Crown to transfer that land from indigenous land tenure and customary law, to British land title controlled by British laws of land administration. It smoothed the transition of control of all land by the sovereign.

In some instances in colonial North America, the exclusive right of pre-emption had been described as all that was 'really surrendered' when sovereignty was ceded. In those cases, pre-emption was even described as sovereignty itself because all that sovereignty consisted of was 'the exclusive right of acquiring and of controlling the acquisition by others' of native lands.[5] This was a substantial right to obtain, as the existence of such transfers suggests. The exclusive right of pre-emption opened the way, not only for increasing the foreign sovereign nation's interests in the land, but for establishing and extending its control (or sovereignty) over that land and its resources.

But in the early 1840s, and for many years subsequently, British officials discussing the purpose of pre-emption in New Zealand, and the possibility of its waiver, did not refer to the legal or administrative control over the land, or the establishment of its own laws of land administration, which was provided through its right of pre-emption. Their debate centred on its protective possibilities and its economic benefits in enabling the Crown to purchase land cheaply and sell it dearly. It is interesting, for example, that when FitzRoy proposed waiving, and waived pre-emption, there was no objection on the basis that it may upset the Crown's ability to gain full (legal-administrative) control over the land. There was merely a recognition that it was a 'precedent' in British colonial practice which ought to be followed. Yet this aspect of Crown pre-emption became its most prominent legacy.

But the theories underlying the above British (colonial officials') assumptions were debated by Gipps, in New South Wales, in the New Zealand Land Claims Bill 1840 (NSW). Gipps's arguments focused on two key principles, reflecting contemporary officials' beliefs. His first 'general principle' was that the 'uncivilized' inhabitants of any country had a mere qualified dominion over it (or a right of occupancy only). He argued that until they established a 'settled form of government', and 'subjugated' the ground to their own uses through cultivation, they could not grant land to

5. See Gipps's speech on the second reading of the Bill, 9 July 1840, in Gipps to Russell, 16 August 1840, BPP, vol 3, p 188

individuals outside their tribe because they had no individual property in it. Gipps's second 'general principle' was that if a 'civilized' power created a settlement in such a country, the right of pre-emption was exclusive to the Government of that power. Individuals could not 'enjoy' this right without the consent of this Government.[6]

Gipps's arguments, in which the Crown's assumptions and theories were outlined, set the groundwork for land policy in New Zealand. But the New South Wales debate was not available to Maori. The debate was not translated into Maori. Neither Gipps, nor Hobson, explained the notions elaborated on in the debates to Maori. Nor did they explain their proposal to apply these theories to Maori title and New Zealand land. They failed to openly discuss, with Maori representatives, the basis for Crown assumptions and actions. Settler interests were expressed in the debates, but no independent representation was made to ensure that Maori interests were protected. In line with his arguments, Gipps viewed the issue in the Bill (the establishment of a land claims commission to inquire into pre-Treaty private land transactions and grant title to settlers) to be between the Crown (which, having the ultimate dominion, was the proprietor of any land for which the native title was 'extinguished') and British settlers (who may have 'extinguished' it through their purchases).

Maori were privy only to the immediate practical effects of British sovereignty on the ground, and to what they were told, usually second-hand, by settlers. What they were told, and what they saw and experienced, of Crown actions regarding their land, was almost immediately alarming. Maori began to question whether they had been misled, and whether the British Crown's motives were truly for their benefit, as had been portrayed by its Treaty negotiators.

Self-interested settlers told Maori that the prohibition on their selling land except to the Queen, and other laws soon to come, would 'make them no better than slaves'. Others were told that Gipps was 'about taking their land from them'. In the limited instances where the Crown bought land, settlers also helped to highlight the incompatibility of Clarke's roles as Protector and purchaser, and the higher prices the colonial administration received for land which it had bought from Maori. Elsewhere, Maori were frustrated by the Crown's unwillingness or inability to purchase the land they offered for sale, and its unwillingness to allow others to do so. Many northern Maori began to feel stifled by the restrictions pre-emption imposed on them and conversely the power it gave the Crown. This was heightened by the fact that pre-emption deprived some Maori of the revenue they had been accustomed to receiving from land sales. The idea that the Crown had merely been given first right of refusal, only became apparent once the Crown had refused to purchase Maori land offered to it.

Clarke later stated that if provision had been made for buying all the Maori land which had been offered to the Crown (which he thought 'ought to have been done in order to preserve the consistency of their own regulations') then 'all might have proceeded quietly'.[7] This may have been so, if it had also quelled the knowledge that

6. Ibid, pp 185–186
7. Clarke to Colonial Secretary, 30 March 1846, George Clarke, letters and journals, qMS-0468, ATL Wellington

Maori authority had been undermined by pre-emption. But the apparent loss of their autonomy, or freedom, to sell to whomsoever they chose, led Kororareka Maori to describe the pre-emption clause as a 'badge of slavery' and to threaten to regain independence unless it was removed. They, and other northern Maori, were not convinced that in signing the Treaty they had surrendered their authority to dispose of their lands to whomsoever they pleased. Nopera Panakareao and other chiefs of Kaitaia declared that they would sell no more land, either to individuals or to the Government. The chiefs claimed that instead they would exercise all their ancient rights and authority of every description.

Concern had led some Maori to call for translations of Government regulations to be made available so that they could read and judge the Crown's Acts themselves. The introduction of *Te Karere o Nui Tireni* (the *New Zealand Messenger* or Maori *Gazette*), from January 1842, was designed to inform Maori of Crown policies and Acts directly. Although it was eagerly received by Maori, the value of its contents was dubious, as was the adequacy of its translations. Its limited print run and its irregular and unsystematic distribution also did not bode well for Crown communication with Maori. The continued sense of the basic injustice surrounding issues such as the Crown's veto on the chiefs' authority to conduct private land transactions through pre-emption, and its acquisition of 'surplus' land, which could only be explained through an understanding of the underlying British assumptions about sovereign title to land, remained. The Crown did not explain to Maori the theory behind its actions on this perplexing, yet vitally important, topic.

In 1843, Acting Governor Shortland noted that the Government's position was weakened, and its dignity lowered, because Maori saw the Crown to be like any other buyer of land. He proposed waiving pre-emption himself in October of that year, in part because he, like FitzRoy to follow him, was influenced by a perception, shared with Clarke, that Maori rebellion against Crown authority would occur unless immediate measures were taken to allow private land sales and demonstrate the Crown's disinterest. Yet, without Colonial Office approval to do otherwise, he held to the letter of the Treaty's pre-emption clause, just as his predecessor, Hobson, had done. He did so despite growing settler and Maori complaints, and a virtually paralysed local economy.

The shift in control, from the chiefs to the Crown, inherent in the Crown's right of pre-emption, was perhaps the key aspect of pre-emption against which Maori of the north reacted. This raises a number of important questions for the Tribunal. The Motonui–Waitara Tribunal has stressed that rangatiratanga denotes mana, not only to possess what one owns, but to manage and control it in accordance with the preference of the owner.[8] More recently the Muriwhenua Land Tribunal, recognising that the Treaty debates are 'more significant for what was not said than for what was', cited, as an example, that it was not said that for the British, sovereignty meant that the Queen's authority was absolute. That tribunal hastened to say that the British negotiators intended no deception, but merely assumed that Britain would rule on all

8. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, 2nd ed, Wellington, Government Printing Office, 1989, p 51

matters. It also identified three Treaty promises which it believed had influenced Maori at that time, and should be kept in mind: (a) that Maori law or custom, and Maori authority, or rangatiratanga, would be respected; (b) that the pre-Treaty transactions would be inquired into, and lands unjustly held (that is 'surplus' land) would be returned; and (c) that all future dealings would be with the Governor, who would provide for and protect Maori interests.[9]

Just what degree of control the pre-emption clause allowed the Crown to have is at issue. Was it a solely administrative function, or a 'check' to protect Maori? Or would it extend to enhancing the sovereign's control, including implicit acceptance of the Crown officials' assumptions about sovereign title to land? One person who, probably unknowingly, tested the acceptability (to British officials, at least) of what may have evolved into merely an administrative model, was Governor Robert FitzRoy.

FitzRoy had already been thinking about waiving pre-emption before he left Britain. In May 1843, he sought advice from Lord Stanley, then the Secretary of State for the Colonies, about the possibility of a waiver. FitzRoy's question resulted in a series of opinions being given in Britain about the advisability of such a move, and on how such a venture may be regulated. As noted above, the key concerns discussed at this time were the protective and economic purposes pre-emption may fulfil.

Stanley informed FitzRoy that he was to make any recommendation regarding pre-emption he felt it expedient to make, after inquiry on the spot. When FitzRoy reached New Zealand, he found groups of Maori and Pakeha Aucklanders pushing for pre-emption to be waived. Maori claimed that they understood that the Treaty had merely given the Crown the first offer. They argued that article 2 gave them the right to sell to whomsoever they chose, as did article 3.[10] Pakeha Aucklanders too expressed their distaste at the Crown's right of pre-emption because it restricted 'free trade'.

FitzRoy believed that the protective ideals of the Treaty's pre-emption clause were paramount, rather than its specific terms. He also wanted to put the Crown more clearly in the role of an intermediary, or umpire, rather than an interested party. He believed that the Crown should distance itself from land purchasing (giving up the Crown's monopoly). And he no doubt agreed with Clarke's view that prosperity in the colonial community would be beneficial to Maori. FitzRoy insisted, in his responses to the Auckland groups, that the Treaty's pre-emption clause had originated solely for Maori benefit. If it was not to Maori advantage, he thought that it should be discontinued.

Stanley, in contrast, was almost solely concerned with the economic function the Crown's right of pre-emption was to provide in assisting the Government to establish British settlement in the colony. He insisted that, if FitzRoy waived pre-emption,

9. Waitangi Tribunal, *The Muriwhenua Land Report 1997*, Wellington, GP Publications, 1997, pp 115, 118
10. Interestingly, FitzRoy's approach prior to waiving pre-emption, of consulting Maori as to their preferences, is consistent with the Tribunal's recognition in Ngati Rangiteaorere's claim that kawanatanga, or sovereignty, clearly included the right to legislate, but that this should not be exercised 'in matters relating to Maori and their lands and other resources, without consultation' (Waitangi Tribunal, *The Ngati Rangiteaorere Claim Report 1990*, Wellington, Brooker and Friend Ltd, 1990, p 31). However, the adequacy of this consultation must also be questioned.

purchasers should not pay less than they would otherwise have paid to the Government, and that they should also pay a substantial portion of their overall payment as a contribution to the emigration fund. He later stated that the 'original intention' of the pre-emption clause was solely its economic advantage to the British Crown – to enable the Crown, as sole purchaser, to obtain land on easy terms and apply a portion of the proceeds, when resold, to emigration and local objects (especially the purchase of more land, which would again be resold at a profit). Stanley's interpretation of the intention of pre-emption, unlike FitzRoy's, was at odds with the explanation given to Maori at the Treaty debates. The time-delayed tug of war which followed between FitzRoy's and Stanley's philosophies reflected these opposing views.

But these comments applied only to individual private purchasers. The New Zealand Company had successfully established its own special agreements with the Crown concerning its purchases. In September 1841, in Port Nicholson (Wellington), Hobson had allowed the Company to 'perfect' its 'defective' pre-Treaty transactions by making additional payments to Maori. He did so despite local Maori requests and expectations that the Crown would protect them from the encroachments of the New Zealand Company on their lands. The marked difference in response, by Wellington Maori, from that of Northland and Auckland Maori (with whom the Company had not transacted), indicates that Maori objection to pre-emption, in addition to having various potential bases, was not universal. FitzRoy then waived pre-emption in the New Zealand Company's favour, for defined acreages, in both the South Island and the North Island, when in Wellington in 1844.

Although these Company waivers have not been studied in depth in this report, FitzRoy appears to have made them without the same protection of Maori interests specifically envisaged in the conditions of his general proclamations to follow. He relied, to some degree, on the responsibility of the Company's representatives, but he also charged officials in his administration with superintending the transactions in the interests of Maori. The Crown's actions in dealing with the Company's transactions with Maori, and the relationship which subsequently developed between the Crown and the Company around these and later transactions (such as Grey's pre-emption waiver in favour of the New Zealand Company in February 1846), are the subject of a separate report by Duncan Moore.[11] This should be read in conjunction with my report. These Company dealings were completely separate from FitzRoy's and Stanley's consideration of the general system, allowing waivers for private individuals, to follow.

FitzRoy returned to Auckland in March 1844 where, having already indicated he would implement provisions to waive pre-emption, he drafted his first general pre-emption waiver proclamation.[12] Dated 26 March 1844, it was proclaimed before receiving Stanley's reserved and temporary sanction. The March proclamation kept the ideals of protecting Maori interests to the fore. It specified that waivers could only

11. See D Moore, B Rigby, and M Russell, *Old Land Claims*, Waitangi Tribunal Rangahaua Whanui Series National Theme A, July 1997
12. Proclamation, 26 March 1844, in encl P in FitzRoy to Stanley, 15 April 1844, BPP, vol 4, p 202

be made over 'certain limited portions of land', defined in acres and physically described. (Later, in December 1844, FitzRoy stated that 'certain limited portions of land' meant 'only a few hundred acres'.) And it stated that FitzRoy would either consent or refuse a waiver application, as he judged best 'for the public welfare, rather than for the private interest of the applicant'. He would fully consider the 'nature of the locality; the state of the neighbouring and resident natives; their abundance or deficiency of land; their disposition towards Europeans; and towards Her Majesty's Government'. He would also consult the Protector of Aborigines before consenting 'in any case'.

The waiver proclamation specified that certain lands were to be excluded from purchase or 'reserved' specifically for Maori, or for Maori benefit. No Crown title would be given for any pa or urupa, or land about them, 'however desirous the owners may now be to part with them'. As a 'general rule', pre-emption would not be waived over land required by Maori for their present use 'although they themselves may now be desirous that it should be alienated'. No waivers were to be given over land lying, in Auckland, between 'Tamaki road and the sea to the northward'. And of all land purchased under a waiver, 'one-tenth part, of fair average value, as to position and quality' was to be conveyed by the purchaser to the Queen 'for public purposes, especially the future benefit of the aborigines'.

The proclamation included other measures designed to protect Maori interests. At least 12 months were to pass from the time the applicant received the Governor's consent (by paying the fees and being issued with a pre-emption waiver certificate), to the issue of a Crown grant. FitzRoy intended this provision to encourage long term relationships between purchasers and Maori. Surveys of the land purchased under a waiver certificate were to be deposited at the Surveyor-General's office prior to a Crown grant being prepared. Deeds of transfer were also to be lodged there as soon as practicable:

> in order that the necessary inquiries may be made, and notice given in the Maori, as well as in the English *Gazette* that a Crown title will be issued, unless sufficient cause should be shown for its being withheld for a time, or altogether refused . . .

FitzRoy elaborated on his reserves policies in an address he made to Maori on Government House lawns that day. He stressed again that pre-emption had been for Maori protection and benefit, indicating that his permission was required so that he could 'inquire into the nature of the case' and ascertain from the protectors whether they could 'really spare it, without injury to yourselves now, or being likely to cause difficulties hereafter'. FitzRoy told the chiefs that he had made distinct conditions that one-tenth of all land purchased was to be 'set apart for, and chiefly applied to' their future use 'or for the special benefit of yourselves, your children, and your children's children'. He stated that the produce of the tenths would be 'applied by Government to building schools and hospitals, to paying persons to attend there' and to teach Maori 'not only religious and moral lessons, but also the use of different tools, and how to make many things' for their own use. He stated that the tenths would be managed by a board or committee of Crown officials.

FitzRoy's pre-emption waiver regulations appeared in the April 1844 issue of *Te Karere*. But despite this publicity, translations of extracts from the issue indicate that even Maori who did receive it, may not have been enlightened by it. Maori who did not have the benefit of FitzRoy's personal explanations would probably have remained confused about the Government's policy. Those were, at the very least, Maori outside Auckland.

Was a departure from pre-emption in itself a breach of the Treaty? As we have seen above, the British Treaty negotiators do not appear to have explained the meaning of pre-emption as the Crown's sole right to purchase Maori land (or extinguish Maori title) in 1840. Instead, pre-emption was explained, at these early hui, as a means to protect Maori and their land from speculators. The exercise of the Crown's right of pre-emption was not argued to be an end in itself (for solely administrative purposes), but a means to enable the Crown to achieve the general principles set down in Normanby's instructions, in light of the prevailing circumstances. It was the protective principles in Normanby's instructions, not the means of achieving them, that were portrayed to Maori, and that needed to be upheld.

Normanby's instructions had stipulated that Crown purchases of Maori land were to be 'fair and equal'; they were to be conducted with 'sincerity, justice, and good faith'; they were not to include any land essential to Maori, or land which would be 'highly conducive, to their comfort, safety or subsistence'; nor were they to include lands the alienation of which would cause Maori any 'distress or serious inconvenience'. In all dealings, the Crown would provide for and protect Maori interests. Normanby had stated that a Protector was to be appointed to ensure the observance of these specifications. This person's express duty was 'to watch over the interests of the aborigines as their protector'.

These principles were the guidelines under which the Crown was to exercise its pre-emptive right of purchase. There is no reason to assume that they should not equally be applied to any purchases the Crown allowed under a waiver of that right. Crown pre-emption was not entirely abandoned, it was only modified; the settlers' 'privilege' of purchase under a pre-emption waiver was a limited one. It was one which involved only 'certain limited portions' of land. It was one which was intended to be vetted by the Governor and Protector in each instance. And it was one which was considered (in Britain at least) to be a temporary measure; with a reversion back to Crown pre-emption when circumstances allowed.

These points were not lost on the British colonial land and emigration commissioners (whose job it was to manage the sale of land in British colonies and promote a well-regulated emigration to them). They were concerned about FitzRoy's May 1843 proposal to waive pre-emption precisely because they believed that, by allowing pre-emption to be waived in favour of private individuals, the Government would become 'mixed-up' with, and therefore responsible for, the purchases those individuals undertook. The commissioners had commented that, contrary to a waiver of pre-emption freeing the Crown from responsibility, any deviation from pre-emption 'must greatly enhance the responsibility of Govt for any unforeseen ill-

consequences to the Natives'.[13] Their opinion would seem to imply that the principles Normanby outlined as limiting Crown purchases of Maori land, would be the very least for the Crown to uphold with respect to private purchases of that land.

Stanley too commented as if to warn of this effect. In approving the March proclamation, he referred for the first time in this context to the Treaty of Waitangi, noting that FitzRoy had taken:

> the serious responsibility of waiving, on the part of the Crown, an important stipulation of the original treaty, and of permitting the direct sale, by natives, of portions of their land.[14]

But Stanley's primary concern was whether the new policy would still yield sufficient funds for Government purposes, and for emigration, rather than the Crown's responsibilities toward Maori.

At first glance, FitzRoy's requirements under the March proclamation appear generally to relate well to Normanby's guidelines. But despite FitzRoy's seemingly protective proclamation, he did not put adequate procedures in place to give effect to the protective ideals it upheld (or the commitments he subsequently made to Maori on Government House lawns). FitzRoy's provisions did not provide specific, independent, procedures for determining these and other important factors. Taking the Tribunal's measures of the fiduciary duties the Crown entailed in exercising its pre-emptive right, and applying them to the waivers, makes this point most clearly. The same argument which allows Normanby's guidelines for Crown purchases to be applied to the Crown's system for waiver purchases, can be used to apply the Tribunal's interpretations of those guidelines to the waiver provisions.

The Orakei Tribunal found that the Crown's exercise of its pre-emptive right of purchase was limited by two principles. The first, stated in the *Orakei Report*, was that the Crown had a duty 'to ensure that the Maori people in fact wished to sell'.[15] The *Ngai Tahu Report* took this point further. In ensuring Maori wished to sell, that Tribunal held, the legitimate owners of the land had to be ascertained, the boundaries of the area to be sold had to be established (so that the Maori owners 'knew with reasonable certainty' the area they were being asked to sell), and the land which the Maori owners wished to retain 'by express exclusion from a proposed sale or by way of reserves out of land agreed to be sold' needed to be 'sufficiently identified'.[16]

FitzRoy did not specifically require a process for identifying the legitimate owners of the land being sold, in either Clarke's, or his own role in assessing the pre-emption waivers. He did not require a survey of purchased land to be provided until after his assessment and consent to a waiver had been given. And he did not require surveys to be published in the English and the Maori *Gazettes*, unlike the deed or deeds, which

13. Unsigned report of colonial land and emigration commissioners, attached to FitzRoy to Stanley, 16 May 1843, marked 'recd from Mr Elliott June 23(?)/43 G W H[ope]', CO 209/24, pp 137–138B, NA Wellington
14. Stanley to FitzRoy, 30 November 1844, BPP, vol 4, p 209
15. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 1st ed, Wellington, Department of Justice: Waitangi Tribunal, 1987, pp 137–147
16. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, pp 240–241

were to be provided as soon as practicable for inquiry and publishing by *Gazette* notice (but this does not appear to have occurred in practice).[17] The reserves provisions suggested by the Tribunal (above) may require less weight here, given the smaller purchases made under FitzRoy's waiver scheme and the 'reserve' provisions built into it (if effective).

The second principle which the Tribunal (in its *Orakei Report)* found limited the Crown in exercising its pre-emptive right, was that it was responsible for ensuring that Maori 'were left with sufficient land for their maintenance and support, or livelihood' (or, as in its *Waiheke Report*, each tribe should be left with 'a sufficient endowment for its foreseen needs').[18] The Ngai Tahu Tribunal further addressed what may constitute a sufficient endowment for the tribe's foreseeable needs. It suggested that the Crown would need to take into account a 'wide range of demographic factors' such as the size of the tribal population, the land they were occupying (or over which various members enjoyed rights), the principal sources of their food supplies and location of such supplies, and the extent to which they depended upon fishing of all kinds, and on seasonal hunting and food gathering.[19]

FitzRoy's exclusion from purchase or granting of pa, urupa, and the land about them, land required by Maori for their present use, and land between Tamaki Road and the sea, and his provision for tenths to be reserved in the Crown and managed to provide schools and hospitals, were obviously intended to ensure that Maori were left with some land (as well as education and health services) for their foreseeable needs. FitzRoy was clearly concerned with the position Maori would occupy in the new community, including the new economy. But his scheme did not incorporate procedures to identify pa, urupa, and the land about them, or land required by Maori for their present use. Nor did it create defined (that is, surveyed) reserves of these areas or the area between Tamaki Road and the sea. FitzRoy's proclamation also merely bound the purchaser to make over a tenth of the land purchased to the Queen. It did not bind the Crown to use the proceeds of that tenth for the benefit of the Maori vendors. His proclamation specified that the tenths were to be 'for public purposes', albeit 'especially the future benefit of the aborigines'. Despite FitzRoy's clear intention that the tenths be used for the purposes he stipulated in his address on Government House lawns, his proclamation did not, in the event, ensure that they were used to benefit Maori.

FitzRoy's attempt to provide the Government with funds through the 10-shillings-an-acre fee – something which his administration sorely lacked, and which no doubt influenced his ability to ensure that his protective procedures, and adequate documentation and record, were carried out – was his saving grace with Stanley, who suggested that if the scheme worked the fee may be increased. But FitzRoy did not appear to establish an adequate means of controlling land purchase and its administration. This was a problem which Governor Grey inherited.

17. He also did not require plans to be inscribed on Crown grants.
18. *Orakei Report*, pp 137–147; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Waiheke Island Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1987, p 38
19. *Ngai Tahu Report*, p 239

The March proclamation resulted in 57 pre-emption waiver certificates being granted for around 2337 acres. The areas sought ranged from 9½ perches to 200 acres. Most certificates were for waivers over areas of 20 acres or less. Initially, at least, Maori received around £1 per acre. This was the figure FitzRoy had originally proposed Maori should receive. But on average, although the prices ranged widely, 16 shillings per acre was paid.

Almost all of these certificates were issued for Auckland land (only five were for areas outside Auckland). By far the greatest number of these certificates were for the land around central Auckland, in the vicinity of Remuera and One Tree Hill, where a 'tripartite agreement' between 'Ngati Maho' (or Ngati Tamaoho or Ngati Te Ata), Ngati Whatua, and Ngati Mahuta (Waikato) determined which chiefs sold the land. This boundary division had been initiated by FitzRoy, following some dissension amongst these tribes. FitzRoy (with Clarke's obvious concurrence or instigation) had asked Edward Meurant, a Government interpreter, to oversee the division.

Each application for a pre-emption waiver was passed to Clarke for approval prior to FitzRoy's consent being given. Clarke's assessment of waiver applications in FitzRoy's system, although pivotal, was cursory. In most instances of the March proclamation applications, Clarke noted that he 'knew of no objection to', or 'knew of nothing to prevent', the purchase. His comment was usually given either the day or at most a few days after the application's receipt. This timing, the wording Clarke used, and the lack of separate reports of Clarke's enquiries, suggests that he did not necessarily investigate the claims, or establish customary rightholding, but relied instead on his own personal knowledge (including contemporary tribal boundary agreements, such as that referred to above). Yet FitzRoy relied heavily on Clarke's recommendations, and his consent in such instances quickly followed, suggesting that he too did not investigate further.

There were few exceptions to Clarke's brief approvals. The exceptions were not outright refusals to approve a waiver as such. Of these cases, under the March proclamation, Clarke required applicants to obtain a further consent (or consents) from certain chiefs before approval would be given. In other cases, clarifications of existing settler rights were required. Clarke's purpose in requiring further consents appears to have been to ensure that the key chiefs he knew of with rights to a particular area of land were consulted. In his rare comments, he referred applicants specifically to particular individual chiefs. He appears to have accepted that legitimate sales could be made by these individual chiefs, without any need for wider consultation with the iwi as a whole. He also appears to have initiated further contemporary tribal 'agreements' as to ownership, such as the three-way division of central Auckland land, assisted by Meurant. In April 1844, he sent Protector Donald McLean to assist in a similar type of division of land, at Waiheke. These boundary divisions appear to have been made between those on the ground at the time, and initiated informally by Protectorate employees. No wider notice, or actual and thorough investigation of customary rightholding, appears to have occurred.

The considerations FitzRoy was to have taken into account, according to the proclamation and FitzRoy's explanation of it to the chiefs on Government House

lawns – particularly any assessment of the 'state of the neighbouring and resident natives', the 'abundance or deficiency' of land, or any assessment of land that Maori could 'really spare' – could not have been properly assessed within this approach.

Clarke's approach to 'reserves' under the pre-emption waiver scheme appears to have been similarly broad-brush. He sought to exempt key blocks of land from purchase prior to his consideration of individual waiver applications. The reservation from purchase, in FitzRoy's March proclamation, of an area of land between Tamaki Road (Remuera Road) and 'the sea to the northward', was evidently made on Clarke's suggestion, prior to the Executive Council meeting discussing the proclamation and, of course, prior to his consideration of each individual waiver application. No doubt he did so in expectation that the majority of applications under the March proclamation would be for Auckland land.

Despite FitzRoy's provisions reserving from purchase or granting any pa, urupa, and the land about them, and any land required by Maori for their present use, there is no indication that Clarke inquired whether the land sought contained pa, urupa, or areas used by Maori, in his assessments of the individual March pre-emption waiver applications. Clarke seems to have left the question of 'reserved' areas to a separate and prior decision (above), independent from his day-to-day role in approving pre-emption waiver certificates (much as the divisions of land ownership were). The proclamation provisions regarding pa, urupa, and land required by Maori for their present use, may have been intended largely as a warning to Europeans that these areas were exempt from the scheme. Clarke may also have believed that the area between Tamaki Road and the sea, for which waivers would not be given, already included these places.

Clarke's two key areas of focus appear to have been the identification of key ownership and the setting aside of areas to be reserved from purchase. These two considerations may have been a reflection of the duties he inherited after December 1842 (in which he was to report on whether Maori were disposed to sell any land recommended by the Surveyor General for purchase, and what reserves he considered it necessary to be made for their benefit). Clarke appears to have applied these two key areas of focus from his role in Crown purchases to his new role in assessing applications for private purchases.

There was no inquiry by Clarke into the price settlers intended to pay Maori vendors for their lands. He was not required by FitzRoy's proclamation to assess this. In fact, FitzRoy made it clear in his speech on Government House lawns that this would be left up to Maori, warning that they should sell for the best price, not simply the first offer. FitzRoy's subsequent proposed form for waiver applicants also omitted any reference to stating what price would be paid. This omission did away with Normanby's (Crown purchase) requirement that the Crown ensure purchases be 'fair and equal'. Yet the British colonial land and emigration commissioners appear to have believed that this requirement would continue should pre-emption be waived. It was also contrary to the Treaty negotiators' promises of a 'fair equivalent' or 'juster valuation' in land purchasing.

As the Muriwhenua Land Tribunal has noted, pre-emption was 'intended not only to augment State revenues but to protect Maori by enabling State supervision of land sales'. But the trouble with this was: 'who would supervise the State?'.[20] The necessity of the Protector's independence in carrying out his role was recognized by Clarke when he pointed out the incompatibility of his initial two roles of Crown land purchase agent and Protector of Aborigines. Yet, in the pre-emption waiver experiment, although without the same clear conflict of interest (but still assisting the process of colonisation), Clarke's role was again confused. FitzRoy's complete reliance on Clarke, meant that the Protector was not an independent assessor of Government actions, but an integral part of that Government action. The Tribunal's query of 'who would supervise the State?', although made in light of the clear conflict of interest between augmenting State revenues and protecting Maori interests, may still be at issue.

The potential for role confusion, exacerbated by the limited number of even near-adequately experienced or skilled personnel within the colonial administration, extended to others employed by the Protectorate. Edward Meurant and Charles Davis, both Government interpreters, also acted as agents and interpreters for both Maori and Pakeha wishing to negotiate pre-emption waiver purchases. They assisted in the sales, drew up deeds, made deposits on behalf of the parties, and witnessed payments. For Meurant, this involvement began before the March proclamation. Although Grey later attempted to highlight the incongruity of these interpreters being employed simultaneously 'to watch over and protect the interests of the natives' while 'acting privately as the paid agents of Europeans', his complaint appears to be questionable. Meurant and Davis were Government interpreters employed by the Protectorate, not protectors. Protector Thomas Forsaith claimed that he and other protectors were not involved in the waiver purchases in the above capacities (although he does appear on some deeds as a witness). But Meurant and Davis's dual source of payment may have been an issue, as may their subsequent involvement in confirming that Maori had understood Meurant and Davis's own translations in Major Matson's 1846 inquiry into the pre-emption waiver purchases.

Although Clarke claimed that the March proclamation had satisfied Maori, it did not satisfy settlers. Advocates of 'free trade' complained about the fees and encouraged direct purchases regardless of the proclamation, arguing (amongst other things) that the Government could not control mass disobedience and that Britain would rather abandon New Zealand than resort to force. FitzRoy repeatedly warned settlers, in the proclamations and notices to follow, that their claims to land would be invalid unless confirmed by a Crown grant. But his lack of control of these settlers (and Maori), and the consequent confusion of land ownership, continued to plague him.

Clarke had foreseen that settlers may have acquired and held large tracts of land on native title only, without complying with the proclamation. He had also predicted that Maori outside Auckland would soon be dissatisfied, as the fee prevented such

20. *Muriwhenua Land Report*, pp 117–118

purchases being worth the settlers' outlay. Clarke claimed to look upon the proclamation with 'considerable anxiety', and saw it 'merely in the light of an expedient'. Perhaps he too thought of it as a temporary measure designed to appease existing and threatening problems. His hasty assessments are consistent with his view that unless he and FitzRoy acted quickly, rebellion may soon result. They are also likely to have been influenced by the lack of funds available to FitzRoy's administration. Adequate funding may have allowed a fuller investigation to be carried out. Despite his cursory assessments, Clarke noted that the waiver did not adequately deal with land disputed between Maori groups, which he thought would 'in all probability' be that offered first. He did not share FitzRoy's expectation that such disputes would be fully solved by the regulations preventing very extensive purchases.

While Hone Heke's questioning of British sovereignty (absolute authority) transcended the pre-emption issue, it helped to highlight the discontent the Crown's right of pre-emption (one aspect of that sovereignty) had evoked in Northland Maori. FitzRoy attempted to appease northern chiefs on this particular count, by telling them that the flag was the signal of freedom, liberty, and safety, and (again) that the pre-emption provision was to protect Maori from 'those who would buy more from you than you could spare'. Arguments likening pre-emption to slavery, and identifying the Government as the Maori oppressor, resurfaced in the Hokianga, where Maori were extremely poor, in debt, and where Europeans refused to trade with them because they claimed that the Government was taking too much through customs and other fees.

FitzRoy's attempts to tighten compliance with the conditions of the March proclamation, which were intended to enable Maori to benefit from competition and restrict the extent of sales (to combat purchasers purchasing prior to receiving a certificate or citing incorrect acreages, continued. By early October 1844, Clarke again expressed his apprehension about the peace of the country. He stated that Maori were complaining about the fee and calling for its removal, and he claimed that its removal was absolutely necessary to prevent insurrection.

The result was FitzRoy's 10 October 1844 pre-emption waiver proclamation. As reasons for his actions, FitzRoy pointed to the disregard of his regulations, and the misrepresentation of the objects and intentions of the Government in requiring the fee and in obtaining the Governor's consent (it being asserted by Maori as a mark of oppression, even slavery). He also claimed that Maori were now aware of the full value of land, and able to look after their own interests, if indifferent to those of their descendants.

FitzRoy's October proclamation was almost identical to his March one.[21] The most obvious difference was of dubious value to Maori. No fees would be demanded on FitzRoy's consent being given to waive the right of pre-emption, and the greatly reduced fee of one penny an acre was only payable on the issuing of a Crown grant. But it included a series of measures which were intended to fine-tune the pre-emption

21. Proclamation, 10 October 1844, in encl 1 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 402

waiver experiment and make it more effective in protecting Maori interests than the March proclamation had been.

FitzRoy extended the provision for 'reserves'. He stipulated that the Crown's right of pre-emption would not be waived over 'any land reserved for the use of the aboriginal natives', not just the area between Tamaki Road and the sea to the northward (it appears that he meant land 'reserved from purchase' here too). And as a general rule, no waiver would be given over land required by Maori for their 'own' use, rather than their 'present' use, as it had appeared in the March proclamation. He also required the lapse of 12 months before issuing a Crown grant to commence 'after the receipt at the Colonial Secretary's office of certified copies of the surveys and deeds of sale', rather than from the time of paying the fees on receiving a pre-emption waiver certificate. This important alteration meant that settlers, wanting to secure their Crown grant, could not leave the survey of their land until immediately prior to the issuing of the Crown grant. Nor could they get away with supplying deeds merely 'as soon as practicable'. This provision would have enabled FitzRoy to gazette purchases a year in advance of issuing a Crown grant, allowing objectors a reasonable chance of appearing. FitzRoy also omitted the statement that the Governor was to give or refuse his consent to waive pre-emption 'to a certain person, or his assignee'. This presumably clarified FitzRoy's intention not to provide a waiver to a specific person, but to open the land concerned up to competition.

Under FitzRoy's October proclamation, much more land was bought overall, larger areas were purchased, a wider area encompassed, and Maori received less per acre. One hundred and ninety-two certificates were issued waiving the Crown's right of pre-emption over around 99,528 acres. The areas under waiver certificates ranged from 13 perches to 3000 acres. Almost three-quarters of these were for waivers for areas of between 100 and 1000 acres (and most of the rest were for less than 100 acres). Many purchasers overcame FitzRoy's December 1844 declaration that 'limited portions of land' meant 'not more than a few hundred acres' simply by submitting a series of applications for adjacent areas of land, or by submitting applications for adjacent areas for each individual family member, pushing up their claim to waivers for areas of around 2500 to 4500 acres.

Over three-quarters of the October waiver certificates were for land in the wider Auckland area, including the islands around it. Many of these 'Auckland' certificates were for blocks around the Waitemata at Riverhead, Rangitopuni, Lucas Creek, Paremoremo, and Te Whau. Nearly as many were for land around the Manukau at 'Manukau', Three Kings, Onehunga, Papakura, Waiuku, and Titirangi. Some certificates were for Remuera and Epsom land. The other quarter of the October waiver certificates were issued for land outside the Auckland area, in the Bay of Islands, Whangaroa, Ngunguru (near Whangarei) including the Poor Knights and Hen and Chicken Islands, Mahurangi, Hokianga, Kaipara, Coromandel (or Thames), the Bay of Plenty, and Waikato.

Almost four-fifths of the purchases made under the October proclamation involved payment of less than 10 shillings an acre. On average only two shillings an

acre was paid for the land. This was far lower than the prices Maori received per acre under the March proclamation.

Settlers still did not comply with the proclamation provisions. Many purchased land before gaining FitzRoy's consent. Some purchases had even been made before the March proclamation. FitzRoy responded by further clarifying the waiver proclamations' specifications as to the extent of acreage acceptable to be applied for, the order of procedure, his intention to publish details in the *Gazette*, and the waiver's role in opening up the land applied for to public competition in his 'explanatory cautions' *Gazette* notice of December 1844. All these provisions potentially protected Maori interests. Nevertheless, FitzRoy appears not to have sanctioned those settlers who failed to comply.

Clarke's assessment of pre-emption waiver applications under the October proclamation proceeded, in many ways, much as it had done with the March proclamation. He continued to interpret his key role as being to assure FitzRoy that he knew of no objection to the sale proceeding if the land in question was bought from the proposed vendor or vendors. He also continued to require prospective purchasers to consult particular chiefs he knew had rights to the area of land concerned.

But as the applications came in for pre-emption waivers over land beyond central Auckland, where most purchases under the March proclamation were made, there were some modifications to Clarke's approach. These modifications further reduced any protection he may have provided for Maori. Clarke appears to have been satisfied not to ascertain in every instance whether certain individual tribal members, listed as intended vendors, had the right to sell. He even approved a waiver when he knew neither where the land lay exactly, nor the individual chiefs stated as vendors, nor even the tribe from whom the applicant proposed to purchase the land. Clarke believed there 'need be no further caution' as long as the applicant was 'satisfied as to having purchased from the right owners'. He was also content to leave it up to intended purchasers to ascertain whether the land they sought was disputed between Maori groups. In doing so, perhaps Clarke was relying on the proclamation provision that purchasing was to be at the buyer's risk until allowed and confirmed by a Crown grant. Once the deed was lodged at the Colonial Secretary's office, 'the necessary inquiries' were to be made, and notice given in the English and Maori *Gazettes* that a Crown title would be issued 'unless sufficient cause should be shown for its being withheld for a time, or altogether refused'. (But this too appears not to have occurred.)

In other instances, where Clarke thought Maori groups may dispute ownership of the land sought for purchase, he required the applicant to consult each group, appearing to recognize multiple Maori rights in the land under transaction. But Clarke sometimes altered this requirement after speaking with an individual chief and being satisfied following that discussion to allow the applicant to purchase from that chief alone. He does not appear to have conducted any wider investigation into customary rightholding involving the other tribes with rights in the area. In at least one instance, Clarke failed to object to a waiver certificate being approved, despite knowing of a dispute over the sale of the land in question, by such another tribe.

Clarke continued to prefer a separate and former inquiry into establishing areas to be reserved from purchase. He instructed at least one of his District Protectors to ask Maori (of that district) to identify areas they wanted to reserve from sale. The Protector was then to assess whether these areas would be sufficient for the 'present and prospective wants' of those Maori. These 'reserves' were intended to be identified prior to any pre-emption waiver certificates being issued, just as the area reserved from purchase for Auckland Maori in the March proclamation, between 'Tamaki road and the sea to the northward', had been. Again, they were not defined (that is, surveyed) reserves, but areas reserved or exempted from purchase under FitzRoy's pre-emption waiver scheme.

Presumably these 'reserves' were to include pa, urupa, and the land about them, and any land required by Maori for their 'own' use, because again, in his consideration of each individual application, Clarke did not assess whether such areas were contained in land for which a waiver was sought. Combined with an inadequate assessment of ownership, this resulted in at least one Maori chief having to move from his residence. Clarke did note lands Maori identified for such purposes before purchasing took place. He stated on one waiver application that he had had a request from a chief to reserve land. The chief Haimona (Ngati Whatua) had requested that the Kaipara landing place and Pitoitoi (the dragging place), used for travel between Auckland and Kaipara, be reserved for himself and Ngatiwhatua living at Kaipara. When Clarke received an application for land near this area he noted that he saw no objection to the waiver if the land sought did not include these places. Again Clarke did not investigate the matter himself, but relied on the purchaser to state whether the land included these places.

Although settlers were pleased with the October proclamation's decrease in the fee to a mere fraction, they now spent their venom on the waiver tenths. They claimed that the Government's assumption of dictation over Maori land was 'nugatory' – Maori could, and would, do as they chose. These ideas continued to be evident when Stanley replaced FitzRoy with George Grey. They were part of a long tradition of settler protest at anything which seemed to limit the profit potential and freedom of private dealing in Maori land.

Grey's appointment as Governor led to the reimposition of pre-emption and a movement back to Crown purchasing, able to be carried out with new vigour by Grey because of the increased funds available to him. (It also involved agreements for land purchases to be made by the New Zealand Company.) Grey's, and the Colonial Office's, preference for renewed State control led to a new recognition of the control (administrative and otherwise) pre-emption could provide. Grey saw pre-emption as a potential means of controlling Maori actions and acceptance of British law in general, by refusing to purchase lands from those who 'conducted themselves improperly' (something FitzRoy had also acknowledged his waiver scheme could do). And he used it to begin to reassert Crown control also over pre-emption waiver purchasers and the legal administration of the lands they claimed.

The Governor's preference for re-establishing such Crown control was evident in his actions to follow. In June 1846, Grey announced that no more waivers would be

granted and required settlers to provide all documentation of their purchases (including surveys) within three months. By the end of that year he had reintroduced Crown pre-emption and set up a commission to assess settler claims, and provide debentures in lieu of land, or land where the claim had been occupied by the purchaser. But very few settlers had bothered to take advantage of these provisions.

Grey then turned to another means of resolving pre-emption waiver purchases, submitting the question of the legality of FitzRoy's proclamations to the local courts. He believed that 'nothing less' than a Supreme Court decision 'formally given' would 'satisfy many of the claimants that they had not obtained legal rights over land purchased under pre-emption waiver proclamations' and that they 'could not compel the government to recognise, and if necessary to enforce' them. The vindication of Grey in *The Queen v Symonds* meant that pre-emption waiver claimants could not find support in the courts and had to turn to the Government to acquire legal title. The judgment was based on a reassertion of the two key principles of British colonial land administration. First, that the Crown was the sole source of legal title, and secondly, that the Queen had the sole right to extinguish native title. Grey was satisfied that all such claimants were now convinced that they had acquired no legal rights by the waivers.

But while the court had ruled that those who purchased land had no legal rights and had to rely on the Government's clemency, in Britain the then Secretary of State for the Colonies, Earl Grey, came to the independent view that because pre-emption waiver claimants had acted on the faith that they had a legal right, their purchases should be granted land on the basis of a strict legal right, but they could expect no leniency if they had not acted in conformity with FitzRoy's proclamation conditions.

Faced with these conflicting views, Governor Grey came up with three options for pre-emption waiver claimants in August 1847. The focus of his scheme, carried out by Commissioner Henry Matson under the Land Claims Compensation Ordinance 1846, was to settle Pakeha land claims, identify the Crown's demesne, and gain Crown control of the administration of those lands. Matson's inquiry, set up on the basis of the Crown's theories on sovereign title to land, did not adequately recognize or protect Maori interests. His interviews with the Maori vendors, from whom the pre-emption waiver purchases had been made, were conducted to provide evidence to support or refute settler interests, rather than to protect or uphold the interests of Maori.

Each of Grey's three options contained measures to ensure that the land had been purchased from the legitimate Maori owners. But Grey did not specifically require identification of those Maori owners in Matson's terms of reference (which were set out in the 1846 ordinance). All the same, for the purposes of his inquiry, Matson recorded responses from Maori vendors and witnesses regarding the ownership of the land, who held the right to sell, and whether any claim to the land remained (based on whether the full payment had been given). He relied on their confirmations of these points. Like Clarke, Matson does not appear to have conducted any significant investigation into the customary ownership of the land.

Grey thought that the waiver proclamations' reserve tenths were 'inconvenient'. He chose to recognize merely that FitzRoy's proclamations had set them aside 'for public purposes', omitting the addition 'especially the future benefit of the aborigines'. Two of Grey's three options, under which almost all the pre-emption waiver claims were made, allowed the settler claimants to purchase the reserve tenths from the Crown at £1 per acre if they met certain criteria. Most settlers awarded land following the Matson inquiry took advantage of this opportunity. This was clearly contrary to FitzRoy's commitment to Maori on Government House lawns, and his intention in the pre-emption waiver proclamations. FitzRoy's view that Maori needed at least both reserves and tenths, expressed in October 1844, was set aside.

Although Maori complaints about the Crown's acquisition of the surplus followed, no complaints have yet been found about the loss of the tenths. The confusion regarding land ownership at this time would have made it difficult for Maori to keep track of what happened to the tenths. Perhaps Maori who attended the Auckland hui remembered FitzRoy's promise of schools, hospitals, and services, which were to be provided from the produce of the tenths, more than the tenths themselves (which FitzRoy had clearly stated were to be vested in, and administered by, the Crown).

Grey does not seem to have thought about whether Maori had retained sufficient reserves for their future needs. (A plan attached to a report of Grey's of November 1847 indicated the area between Tamaki Road and the sea as 'Native land'.) He did not require Matson to assess whether the Maori vendors had retained sufficient land, nor did he require him to inquire whether any of the land sought by the Pakeha claimants included any pa or urupa (which were not to receive a Crown grant) or land Maori required for their own use (which was not to have been waived). The past protective purposes of pre-emption were overshadowed by the new assertion of Crown control and land administration (and the establishment of the Crown's demesne which could in turn be used to create revenue).

As noted above, the Maori vendors and witnesses' evidence in Matson's inquiry included confirmation of the amount they had been paid in compensation for the land. But Matson was not required to assess whether the payments Maori received were sufficient. This confirmation was used instead in assessing a Pakeha claimant's entitlement. (It was probably also used to establish that Maori were 'fully satisfied' and had no further claim – that is, that their interests were 'extinguished'.) Despite some Maori complaining that the price they had been paid was inadequate, and evidence that the resale of some of the land had resulted in large profits for the original settler purchasers, Matson's best response was to ensure, at times, that Maori were paid the amount that was originally agreed to. At other times, he passed over cases where Maori did not receive the agreed payment.

A decade later, settler concerns about the pre-emption waiver purchases were again raised. Many claims had been disallowed in the 1847 investigations through the claimants' failure to send in plans within Grey's deadline. Colonial officials considered this unfair and unjust. The Land Claims Settlement Act 1856 allowed Commissioner Francis Dillon Bell to maintain the focus on settler demands and Crown interests. Survey compensation provisions encouraged settlers, whose claims

had formerly been disallowed, to survey the full extent of their claims. This resulted in large quantities of land, previously 'locked up' because ownership was 'uncertain', becoming available for colonisation, either by being awarded to a settler or reverting to the Crown as 'surplus'. But these provisions were not matched by giving Maori any significant power to challenge the surveys being undertaken, the claimant's presentation of their claim, or the Crown's acquisition of the 'surplus'. Only where a claim had lapsed, may the land have reverted to Maori.

Bell tabulated a number of statistics on the pre-emption waiver purchases. He calculated that 97,427 acres of land had been surveyed under the pre-emption waiver claims (although this was not the total of the land allegedly purchased). And he found that a total of £6841 4s 2d had been paid to Maori for land purchased under FitzRoy's pre-emption waiver proclamations. Calculations of the amount of surplus acquired by the Crown under pre-emption waiver purchases vary widely, and will need to be reassessed. The surplus probably included FitzRoy's pre-emption waiver reserve tenths. There were no provisions in the 1856 Act for settlers to purchase the tenths. As an undefined part of the surplus, these tenths appear to have simply disappeared into the Crown's demesne.

By this time Grey, with McLean, had set up an effective system of Crown purchasing of Maori land. The Crown obtained enough land under this system to stem the settler demand for the abolition of pre-emption until the late 1850s. But Maori opposition to sales, and a rapid increase in settler immigration, then put pressure on Crown land purchase agents. In 1858, there was an unsuccessful attempt to waive pre-emption. Growing demand for more Maori land for settlement led the New Zealand General Assembly to propose abolishing pre-emption and the placing of Maori land in an open market through the Native Territorial Rights Bill. The British Government disallowed the Bill on the ground that it was an infringement of the Treaty. But after the control of Native Affairs passed to the New Zealand Government in 1862, the Crown's exclusive right to purchase Maori land was finally abolished.

The protection of Maori interests in land, which pre-emption potentially allowed the Crown to achieve, had long since faded in the face of settler interests. The legal-administrative control which pre-emption provided for the Crown – facilitating the transfer of land from customary to British land title and law – continued in a modified form through the Native Lands Act 1862 and subsequent land Acts. The Crown's sole power to extinguish aboriginal title continued (and continues) through the Native (later Maori) Land Court. Restrictions on the alienability of Maori land were not wholly abandoned after 1862 either. The Crown reasserted this aspect of pre-emption by proclamation, whenever it deemed it necessary, to again monopolize the purchase of particular areas of (and for a brief period all) Maori land, well into the twentieth century.

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