

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

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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

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.

covered by these provisions. 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

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

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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 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

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).

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.

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

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

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himself, in a confidential letter to Hobson dated 6 May 1840, explained that his Bill¹² would claim:

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

11. Donald Loveridge, 'The New Zealand Land Claims Act of 1840', report commissioned by the Crown, 18 June 1993, (Wai 45 rod, doc i2) 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.

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

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:

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

20. BPP, vol 2, [425], p 78

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

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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 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:

25. Ibid, p 189

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.

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 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

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.

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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.

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

33. Gipps's speech, p 197

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

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 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

39. Gipps’s speech, p 199

40. Gipps’s speech, p 199

41. Belgrave, p 30

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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, 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

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

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 Tenth's' ('Otakou Tenth's'), (Wai 27 rod, doc r35), p 95).

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 deãned by the commission, and the Crown's demesne being determined by the 'surplus' and 'wasteland' theories, the British deãnition 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 ãnally put to rest until the late 1840s.

3.3.2 The royal charter: Maori lands deãned 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 aãect or be construed to aãect' 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

47. Parsonson, 'Otakou Tenth's', pp 77–80. On British discussions about 'wastelands of the Crown' in the early 1840s, see Ann Parsonson, 'Nga Whenua Tautohetohe o Taranaki: Land Conëict in Taranaki, 1839–59' ('Taranaki'), November 1991 (Wai 143 rod, doc a1(a)), app 2.

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

3.3.3 Right of Pre-emption and Fitzroy's Waiver

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 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 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

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

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:

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

54. David Armstrong, 'The Land Claims Commission: Practice and Procedure, 1840–1856' (Wai 45 rod, doc i4), 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.

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

3.4 Right of Pre-emption and Fitzroy's Waiver

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 âctitious 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 speciâcally 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 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 identiâed 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 deânition 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

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

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 conârmation came on 18 March 1842 (Stanley to Hobson, 18 March 1842, BPP, vol 3, p 476).

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.

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

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).

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)

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.

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'.

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 i, p 88(i)–95(i) (see Wai 145 rod, doc a29, pp 632–634).

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.

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:

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

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

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 '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

76. Moore, p 96

77. Hobson to Stanley, 12 March 1842, BPP, vol 3, p 543

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 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

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).

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)

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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 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

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

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

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 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)

87. Hobbs to Martin, 22 October 1847, in W Martin, *England and the New Zealanders*, Auckland, Colledge 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

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

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 Otawahao, 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 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.

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

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

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 diærent natives, according to their rank, stand up and argue the diærent points contained; which being done, they retire home, and answer the diærent 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 diiculties in regularly and systematically distributing the *Gazette*. Initially, Clarke sent *Te Karere* to the missionaries for distribution at their diærent stations.⁹⁹ Later, when district 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 åve 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

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

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

3.6 Right of Pre-emption and Fitzroy's Waiver

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 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 paciãc) 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 speciãcity. 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

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

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

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

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 proëigate 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 rufians 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:

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).

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

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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-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 Mischiefs.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

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

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

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 paha 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 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

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

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

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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.