

CHAPTER 4

NEGOTIATING AND MODIFYING PRE-EMPTION, 1843–44

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

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

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

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

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

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

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

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

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

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

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

4. Ibid, pp 387–388

5. Connell (for Colonial Secretary) to Clarke, 25 November 1842, in H H Turton, *An Epitome of Official Documents Relative to Native Affairs in the North Island of New Zealand*, Wellington, Government Printer, 1883, c 152

6. FitzRoy to Stanley, 16 May 1843, BPP, vol 2, app 13, p 388

7. Shortland to Stanley, 30 October 1843, in Report from the Select Committee on New Zealand, 29 July 1844, BPP, vol 2, app 9, no 4, pp 340–341

8. Ann Parsonson, 'Ngai Tahu Claim Wai 27 in Respect of the Otakou Tenths' ('Otakou Tenths'), (Wai 27 rod, doc r35), p 72

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

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

This right is one of the Conditions of the solemn Treaty with the Natives on assuming the Sovereignty of N Zealand, a compact which it would seem undesirable to depart from unless on some very strong reason. It might possibly admit of a question whether it could be departed from, consistently with good faith. At any rate any deviation from it must greatly enhance the responsibility of Govt for any unforeseen ill-consequences to the Natives.

2ndly. This stipulation of the Treaty is believed to be in consonance with the mode of dealing with the Aboriginal owners or claimants of Lands in analogous cases in other parts of the world: it falls into a broad current of Precedent.

3rdly. The same danger – which probably prompted the condition – of the Natives' being cheated by European Purchasers, will remain, with the addition that Govt will be more or less involved in the responsibility for their proceedings. Capt'n FitzRoy shows that the bargain would not be ratified till payment had been actually made. But there would have been previous negotiations, and conditions which might not immediately come to light. – It may be permissible therefore, without coming under the charge of over-anxiety, to feel some fears of the effect of Government's becoming *mixed up* with any dealings of European Land-Jobbers with people from the condition of savages.

4thly. No sufficient practical motive is alleged for the change. – On the one hand as regards the Natives it would hardly remove the unwillingness at present said to have

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

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

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

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

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

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

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

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

12. Unsigned report of Colonial Land and Emigration Commissioners, attached to FitzRoy to Stanley, 16 May 1843, marked 'recd from Mr Elliott June 23(?) / 43 G W H[ope]', co 209/24, pp 137–138b, NA Wellington

13. Parsonson, 'Otakou Tenths', pp 75, 80–81; Ann Parsonson, 'Nga Whenua Tautohetohe o Taranaki: Land Conflict in Taranaki, 1839–59' ('Taranaki'), November 1991 (Wai 143 rod, doc a1(a)), app 3, p 203

14. Stanley, undated minute attached to FitzRoy to Stanley, 16 May 1843, co 209/24, pp 136–136b, NA Wellington

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

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

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

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

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

15. Stephen, draft reply, 26 June 1843, attached to FitzRoy to Stanley, 16 May 1843, co 209/24, p 141b, NA Wellington

16. Stanley to FitzRoy, 26 June 1843, BPP, vol 2, app 13, pp 389–390. Dean Cowie noted that Stanley would have assumed that FitzRoy would keep the price per acre on or above one pound an acre in observance of the Land Sales Act 1842 (D Cowie, "To Do All The Good I Can" Robert FitzRoy: Governor of New Zealand', MA thesis, University of Auckland, 1994, fol 77).

17. Parsonson, 'Otakou Tenths', p 81

18. Connell to Clarke, 29 December 1842, Turton's *Epitome*, c 152; see also Russell to Hobson, 28 January 1841, BPP, vol 3, p 174

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the country contains'. Not only this, but Clarke believed that little desirable land would be left to sell once Maori needs were met. He also argued that the Government should not buy large areas from Maori (the Crown land purchase agent was to try to buy blocks of 10,000 acres or more¹⁹) because he believed their 'independence' (presumably what was 'essential, or highly conducive, to their own comfort, safety or subsistence') would only be maintained by retaining their lands. Clarke concluded it would 'not only be difficult but very injurious to them to purchase large blocks of land, even if offered'.²⁰

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

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

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

19. Thomas Forsaith, who had been chosen in December 1842 as the Government's land purchase agent, had been instructed to try to buy land only in compact blocks of not less than 10,000 acres, to pay not more than 3d an acre for arable land – and nothing at all for unsuitable land, though it was to be purchased – and to make payment in cattle, clothes and agricultural implements with a proportion in money if the sellers insisted (Colonial Secretary to Forsaith, 29 December 1842, Outward Letterbooks, Protector of Aborigines, ia 4/271, na Wellington).

20. Clarke to Colonial Secretary, 1 November 1843, encl in Shortland to Stanley, 30 October 1843, in Report from the Select Committee on New Zealand, 29 July 1844, BPP, vol 2, app 9, no 4, p 360. This was a view very much at odds with the subsequent history of colonial land policy.

21. Shortland to Stanley, 30 October 1843, in Report from the Select Committee on New Zealand, 29 July 1844, BPP, vol 2, app 9, no 4, pp 340–341

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

4.2 FitzRoy's Arrival and Discussions with Auckland Chiefs and Settlers

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

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

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

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

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

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

FitzRoy's verbal response clarified his personal stance on the purpose of pre-emption. It echoed the sentiments expressed at the Treaty debates. To the assembled

23. Ross notes FitzRoy was met 'immediately' by Maori and Pakeha groups – no doubt meaning at the first available instance (R M Ross, 'Te Tiriti o Waitangi Texts and Translations', NZJH, vol 6, no 2, 1972, p 146).

24. 'Natives' Addresses', *Southern Cross*, 30 December 1843, vol 1, no 37

25. Ibid. These addresses were translated by Clarke (now Chief Protector) and Forsaith (a Protector) respectively. The latter point concurs with Shortland's statements (above).

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

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

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

26. See Ross, p 146 cf Grey to Stanley, 9 June 1846, co 209/44, pp 56–58, NA Wellington. Clarke interpreted these addresses as merely a request for 'an extension of their privileges' (Clarke to Colonial Secretary, 31 July 1844, encl 4 in FitzRoy to Stanley, 18 December 1844, BPP, vol 4, pp 457–458). Yet waiving pre-emption was understood by the colonial land and emigration commissioners as far more than an extension of privileges (see above).

27. 'Levee', *Southern Cross*, 30 December 1843, vol 1, no 37

28. *Ibid*

29. 'Natives' Addresses', *Southern Cross*, 30 December 1843, vol 1, no 37

30. *Ibid*

31. Samuel McDonald Martin, *New Zealand; in a Series of Letters: Containing an Account of the Country, Both Before and Since its Occupation by the British Government*, London, Simmonds and Ward, 1845, p 184

At a public meeting held the same morning, FitzRoy also received statements, similar to those received from the chiefs, from the Pakeha inhabitants of Auckland. Many had long wanted the opportunity to purchase land unhampered by the colonial administration. The auction of town allotments following the establishment of the capital at Auckland had ended unhappily for many of those who had gambled on staying. To their disgust, the long-awaited auction had been delayed in 1841. They saw the delay merely as a means used by colonial officials to beat up anticipation and competition, and thereby increase the prices received for the limited number of allotments being offered. The result they had feared had occurred – most allotments had indeed realised extraordinarily high prices. These had largely been paid by speculators, way beyond most settlers' means.³² The prices sought in the auction of the town, suburban, and country allotments continued to be beyond their reach. This was especially so as the local economy came to a near standstill by the end of 1841. Only 5 of the 80 town and country allotments auctioned by the Crown in mid-1843 were sold.³³

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

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

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

The address made by Auckland settlers now, on FitzRoy's arrival, was read out by the chairman, Martin, on behalf of the 60 or so people present.³⁶ It dealt with

32. R C J Stone, *Young Logan Campbell*, Auckland, Auckland University Press, 1982, pp 50, 87, 91–93

33. Stone, pp 101, 105, 113

34. Ibid, p 103

35. Ibid, pp 104–105, 114

36. Parsonson, 'Otakou Tenth's', p 13

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many matters – among them the purchase of Maori land. To justify their wish for direct purchase, the settlers argued that Maori were not being given their full rights as British subjects – more specifically, the power to sell their land to whomsoever they chose. But they added an extra caution, to push their goal along. They surmised that unless Maori were given those rights, settler lives and property would not be secure.³⁷ Nothing would affect the interests of the colony more powerfully, they argued, than 'the proper adjustment' of their interaction with Maori. Providing Maori with this right would 'ensure their good will and friendship; without which, we do not hesitate to express our conviction that this colony can never prosper'.³⁸ They continued:

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

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

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

No one is more desirous than I am myself, that the Natives of New Zealand should enjoy the full rights of British subjects, as soon as they are sufficiently advanced in civilization.

The power of selling their land to whom they please, was withheld from them by the Crown for their own benefit. I am authorized to prepare for other arrangements more suitable to their improved, and daily improving condition.⁴¹

37. Samuel McDonald Martin, chairman, 'Address from the Inhabitants of Auckland to Governor FitzRoy', 26 December 1843, encl 1 in FitzRoy to Stanley, 14 July 1844, BPP, vol 4 p 238

38. 'Address', *Southern Cross*, 6 January 1844, vol 1, no 38

39. Martin, 'Address from the Inhabitants of Auckland', p 238

40. See Walter Brodie, *Remarks on the Past and Present State of New Zealand*, London, Whittaker and Co, 1845, p 70

41. 'Address', *Southern Cross*, 6 January 1844, vol 1, no 38. See also FitzRoy to 'S McD Martin and the other gentlemen of the Deputation from the Inhabitants of Auckland', 30 December 1843, encl 2 in FitzRoy to Stanley, 14 July 1844, BPP, vol 4, p 240 (see also FitzRoy to Stanley, 16 May 1843, BPP, vol 2, app 13, pp 387–389).

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

All these statements might have indicated to the settlers that what FitzRoy envisaged was a modification of the existing system, allowing for a limited right in some cases, rather than an immediate and complete change in policy. Maori were not going to be able to sell to Pakeha without the fetters of a protective government attached.

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

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

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

The Government, he wrote, was:

42. Perhaps FitzRoy considered that ‘civilization’ would ‘raise’ Maori from being considered as ‘minors’.

43. ‘Arrival of His Excellency Captain FitzRoy’, *Southern Cross*, 30 December 1843, vol 1, no 37

44. Ibid

45. FitzRoy to Stanley, 15 April 1844, BPP, vol 4, pp 178–179. These arguments impressed FitzRoy, although he attributed their origin yet again to dissatisfied Pakeha.

4.2 Right of Pre-emption and Fitzroy's Waiver

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

As to the need for urgency, FitzRoy, like his predecessor, Shortland, described the situation as critical. He claimed to be apprehensive that unless pre-emption was not waived immediately the character of the Government would be 'irretrievably injured in the native estimation'. He postulated that 'open opposition to authority' would otherwise result, and the Crown's 'moral influence, by which alone we stand firmly in New Zealand' would be lost. (He appears to have not altered this view in February 1846, when he wrote *Remarks on New Zealand*.) In recognition that he had acted before formal authorisation had been given, he concluded: 'to that decision I found myself obliged to come without waiting for your Lordship's express sanction'.⁴⁷

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

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

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

46. Ibid

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

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

49. Belich, p 205

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

Zealand Company dealings to the south, particularly following the altercation at Wairau in June 1843.

4.3 FitzRoy's New Zealand Company Pre-emption Waivers

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

On 27 February 1844, after assessing the Company's position in Wellington, in light of the fact that its settlers had already left Britain, and the fact that the Government now had neither the time nor the funds to purchase land before their arrival, FitzRoy adopted the only course which appeared practicable to him. He waived the Crown's right of pre-emption over 150,000 acres of land for a proposed Scottish settlement in 'New Munster' (the South Island). The land was to be selected by the Company's agent, Colonel William Wakeāeld, 'under the superintendence and with the assistance of the most eicient Government oicer' available: John Jermyn Symonds.⁵¹

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

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

51. FitzRoy to Stanley, 15 April 1844, BPP, vol 4, p 176. Symonds was described by FitzRoy as having spent several years in New Zealand, having been employed as a surveyor, then a sub-Protector of Aborigines, and was, at the time FitzRoy appointed him to superintend the Company agent, a police magistrate. FitzRoy noted that Symonds spoke Maori and had an 'irreproachable character'.

52. Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wellington, Brooker and Friend Ltd, 1991, vol 2, pp 300–304

53. *Ibid*, p 290

4.3 Right of Pre-emption and Fitzroy's Waiver

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

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

Symonds was not a designated Protector (although he had been a sub-Protector at one time). In the *Ngai Tahu Report*, the Tribunal noted that these instructions gave Symonds obligations to both the Company (to assist it to make a valid purchase) and to Maori (to ensure Maori owners wished to sell and that proceedings were 'honest, equitable and irreproachable'). The role of Protector was assigned to George Clarke Jr (the Chief Protector's son). FitzRoy only sent Clarke Jr down to the South Island in July, when it appeared the sale might be finalised.⁵⁵ The Ngai Tahu Tribunal has noted that Clarke explained the nature of the deed, and it commented that he played an active role in ensuring Ngai Tahu understood the arrangements being entered into.⁵⁶

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

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

54. FitzRoy to Symonds, 27 February 1844, BPP, vol 4, p 437. For more information on Symonds instructions see Parsonson, 'Otakou Tenths', pp 45–46.

55. See the *Ngai Tahu Report*, vol 2, pp 323–324. See G Clarke, *Notes on Early Life in New Zealand*, Hobart, J Walch and Sons, 1903, pp 65–67; Symonds to Richmond, 2 September 1844, BPP, vol 4, p 435; Richmond to Symonds, 2 April 1844, BPP, vol 4, p 440.

56. See the *Ngai Tahu Report*, vol 2, pp 310, 326

57. FitzRoy to Spain, 27 February 1844, BPP, vol 4, p 437

58. See ch 3

cases referred to is to be provided by the Company'; and thirdly, the exterior boundaries and interior divisions of the land be surveyed by and at the expense of the Company.

None of these conditions speciãcally concerned the protection of Maori interests.⁵⁹ They did not, as the Ngai Tahu Tribunal has noted (above), require that 'tenths', or any reserves other than those which may have been required by existing arrangements (also above), be provided.⁶⁰ This was despite the New Zealand Company's earlier professed commitment to a general tenths scheme which would place Maori chiefs throughout the new settler communities.⁶¹ Again, pressing concern for settlers' interests took precedence over protection of Maori interests.

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

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

59. Hamilton to Wakefield, 27 February 1844, BPP, vol 4, p 437. Stanley presumed it was intended that lands which may be acquired were to form part of the extent of land to which the Company was entitled under Pennington's award, and that any payment which may be necessary to complete the Company's title would not become an additional claim for land, involving a subsequent inquiry as to the amount (see Stanley to FitzRoy, 30 November 1844, BPP, vol 4, pp 206–207).

60. *Ngai Tahu Report*, vol 2, pp 290–294

61. See ch 1

62. Stanley to FitzRoy, 30 November 1844, BPP, vol 4, pp 206–207

63. *Ibid.* In July 1844, a purchase was made of 400,000 acres at Otago for £2400. The completion of the other intended purchases to be supervised by Spain (150,000 acres at Wairarapa and 250,000 acres elsewhere) was said to have been 'prevented' by FitzRoy's October proclamation and by the suspension of the Company's operations (see encl in Stanley to Grey, 6 July 1845, BPP, vol 4, p 578).

64. Stanley to FitzRoy, 30 November 1844, BPP, vol 4, pp 206–207; see also the *Ngai Tahu Report*, vol 2, p 297

4.4 FitzRoy's 10-shillings-an-Acre Pre-emption Waiver Proclamation, March 1844

FitzRoy returned to Auckland early in March 1844. There, settlers had been urged by the obstreperous *Southern Cross* to resume direct purchasing. The writer of one article had argued that such purchases would be secure because: (a) Maori had the right (not given up by the Treaty), and the might, to sell; (b) purchases were not illegal, as there was no enactment to prohibit them; (c) if they were illegal, 'the Government now appear to be satisfied of the injustice and impolicy of preventing such sales', and FitzRoy had indicated that immediate measures were likely to be taken to enable private purchasing; and (d) Maori would refuse to sell to the Government, being aware they can obtain higher prices from settlers.⁶⁵ Some settlers and Maori had already entered into land transactions.⁶⁶

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

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

65. 'The Prospects of this Government', *Southern Cross*, 9 March 1844, vol 1, no 47. Other *Southern Cross* articles on how pre-emption may be implemented (some again, actively encouraging its readers to enter into private land deals) had appeared both before and after FitzRoy's arrival in New Zealand. See for example *Southern Cross*, 17 June 1843, vol 1, no 9; *Southern Cross*, 16 December 1843, vol 1, no 35; *Southern Cross*, 16 March 1844, vol 1, no 48; *Southern Cross*, 30 March 1844, vol 1, no 50.

66. See chs 5–6

67. 'Legislative Council', *Southern Cross*, 13 January 1844, vol 1, no 39. The *Wellington Spectator* also published this extract from the Legislative Council, on 31 January 1844.

68. Wakefield to Secretary of the New Zealand Company, 17 April 1844, in New Zealand Company, *The Seventeenth Report of the Directors of the New Zealand Company*, London, Stewart and Murray, 1845, p 49

69. FitzRoy to Symonds, 27 February 1844, BPP, vol 4, p 437

70. FitzRoy to the Inhabitants of Nelson, 7 February 1844, *New Zealand Gazette and Spectator*, 24 February 1844

71. Minutes of the Executive Council, 22 March 1844, BPP, vol 4, pp 199, 313

72. Minutes of the Executive Council, 25 March 1844, BPP, vol 4, pp 199–200, 313–314

Clarke, although not a member of the Executive Council, was present and introduced at both meetings. In his thesis on the Protectorate, Peter Gibbons has suggested that Clarke may not have played a large part in the discussions leading up to the March waiver, as ‘those who urged waiver upon FitzRoy were preaching to the converted’.⁷³ FitzRoy’s questions to Stanley prior to leaving Britain had suggested this would be the case. But it should also be remembered that Clarke’s views, expressed in his regular reports, and forwarded to the Colonial Office, were probably influential in FitzRoy’s conclusions. FitzRoy also conducted private discussions with Clarke on his arrival in New Zealand.⁷⁴ And Clarke appears to have been instrumental in Shortland’s proposal to waive pre-emption as well. Gibbons suggests that Clarke, in whom FitzRoy placed great confidence,⁷⁵ and whose position as Chief Protector was fundamental to the discussion of pre-emption as it affected native policy, would have been key in these Executive Council discussions.⁷⁶

The Executive Council discussions resulted in FitzRoy’s first general pre-emption waiver proclamation, dated 26 March 1844.⁷⁷ The proclamation stated that FitzRoy would consent, until otherwise ordered, to waive the right of pre-emption over ‘certain limited portions of land in New Zealand’ on the Queen’s behalf, under certain conditions.⁷⁸ It was to apply throughout New Zealand, although Stanley did not originally understand this.⁷⁹ The conditions were as follows:

- Applications were to be made in writing to the Governor for a waiver over ‘a certain number of acres of land at or immediately adjoining a place distinctly specified’. The description of the land was to be done ‘as accurately as may be practicable’.⁸⁰
- The Governor’s consent or refusal would then be given, ‘to a certain person, or his assignee’, as he judged best ‘for the public welfare, rather than for the private interest of the applicant’.⁸¹
- FitzRoy would fully consider the ‘nature of the locality; the state of the neighbouring and resident natives; their abundance or deficiency of land; their disposition towards Europeans; and [their disposition] towards Her Majesty’s

73. Peter Gibbons, ‘The Protectorate of Aborigines, 1840–1846’, MA thesis, Victoria University of Wellington, 1963, fol 39

74. Shortland to Secretary of State for Colonies, 12 January 1844, in Robert FitzRoy, papers, qms-0794, ATL Wellington

75. See ch 5

76. Gibbons, fol 39–41

77. Proclamation, 26 March 1844, in encl p in FitzRoy to Stanley, 15 April 1844, BPP, vol 4, p 202

78. FitzRoy later clarified that ‘[b]y a limited portion of land, not more than a few hundred acres is the quantity implied’ (*New Zealand Gazette*, 7 December 1844, notice in encl 1 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 403).

79. See also Parsonson, ‘Otakou Tenth’s’, p 56

80. *Ibid*, p 57

81. FitzRoy also later explained that he had not intended the applicant to necessarily be the purchaser of the land for which a pre-emption waiver was sought; the waiver merely had the effect of opening it up to competition (*New Zealand Gazette*, 7 December 1844, notice in encl 1 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 403). See also FitzRoy’s comments in his book, *Remarks on New Zealand in February 1846*, London, Hocken Library Facsimile No 10, 1969.

Government'. He would also consult the Protector of Aborigines before consenting 'in any case'.⁸²

- No Crown title would be given for any pa or urupa, or land about them, 'however desirous the owners may now be to part with them'. As a 'general rule' pre-emption would not be waived over land required by Maori for their present use 'although they themselves may now be desirous that it should be alienated'.
- No waivers were to be given over land lying between 'Tamaki road and the sea to the northward' near Auckland.⁸³ (See åg 1.)
- Of all land purchased under a waiver, 'one-tenth part, of fair average value, as to position and quality' was to be conveyed by the purchaser to the Queen 'for public purposes, especially the future beneåt of the aborigines'.
- A fee of 10 shillings per acre, for nine-tenths of the land over which pre-emption had been waived, was to be paid by the Pakeha applicant as a contribution 'to the land fund, and for the general purposes of Government'. Four shillings per acre of this fee was to be paid on receiving the Governor's consent for a waiver.
- At least 12 months were to pass from the time the applicant received the Governor's consent (by paying the fees and being issued with a pre-emption waiver certiåcate), to the issue of a Crown grant. The remaining six shillings per acre were to be paid on the issuing of a Crown grant.⁸⁴
- Surveys of the land purchased under a waiver certiåcate were to be done at the purchaser's expense 'by a competent surveyor, licensed or otherwise, approved of by the Government, who will be required to declare to the accuracy of his work, to the best of his belief'. The surveyor was to deposit certiåed copies at the Surveyor-General's oice prior to a Crown grant being prepared.
- Deeds of transfer were to be lodged at the Surveyor-General's oice as soon as practicable:

in order that the necessary inquiries may be made, and notice given in the Maori, as well as in the English Gazette that a Crown title will be issued, unless suicent cause should be shown for its being withheld for a time, or altogether refused.
- The Crown reserved the right of constructing roads and bridges for public purposes 'through or in lands so granted'.⁸⁵

82. The colonial land and emigration commissioners, in assessing FitzRoy's actions (see below), noted that the Governor's decision would be based on the public welfare and that of natives, rather than that of private interests (see Lefevre and Wood to Stephen, 19 November 1844, co 209/40, p 250, NA Wellington).

83. The reason for this condition was later explained as being so that the land be kept for Maori.

84. This was to encourage long term relationships between purchasers and Maori.

85. This condition was later overlooked by Grey in his criticisms of FitzRoy's waiver scheme (see Grey to Earl Grey, 4 December 1847, BPP, vol 6, [1002], pp 43–44).

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

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

FitzRoy also explained the proclamation in a speech given to Maori on Government House lawns, on the same day as the publication of the waiver.⁹¹

86. Proclamation, 26 March 1844, in encl p in FitzRoy to Stanley, 15 April 1844, BPP, vol 4, p 202

87. Connell to Clarke, 29 December 1842, Turton's *Epitome*, c 152

88. The Internal Affairs register for this year recorded that Clarke wrote a letter to the Colonial Secretary on 22 January 1844, which was noted to have been received on 23 March, in which he reported that Maori were selling their lands and recommended certain reserves be made in Remuera. The letter itself cannot be located. Clarke would have been aware of the value Auckland Maori placed on Orakei land.

89. The proclamation had specified that no Crown title would be given for any pa, urupa, or the land about them. It had not stipulated that pre-emption would not be waived in those areas. While this difference may have resulted in very different outcomes (pa, urupa, and the land about them, if purchased by settlers, would presumably have become Crown rather than remained native land) the wording of FitzRoy's proclamation itself suggests that he may have meant them to have had the same effect. Later, Governor Grey did not require Commissioner Matson to identify pa, urupa, or the land about them, so that they could be excluded from Crown grants (see ch 7).

90. Gibbons, fol 39–41

91. He had promised to do this on 19 March (see 'Copy of Minutes of a Meeting of Native Chiefs . . . at Government House . . . on 26 March 1844', encl o in FitzRoy to Stanley, 15 April 1844, BPP, vol 4, p 197); see also ch 5.

FitzRoy (with Clarke translating) told those present that the conditions allowed them to sell any parts of their land they wished, as long as it did not injure them now, or cause injury and injustice to their children. He explained his view of pre-emption again:

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

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

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

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

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

[t]he produce of that tenth will be applied by Government to building schools and hospitals, to paying persons to attend there, and teach you not only religious and moral lessons, but also the use of different tools, and how to make many things for your own use . . .

The management of the reserves would be entrusted to a board or committee of Crown officials, consisting of the Governor, the Anglican Bishop, the Attorney General, the Commissioner of Crown Land, and the Chief Protector of Aborigines.⁹⁵

92. Ibid, pp 197–198

93. Ibid

94. Ibid

95. Ibid

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

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

The proclamation was published in the (English) *Gazette*⁹⁷ and *Te Karere*, the Maori *Gazette*.⁹⁸ News of the proclamation, and the *Gazette* itself, reached Port Nicholson in time for publication in the *New Zealand Gazette and Wellington Spectator* of 10 April 1844.⁹⁹

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

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

96. Parsonson, 'Otakou Tenths', p 15

97. See *New Zealand Gazette*, 26 March 1844; BPP, vol 4, pp 618–619

98. See Alan Ward, 'Supplementary Historical Report on Central Auckland Lands', Wellington, CCJWP, 1992, p 31

99. Parsonson, 'Otakou Tenths', p 16

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

who had a poor knowledge of the language’, and that Maori relying solely on it ‘would have had a hard time making sense of it’.¹⁰¹

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

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

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

In the third (article) of the Proclamation you will see that the ten acres of every soil bought (or sold) will be given by the purchaser to the Governor, the revenue derived from that (the ten acres) will be used to build hospitals, to educate the Maori people and for other purposes.

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

4.5 The Proclamation’s Protection Mechanisms

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

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

102. Parsonson, ‘Otakou Tenths’, p 18

4.5 Right of Pre-emption and Fitzroy's Waiver

circumstances. It was these principles, not the means of achieving them, which were portrayed to Maori, and which needed to be upheld.¹⁰³

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

In 1839, Normanby had limited the Crown's purchasing of Maori land, under its pre-emptive right, by four key principles.¹⁰⁴ The first was that all land purchase be conducted with sincerity, justice, and good faith. The second specification was that Maori were to be prevented from entering contracts 'in which they might be the ignorant and unintentional authors of injuries to themselves'. Hobson was not, for example, to purchase land essential or highly conducive to their comfort, safety or subsistence. The third specification, was that acquisitions were to be limited to land Maori could alienate 'without distress or serious inconvenience to themselves'. And the fourth required that a Protector be appointed to ensure the above.

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

These points were not lost on the colonial land and emigration commissioners. Elliot and Villiers were concerned about FitzRoy's May 1843 proposal to waive pre-emption precisely because they believed that, by allowing pre-emption to be waived in favour of private individuals, the Government would become 'mixed-up' with, and therefore responsible for, the purchases those individuals undertook. The commissioners commented that, contrary to a waiver of pre-emption freeing the Crown from responsibility, any deviation from pre-emption 'must greatly enhance the responsibility of Govt for any unforeseen ill-consequences to the Natives'.¹⁰⁶

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

104. See ch 2

105. Parsonson has also argued that 'the Crown had an equal duty when it waived its right of pre-emption' (Parsonson, 'Otakou Tenths', p 117).

106. Unsigned report of colonial land and emigration commissioners, attached to FitzRoy to Stanley, 16 May 1843, marked 'recd from Mr Elliott June 23(?) / 43 G W H[ope]', co 209/24, pp 137–138b, NA Wellington

Their opinion would seem to imply that the principles Normanby outlined as limiting Crown purchases of Maori land, would be the very least the Crown had an obligation to uphold with respect to private purchases of that land.

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

At first glance, FitzRoy’s requirements under the 10-shillings-an-acre proclamation appear generally to relate well to these principles. For instance, Normanby’s first specification, that land purchase be conducted with sincerity, justice, and good faith, appears to be catered for in FitzRoy’s requirement that the acreage of the intended purchase be specified and the land be described as accurately as possible, and his specification that he would himself consider fully the Maori owners’ position and consult the Protector. It would also be indicated by his requirement that the deeds be gazetted in Maori and English, and that long-term relationships between Maori and Pakeha be encouraged by a 12-month lapse between issuance of a pre-emption waiver certificate and the issuance of a Crown grant.

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

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

107. See ch 6

108. Stanley to FitzRoy, 30 November 1844, BPP, vol 4, p 209

109. Parsonson, ‘Taranaki’, app 3, p 208

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

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

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

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

110. See ch 1

111. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 1st ed, Wellington, Department of Justice: Waitangi Tribunal, 1987, pp 137–147

112. *Ngai Tahu Report*, pp 240–241

113. This itself needed to be specified as coming within 'a few hundred acres' before it held any real protection.

require them to be published in the English and Maori *Gazettes* (unlike the deed or deeds, which were to be provided as soon as practicable for inquiry and publishing by *Gazette* notice).¹¹⁴

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

The second principle which the Tribunal (in its *Orakei Report*) found limited the Crown in exercising its pre-emptive right, was that the Crown was responsible for ensuring that Maori 'were left with sufficient land for their maintenance and support, or livelihood' (or, as in its *Waiheke Report*, each tribe should be left with 'a sufficient endowment for its foreseen needs').¹¹⁶ The Ngai Tahu Tribunal further addressed what may constitute a sufficient endowment for the tribe's foreseeable needs. It suggested that the Crown would need to take into account a 'wide range of demographic factors' such as the size of the tribal population; the land they were occupying (or over which various members enjoyed rights); the principal sources of their food supplies and location of such supplies; and the extent to which they depended upon fishing of all kinds, and on seasonal hunting and food gathering.¹¹⁷

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

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

114. Where relatively small blocks of land were involved, and where their descriptions were precise, there may have been little room for misunderstanding between vendor and purchaser.

115. See ch 5.

116. *Orakei Report*, pp 137–147; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Waiheke Island Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1987, p 38

117. *Ngai Tahu Report*, p 239

an idealised one, in which Maori were to be brown Britons – Christian, ‘civilized’ and living in the new (British) colonial community.

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

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

In June 1841, Russell directed that 50 percent of the produce of land sales would be retained for survey, aborigines, and local government charges.¹²² In September 1842, Stanley instructed Hobson that, of the remaining half of the proceeds from the sale of Crown lands not earmarked for emigration, some, ‘not exceeding in the whole 15 percent of the gross proceeds of the Land Sales’, may be applied ‘for the benefit, civilization and protection of the Aboriginies’.¹²³

FitzRoy's intended reservation of a tenth of the land purchased under the waiver provisions, to be conveyed by the purchaser to the Crown (not Maori) ‘for public purposes, especially the future benefit of the aborigines’, was reminiscent of the 1840 select committee's recommendation. He appears to have been attempting to ensure that Maori would gradually participate in the benefits of British settlement. FitzRoy had elaborated on his intentions to Maori in his address on Government House lawns. He had explained that the tenths were to be ‘set apart for, and chiefly applied to’ their future use, ‘for the special benefit of yourselves, your children, and your children's children’. FitzRoy had also indicated that the tenths would be managed by a committee of Crown officials, and that the income obtained would be spent on building schools and hospitals and on ‘paying persons to attend there’. But his proclamation did not bind the Crown to use the proceeds of that tenth for the

118. Report from the Select Committee on New Zealand, 3 August 1840, BPP, vol 1, [582], p ix

119. Russell to Hobson, 28 January 1841, BPP, vol 3, p 174

120. Parsonson, ‘Otakou Tenths’, p 48. Alan Ward has suggested that FitzRoy's tenths provision ‘was an attempt to implement the additional instructions of 28 January 1841, providing for an endowment *in the Crown* to fund Maori purposes expenditure. . . . The question of Maori retaining adequate land for their subsistence and development purposes therefore also remained at issue’ (emphasis in original)(Ward, p 31).

121. Parsonson, ‘Otakou Tenths’, p 48

122. Vernon Smith to Somes, 4 June 1841, BPP, vol 3, p 358

123. Stanley to Hobson, 15 September 1842, co 406/2, pp 247–248, NA Wellington

beneat of Maori. It merely bound the purchaser to make the land over to the Crown. As Parsonson notes, FitzRoy gave a ‘very clear message’ to Maori about what the tenth was for, but did not provide any safeguards to ensure the tenth was used as he intended.¹²⁴

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

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

As Parsonson states: ‘FitzRoy did his best to ensure that a system of direct purchase would not harm Maori interests’ – by consulting the Chief Protector on each waiver application, making provision for areas to be reserved from purchase, as well as tenths, and setting up a system whereby the Crown grant was not issued until a year after application was made for a waiver.¹²⁸ But there was a gap between intention and execution. For all its complexity, the protection of Maori interests promised in FitzRoy’s proclamation was limited. It would depend on how conscientiously his protective provisions were put into practice.

124. Parsonson, ‘Otakou Tenths’, p 66

125. Parsonson, ‘Taranaki’, app 3, p 205

126. Te Matua (cited above) agreed with FitzRoy that he would still be needed as a guardian, to watch Pakeha dealings.

127. Parsonson, ‘Taranaki’, app 3, p 208

128. Parsonson, ‘Otakou Tenths’, pp 115–117

