

CHAPTER 6

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

6.1 Local Response to the March Waiver

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

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

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

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

6.1 Right of Pre-emption and Fitzroy's Waiver

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

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

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

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

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

4. *Southern Cross*, 6 April 1844, vol 1, no 51

5. Clarke to Colonial Secretary, 31 July 1844, encl 4 in FitzRoy to Stanley, 18 December 1844, BPP, vol 4, p 458. FitzRoy believed the 'intermixed interests of various tribes, families and individuals' was solved by the waivers being for small areas (FitzRoy, 'Memorandum on the Sale of Lands', encl 2 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 404).

complying with the Government regulations, which may hereafter create some embarrassment'.⁶ The reality of this concern is confirmed by FitzRoy's view expressed to the Colonial Office in October 1844.

6.2 The Colonial Office Response

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

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

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

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

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

-
6. Clarke to Colonial Secretary, 31 July 1844, encl 4 in FitzRoy to Stanley, 18 December 1844, BPP, vol 4, p 458. There is some indication in the penny-an-acre pre-emption waiver claim files that this may well have been the case.
 7. Ann Parsonson, 'Ngai Tahu Claim Wai 27 in Respect of the Otakou Tenths' ('Otakou Tenths'), (Wai 27 rod, doc r35), p 82
 8. Lefevre and Wood to Stephen, 19 November 1844, co 209/40, p 256b, NA Wellington
 9. Ibid, p 257b–258

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

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

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

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

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

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

10. Commissioners to Stephen, 19 November 1844, co 209/40, pp 248–258, NA Wellington; Stanley to FitzRoy, 30 November 1844, BPP, vol 4, pp 203–204

11. Stanley to FitzRoy, 30 November 1844, BPP, vol 4, pp 208–210

12. See ch 3

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

14. Ibid

6.3 Movement against Customs and Pre-emption in the North

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

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

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

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

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

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

15. *Southern Cross*, 17 February 1844, vol 1, no 44

16. *Ibid.* The analogy these chiefs made between their own plight and the plight of Pakeha settlers is perhaps an indication that many such Maori leaders were beginning to realise what the Crown meant by sovereignty, and its implications for rangatiratanga.

17. See BPP, vol 4, pp 304–310, 356–358; see J Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict*, Auckland, Penguin, 1988

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

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

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

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

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

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

18. FitzRoy to Stanley, 16 September 1844, BPP, vol 4, p 356

19. *Southern Cross*, 7 September 1844, in encl 3 in FitzRoy to Stanley, 16 September 1844, BPP, vol 4, p 366

20. *Ibid*, pp 367–368

21. *Ibid*

reserves and allowing settlers only small areas. He stressed that the Treaty, which contained the pre-emption ‘regulation’, was agreed to by the chiefs. The ēag, the signal of freedom and security, he concluded, was a signal of great advantages.²²

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

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

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

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

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

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

FitzRoy and his Legislative Council responded by abolishing customs totally in early October 1844. He explained to Stanley that the additional levy on customs had ‘brought about a crisis’, which he described as ‘the attempt to question Her

22. FitzRoy to Heke Pokai, 5 October 1844, encl 7 in FitzRoy to Stanley, 19 October 1844, BPP, vol 4, p 417

23. Extract from the *Southern Cross*, 14 September 1844, in encl 3 in FitzRoy to Stanley, 16 September 1844, BPP, vol 4, p 372

24. Clarke to Colonial Secretary, 30 September 1844, encl 11 in FitzRoy to Stanley, 19 October 1844, BPP, vol 4, p 419

25. Ibid

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

6.4 Right of Pre-emption and Fitzroy's Waiver

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

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

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

6.4 FitzRoy's 'Penny-an-Acre' Pre-emption Waiver Proclamation, October 1844

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

FitzRoy declared that pre-emption would not be waived in any case where a person had not complied strictly with the regulations. He added the usual warning

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

that all titles to land not confirmed by a Crown grant were ‘absolutely null and void’. FitzRoy then listed a number of provisions designed to force compliance with the regulations. He specified that:

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

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

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

apprehensive that the peace of the country cannot be secured, without something being done to admit of their alienating such portions of their land as they can very well spare, without injury to themselves and their children.

In my last report . . . I alluded especially to this subject, and pointed out to your Excellency the disappointment manifested by Europeans and Natives at their being obliged to pay 10s an acre to Her Majesty’s Government, to enable them to buy land from the Natives; that feeling on the part of the Natives is daily increasing, and applications are continually made to your Excellency for the removal of this impediment, in order that they may complete their engagements, pay their debts contracted before Her Majesty’s Government was formed, and procure what appears to them essential and necessary.²⁹

FitzRoy read Clarke’s letter to the Executive Council as evidence of the ‘very great dissatisfaction of the natives with respect to the restrictions placed on the sale of

28. See *New Zealand Gazette*, 1 October 1844, BPP, vol 4, pp 619–620

29. Clarke to FitzRoy (confidential), 9 October 1844, encl 4 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 406

their land'. He proposed that 'an alteration' which he was anxious to introduce in the existing regulations be considered. A discussion of the subject ensued.

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

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

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

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

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

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

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

30. Extract from minutes of the Executive Council, 10 October 1844, encl 3 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, pp 404–405

31. Ibid, p 405

32. Proclamation, 10 October 1844, in encl 1 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 401

33. Ibid, p 402

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

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

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

FitzRoy’s 10 October 1844 waiver represented a further attempt at tightening the reins which he had begun earlier that month.

34. The other alteration, probably a misprint, was that whereas the March proclamation stated that ‘all transactions with the sellers’ were to be at the buyer’s risk, the October proclamation stated that ‘all transactions with the settlers’ were to be at the buyer’s risk.

Stanley had suggested that FitzRoy might consider increasing (rather than decreasing) the March proclamation's fee. FitzRoy's report to Stanley stressed that the penny-an-acre waiver was 'absolutely necessary' to prevent insurrection, to which Maori were being incited by settlers – a large reward having been offered 'for whomsoever should do most towards stirring up and informing the natives how to act together on this subject'. He explained that Maori had been told that 'te hokonga' was 'the option of purchase' not the exclusive right of purchase, and that the meaning of the exclusive right of pre-emption was 'not generally understood' by them. He stated that Maori would never have agreed to denying themselves the right to sell to private persons if the Government declined to purchase. He also repeated that Maori attention had been drawn to article 3 of the Treaty, and to the argument that while unable to sell their own land, they were 'no better than slaves'.³⁵

FitzRoy included, in his despatch to Stanley, a memorandum on the sale of lands in New Zealand, in which he attempted to explain the fairness of this measure to all concerned. He argued that the measure would neither result in unfairness to those who had already purchased land at high prices, nor lead Maori to be speedily dispossessed of their lands. On the first point, FitzRoy reasoned that unless the colony prospered, the value of land already bought would 'fall to nothing' and that only if the land was easily attainable in small quantities, and land transactions and trade encouraged, would the colony prosper. This was his and Clarke's aim with both pre-emption waiver proclamations. He envisaged Maori would be part of this prosperous new community.³⁶

As for the second point, FitzRoy argued that the last four years of contact with 'so many' British people had 'so completely informed the natives of the value of land, that there is not now any doubt of their ability to manage their own transactions of this nature, as far as relates to their own present interests'. This contact had included the land claims commissioners, the advice and explanations of the protectors, the missionaries, and those interested in Maori welfare, as well as the competition of Europeans themselves for land at auctions. Perhaps this explains further FitzRoy's limited requirement of Clarke's role. But he still held some reservations about what he interpreted as Maori 'indifference' to the interests of their descendants, and thought that they needed the provision of 'at least a tenth of all lands sold, besides extensive reserves in addition'.³⁷ FitzRoy's tenths, as explained to Maori on the Government House lawns, were to be 'set apart for, and chiefly applied to, your future use, or for the special benefit of yourselves, your children, and your children's children'. The reserves in addition appear to be those lands to be reserved from purchase.

35. FitzRoy to Stanley, 14 October 1844, BPP, vol 4, pp 400–401

36. See ch 4

37. FitzRoy, 'Memorandum on the Sale of Land in New Zealand by the Aborigines', 14 October 1844, encl 2 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, pp 403–404. Dean Cowie also suggests that FitzRoy may have been using the penny-an-acre proclamation to subvert the £1-per-acre minimum price set by the Australasian Land Sales Act (Dean Cowie, "'To Do All the Good I Can": Robert FitzRoy, Governor of New Zealand', MA thesis, University of Auckland, 1994, fol 87).

Interestingly, FitzRoy also chose this opportunity to spell out his idea that pre-emption may be used as a punishment for those not complying with British law. This was forewarned in his consideration, in the March and October proclamations, of Maori ‘disposition towards Europeans, and towards Her Majesty’s Government’. FitzRoy noted that:

Permission to purchase land in certain districts, or rather consent being given to waive the Crown’s right of pre-emption in certain limited places, is a power that may be used with the greatest advantage to the colony, as it at once enables the Governor to encourage those natives who treat the English well and adopt our laws, while it enables him to place under a ban, as it were, those tribes who act diäerently.³⁸

This use was put into practice in January 1845, when FitzRoy proclaimed that he would not consent to waive the Crown’s right of pre-emption over any land belonging to the Kawakawa or Whangarei tribes, or to any tribe that might assist or harbour chiefs Parehoro, Mate, and Kokou, until some property stolen from a European in the Bay of Islands (named Hingston) was returned, süicient compensation made, and the chiefs ‘delivered up to justice’.³⁹

FitzRoy reported that the foundation upon which British authority rested in New Zealand had been secured by removal of customs and pre-emption restrictions. But he also felt that the peace of the country would only be maintained if the inëuence of principal chiefs was upheld as much as possible and if the military and the naval force was strengthened.⁴⁰ These sentiments closely resemble those of Clarke, expressed in March 1846, after Grey announced that the Protectorate was to be disbanded.⁴¹

6.5 The October Pre-emption Waiver Certificates and Deeds: The Results

Under the 10 October 1844 proclamation, 192 certiãcates were issued waiving the Crown’s right of pre-emption over around 99,528 acres.⁴² The waivers ranged from 13 perches to 3000 acres, but many purchasers submitted a series of applications

38. FitzRoy, ‘Memorandum on the Sale of Land in New Zealand by the Aborigines’, 14 October 1844, encl 2 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 404

39. Proclamation, 8 January 1845, BPP, vol 4, p 542

40. FitzRoy to Stanley (confidential), 19 October 1844, BPP, vol 4, p 412

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

42. These are waiver certiãcates for olc 1/1073, 1/1082–1084, 1/1091–1093, 1/1097–1099, 1/1102–1103, 1/1113–1114, 1/1117, 1/1121, and 1/1123–1299, NA Wellington. This list includes the three olcs (1/1073, 1/1126 and 1/1179) which received certiãcates after 10 October 1844, but were dealt with under the March waiver proclamation. The 15 olcs listed (above) between 1/1073 and 1/1123 are interspersed throughout the 10-shilling-an-acre waivers. Some appear to be listed there to be linked to earlier waivers in favour of the same claimant settler. Others appear to be cases where the waiver application pre-dated the 10 October proclamation but the certiãcate post-dated it. These claims are dealt with under the penny-an-acre proclamation.

6.5.1 Right of Pre-emption and Fitzroy's Waiver

for adjacent areas of land, or applied for adjacent areas for each individual family member, pushing up their claim to waivers for areas of around 2500 to 4500 acres.⁴³

6.5.1 Acreages purchased

With the above in mind, almost three-quarters of the certificates issued under the penny-an-acre proclamation were for waivers of between 100 and 1000 acres; around a quarter were for waivers for areas less than 100 acres; and a small number were for waivers for areas between 1000 and 3000 acres (see § 5). This was despite FitzRoy's December 1844 clarification (see below) that by the proclamation's allowance of waivers over 'limited portions of land', he meant 'only a few hundred acres'.

6.5.2 Certificates issued

Around two-thirds of the certificates under the penny-an-acre proclamation were issued from December 1844 to March 1845. Only a small number were issued before December 1844. The rest of the penny-an-acre pre-emption waiver certificates were issued after March 1845, with the last certificate issued in November or December 1845.⁴⁴

6.5.3 Areas of purchase

Over three-quarters of the certificates under the October 1844 proclamation were for land around the wider Auckland area – including the islands, such as Waiheke, linked by sea and tribal rights, around it. Many of these 'Auckland' certificates were for blocks around the Waitemata at Riverhead, Rangitopuni, Lucas Creek, Paremuremo, and Te Whau. Nearly as many were for land around the Manukau at 'Manukau', Three Kings, Onehunga, Papakura, Waiuku, and Titirangi. There were still some certificates for Remuera and Epsom land.

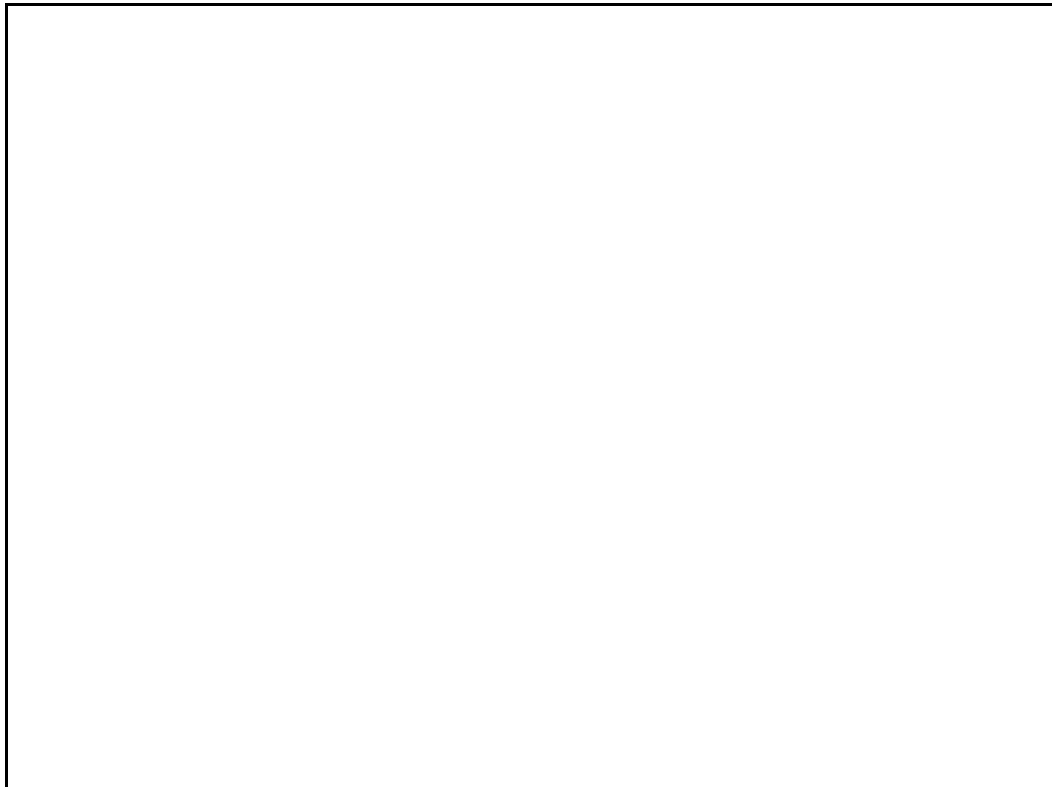
A small number of certificates were issued for land in the Bay of Islands, at Whangaroa, around Ngunguru (near Whangarei) including the Poor Knights and Hen and Chicken Islands, around Mahurangi, in Hokianga, in Kaipara, at Coromandel or Thames, in the Bay of Plenty, and one in the Waikato.

6.5.4 Price paid to Maori

As with the March proclamation purchases, payment for land under the penny-an-acre proclamation was generally in the form of goods or money or both. And again,

43. See for example OLC 1/1137–1139 and 1/1149–1154

44. The last certificate was probably issued in November 1845. Governor Grey arrived in mid-November 1845, and by 10 December 1845 he had directed that no further applications for the direct purchases of land be received (see ch 7).



as with the March waiver, calculations estimating the value of goods given in payment for purchases made may be exaggerated (see above).

The price paid to Maori per acre in land transactions occurring under the penny-an-acre proclamation ranged from 6d an acre to £2 an acre (although one figure, probably inaccurately because it is so far removed from the other prices, puts the maximum price paid at £5 12s per acre).⁴⁵ Around three-quarters of the purchases involved payment of less than 10 shillings an acre. By far the largest proportion of these were payments of over one shilling an acre. Payment within this range (from 1 to 10 shillings per acre) made up over half of the purchases as a whole.

On average only two shillings an acre was paid for the land purchased under the October proclamation. This was far lower than the prices Maori received per acre under the March proclamation. Land at Rangitopuni and Te Whau was the cheapest, ranging from 6d to 1s 8d per acre. Mahurangi land ranged from 10d to 2s 6d an acre (or £5 12s per acre if the above-mentioned maximum price paid is correct). Land in the Coromandel ranged from 10d to 5s 4d per acre. Land on the islands around Auckland ranged from 7d to £1 2s. Manukau land ranged from 6d to

45. The figure comes from a purchase by Frederick Whitaker and Theophilus Heale. These two settlers are recorded to have paid Ngatai (Ngati Paoa) and Ruinga £1 and one pair of blankets to the value of 36s (respectively) for Taungamaro Islet, Matakana (Mahurangi). The purchase was described as consisting of two roods in the pre-emption waiver certificate (H H Turton, *Maori Deeds of Land Purchases in the North Island of New Zealand* (Turton's Deeds), Wellington, Government Printer, 1877, vol 1, part ii, p 440; see also olc 1/1288, NA Wellington). These figures were taken from 50 October proclamation waiver claims in which both acreage and price paid were available.

6.5.5 Right of Pre-emption and Fitzroy's Waiver

£1 2s 7d an acre. And Remuera land remained the most sought-after (expensive), ranging from 1s 5d an acre to £2 an acre. Calculating whether prices fell or rose during the October proclamation period is contradictory. There was a range of prices throughout.

6.5.5 Deeds signed

As with the March waiver deeds and the March proclamation, some of the deeds for land covered by October pre-emption waiver certificates were signed prior to the October proclamation.⁴⁶ Obviously these also preceded the issuance of their pre-emption waiver certificates. Of these deeds, three were even signed prior to the March proclamation, suggesting that perhaps the purchasers, who had obviously followed the advice of the *Southern Cross*, had waited until the fee for a waiver was favourable.⁴⁷

But the majority of deeds recorded were signed between October 1844 and March 1845, with a few purchases being made between April and August 1845 and a small resurgence in purchasing occurring again from September to December 1845 (with Governor Grey's arrival imminent).⁴⁸ Generally, only one purchase occurred per month between then and the final two deeds signed in September 1846.

A number of purchases involved subsequent payments or confirmations of earlier agreements.⁴⁹ Most of the subsequent payments were made within the above general time period. But one involved further payment in October 1846, another in June 1847, and another in July 1858. These may have come about through the Matson and Bell inquiries, set up to (amongst other things) grant land held to have been validly purchased under the pre-emption waiver proclamations (see below).⁵⁰

6.6 The Protector's Role

Bishop Selwyn was one person resident in New Zealand who did not agree with the lowering of the fee paid to the colonial administration. He thought it compromised the Protectorate's ability to assess claims. Commenting to FitzRoy on the penny-an-acre proclamation, he stated:

46. olc 1/1073 (deed June 1844), 1/1082 (the file notes purchase prior to application for certificate in August 1844, possibly April 1844 – FitzRoy would not consent until it was clear there were no previous claims to the same land; by the time the certificate was allowed it was past 10 October and dealt with as a 1d per acre waiver), 1/1093 (deed 20 December 1844, January 1845, and June 1847), 1/1124 (deed September 1844), 1/1126 (deed August 1844), 1/1143 (deed 8 October 1844 and 20 December 1844), 1/1145 (deed May 1844), 1/1179 (deed February 1844, April 1844, and July 1845), 1/1198 (deed September 1844), 1/1237 (deed January 1832), 1/1253 (deed April 1844), 1/1254 (deed September 1844), 1/1262 (deed May 1844), 1/1294 (deed 1842).

47. olc 1/1179 (deed February 1844, April 1844, and July 1845), 1/1237 (deed Jan 1832), 1/1294 (deed 1842)

48. See ch 7

49. See olc 1/1093, 1/1117, 1/1126, 1/1130, 1/1143, 1/1149, 1/1151, 1/1179, 1/1215, 1/1247, 1/1258, 1/1288, 1/1295

50. See ch 7

[t]he reference to the Protector's office could scarcely be more than nugatory, because the abolition of the tax upon such purchases deprived the Government of the resource by means of which a careful enquiry and survey might have been instituted in every case.⁵¹

Failing such careful enquiry and survey, he felt, disputes over boundary and title would arise between Maori and Maori, and Maori and European. He concluded that the proclamation was 'so fraught with mischief' to both races 'that not even the fear of insurrection should have induced me to advise it'.⁵² Was Clarke's assessment scarcely more than 'nugatory'?

6.6.1 Clarke's assessment of legitimate owners

Clarke's assessment of pre-emption waiver applications under the October proclamation proceeded, in many ways, much as it had done with the March proclamation. He continued to interpret his key role as being to assure FitzRoy that he knew of no objection to the sale proceeding if the land in question was bought from the proposed vendor or vendors. A common refrain was that he 'knew of no objection to' the purchase,⁵³ or, for example, that '[t]he chiefs herein named are I believe the proprietors of the land applied for and with their consent I know of no objection to the proposed purchase'.⁵⁴

He also continued to require prospective purchasers to consult particular chiefs. For example, Clarke's comment on James Watt's application for a waiver over a block of land near One Tree Hill, from 'Wanganui' (of Ngati Whatua), was that he knew of no objection to the purchase:

but would suggest to purchasers that in buying of land from Ngatiwhatua tribe, they should consult the Chiefs Kawau and Tiriaua [Tinana?] they being the two principal Chiefs of the Tribe . . .

Watt was 'sent for and informed verbally'.⁵⁵ And as with the March proclamation, Clarke (and Protector Forsaith, who also assessed pre-emption waiver applications in the Auckland district) appears never to have actually objected to a waiver, as opposed to seeking further ratification for an intended purchase, or clarification if a previous purchase had taken place over the same area, or any part of it.⁵⁶

But as the applications came in for pre-emption waivers over land beyond central Auckland, there were a few modifications to Clarke's approach. Perhaps emphasising the relevance of Bishop Selwyn's comment, Clarke appears to have

51. Selwyn to FitzRoy, November 1845, g19/1, pp 96–97, NA Wellington

52. Ibid, p 98

53. See, for example, olc 1/1121, 1/1125, 1/1135, 1/1142, NA Wellington

54. olc 1/1165, NA Wellington; See also olc 1/1082, NA Wellington

55. olc 1/1129, NA Wellington. Watt had actually concluded the deed with Wanganui the day before. See also, olc 1/1141, 1/1149, NA Wellington.

56. See for example olc 1/1082, 1/1117, 1/1126, NA Wellington. In olc 1/1132, NA Wellington, Whitaker withdrew his application because Brown and Campbell had already applied for it and Ruinga had offered it to them.

6.6.1 Right of Pre-emption and Fitzroy's Waiver

been satisfied not to ascertain, in every instance, whether certain individual tribal members, listed as intended vendors, had the right to sell. For example, Clarke noted he had no objection to Jerry Waite's purchase of an area of land at the head of the Waitemata 'provided it is purchased from the Ngatiwhatua chiefs'. But when Waite informed the office that he intended to purchase from 'Horake', Clarke's reply was somewhat vague, noting that he had no objection to Hauraki selling the land 'provided he is the owner of the same, and disposed to sell it'.⁵⁷ Just who was to decide who the 'owner' was, and when this would occur, is unclear.

In another application, made by White and Wilson, for land between the head of the Waitemata River and Kaipara, from chiefs Taierua, Taraia, Tongariro, and Haki (of Kaipara), Clarke noted: '[i]f the grantees named are the right owners of the land I know of no objection to the purchase'. This led Sinclair to question whether Clarke might recommend that the applicants be asked 'for their own sakes' to take measures for 'better ascertaining the real owners'. Clarke's response is very telling. He noted:

[i]f the applicant is satisfied as to having purchased from the right owners there need be no further caution – but he [the applicant] does not state where the land lies nor the name of the tribe from whom he proposing purchasing . . .

When the applicants replied, Clarke was still at a loss: 'I am not acquainted with the chiefs named by the applicant nor am I aware of any objection to this purchase provided the chiefs are the right owners'. It seems that purchasers were to determine who the legitimate owners were. FitzRoy's consent for a waiver over 1000 acres proceeded that day.⁵⁸

Harris and Hataeld also applied for a waiver to purchase land near the head of the Waitemata; but they sought to purchase land from Tautari, Manihera, Wirihana, and Honepihama (Ngati Whatua). Clarke remarked that 'Haimona has been disputing lands in this direction with Tautari. If this forms none of the disputed lands I see no objection to the purchase'. Harris later claimed the land was undisputed and FitzRoy's consent followed.⁵⁹ So, it seems that the purchasers were also to determine whether their application may be for disputed land.

Perhaps Clarke was relying on FitzRoy's proclamations' provision that purchasing was to be at the buyer's risk until allowed and confirmed by a Crown grant. But who would decide who the legitimate owners were when the grant was to be issued is unclear. The proclamation had stipulated that once the deed was lodged at the Colonial Secretary's office 'the necessary inquiries' were to be made, and notice was to be given in the English and Maori *Gazettes* that a Crown title would be issued 'unless sufficient cause should be shown for its being withheld for a time, or altogether refused'. But it seems that no such inquiries were made, or *Gazette* notices published.⁶⁰ What was Clarke to do before a certificate was issued?

57. olc 1/1143, NA Wellington

58. olc 1/1158, NA Wellington

59. olc 1/1155, NA Wellington

60. Proclamation, 10 October 1844, in encl 1, in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 402

His response to his own criticism that the waiver provisions did not adequately deal with disputed land, in this last instance, appears to have been to avoid those lands. If the applicant admitted that the land was disputed, Clarke may not have approved issuing a certificate. Clarke seems to have limited his involvement, in at least these October waiver applications, to ensuring that any 'reserved' land (see below), and possibly also any disputed land, was not purchased.

But in other instances of 'disputed' lands, where a number of groups held an interest, Clarke required the applicants to consult each group. He sometimes altered this requirement after having spoken to an individual chief, without conducting any wider investigation into customary rightsholding. As Alan Ward has commented, with regard to these instances, Clarke 'proceeded in an ad hoc way, making new discoveries about Maori rightsholding [whether correct or not], day by day'.⁶¹

In Charles McIntosh's intended purchase of Waiheke (where McLean had assisted in a boundary 'agreement' dividing the island into three in April 1844) Clarke thought the purchase from Ruinga (of Ngati Paoa) alone was 'unsafe' because there were 'so many disputes about the island'. It is difficult to know whether he was concerned about the safety of Maori or Pakeha, or the community as whole. In that instance (without any reference to the April 1844 'agreement') he thought it necessary for McIntosh to obtain the consent of Ngatimaru and Patukirikiri as well. Clarke also warned McIntosh about Ngatai, who had apparently sold one area of land to two parties. He suggested that McIntosh 'treat him [Ngatai] with much caution'. Later, Clarke's stamp of approval was obtained when the applicant added the acquisition of a 1½-acre island nearby. Clarke then recorded: 'I have seen the Chief Ruinga and his party', 'and have every reason to believe that he [Ruinga] has a right to sell this island to [the] applicant'.⁶² Clarke appears to have been satisfied with Ruinga's claim based on Ruinga's own assurances. But in so doing, he may have set aside Ngatimaru, Patukirikiri, and perhaps other Hauraki-based groups as well; Ruinga (Ngati Paoa) had 'a right', but others may have had rights too.

Paul Monin, who studied all purchases involving the islands of the Hauraki Gulf (and beyond), noted that Clarke 'probably acted correctly enough' in the McIntosh instance, because 'the land in question was Te Patu, a part of the island where Ruinga's rights were strongest'. But Putiki was probably the place on Waiheke where Maori rights were most complex. Yet, a settler named Charles de Witte purchased from Ngati Paoa alone, ignoring the rights of Patukirikiri. Another settler, Adam Chisholm, purchased land there from Patukirikiri ignoring the rights of Ngati Paoa.⁶³ Both instances caused protracted disputes. In the latter case, Monin noted:

the sale went ahead despite Clarke's having full knowledge of Ngati Paoa's opposition to it. In Auckland town, Chisholm had tried unsuccessfully to bully both

61. Alan Ward, 'Supplementary Historical Report on Central Auckland Lands', Wellington, CCJWP, 1992, p 41

62. olc 1/1117, NA Wellington

63. These were olc 1/1140 and 1/1164, NA Wellington.

6.6.1 Right of Pre-emption and Fitzroy's Waiver

Te Ruinga and Wiremu Hoete into consenting to the sale, even physically threatening the latter. Regardless, Patukirikiri went ahead and sold the land to Chisholm.⁶⁴

These instances also confirm the error of FitzRoy's impression that small tracts of land could easily be validly obtained because they would not be plagued by 'the numerous, separate or intermixed interests of various tribes, families and individuals' (which he recognized were present in larger purchases).⁶⁵

Frederick Whitaker's Waiheke claim provided an almost identical instance to that of McIntosh's (above) where Clarke's decision was based on an insufficiently wide investigation. Clarke again thought it unsafe to purchase any part of Waiheke from 'Ruinga apart from the Chiefs of Ngatimaru Patukirikiri'; yet a week later he noted 'I have seen the Chief Ruinga and his party and from him I learnt that the land applied for belongs solely to him therefore I see no objection to the sale'.⁶⁶ In a further instance, the prospective purchaser himself mentioned in his application that 'Mr Clarke has seen the native chiefs and is satisfied that they are the owners of the above land'.⁶⁷

While Clarke does not record how he determined that the chiefs he was speaking to were the legitimate owners, his method was clearly inadequate. His conversations with individual chiefs indicate that he was perhaps more involved day to day with Maori than his brief comments imply. But they also confirm that he did not pay due attention to the complexity of Maori land rights, sometimes seeming to actively ignore them altogether (such as Chisholm's case above). Yet, at other times, when dealing with disputed land, Clarke did recognize multiple Maori rights in the land under transaction. Monin cites John Brigham's purchase on Waiheke, where both Ngati Maru and Ngati Paoa were involved.⁶⁸

Clarke's acceptance of individual chiefs as vendors, without requiring wider consultation with the iwi as a whole, has already been illustrated (above). In fact, it appears he may have actively encouraged land transactions on this basis in another way as well. Monin, for example, has pointed to 'some cases' where 'the chiefs, as individuals, were invited to Auckland for negotiations at the Protector's office, at the expense of the hopeful European purchaser'.⁶⁹ And Davis's description (above) of negotiating 'between parties at my own residence, or elsewhere, after office hours', indicates that this method may not have been uncommon.

64. Paul Monin, 'The Islands Lying Between Slipper Island in the South-East, Great Barrier Island in the North and Tiritiri-Matangi in the North-West', report commissioned by the Waitangi Tribunal, December 1996 (Wai 406 rod, doc c7), p 53

65. FitzRoy's impression was that small tracts (of up to 100 acres) would easily be obtained, whereas larger tracts (perhaps exceeding 1000 acres) would entail 'very great trouble, patience and expenditure of time . . . besides an accurate knowledge of the native language, or the employment of a good interpreter'. A valid purchase of an area a tenth the size of those claimed by the New Zealand Company, he thought 'would be quite impossible' (FitzRoy, 'Memorandum on the Sale of Lands in New Zealand by the Aborigines', 14 October 1844, encl 2 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 404).

66. olc 1/1132, NA Wellington

67. olc 1/1128, NA Wellington

68. See olc 1/1216-1218, NA Wellington. He also cited McIntosh's purchase of Pakatoa (a March proclamation waiver) where Ngai Tai and Ngati Paoa sold land (olc 1/1116, NA Wellington).

69. Monin, p 54

In a small number of cases it seems that Maori themselves applied for a waiver. (This is interesting, considering Governor Grey's (unrealised) waiver proposal had Maori applying for waivers.)⁷⁰ Wiremu Nera had an interview with FitzRoy, regarding 'Wangaroa' land, resulting in the Governor's consent to a waiver. Meurant's diary entries tell of other instances when Maori applied for a waiver themselves, on a Pakeha's behalf.⁷¹ Clarke's involvement in these instances is not clear.

In October 1845, McLean wrote what appears to have been a draft letter (from the Wesleyan mission station at Waimate) to Clarke, asking him for:

advice respecting the course I have to pursue with land purchasing or leasing from the Natives[,] or whether I have anything further to do with it than sanction or disapprove of either as circumstances admit, or rather as the justice and equity of the proceeding will devise, leaving the purchasers to enquire into the particular claims and make their own bargains instead of subjecting the Protector to the incompatible duty of parleying and bargaining on behalf of the settlers which would be in direct contradiction to your instructions and advice as well as highly injurious in its effects[,] the natives would at once come to the conclusion that their Protector endeavoured to take advantage of them in their dealings rather than see them have a plentiful utu . . .⁷²

In one or two instances, McLean had 'assisted Settlers in getting on their land and partly affected [sic] the purchase of 30 acres for one'. The issue was evidently just arising in some areas of the country when already the Colonial Office had decided to recall FitzRoy, and to discontinue his pre-emption waiver scheme.

6.6.2 Reserves

FitzRoy and Clarke ensured that land be reserved from purchase for Auckland Maori between 'Tamaki road and the sea to the northward' in the March proclamation. As noted above, this provision, which stipulated that pre-emption would not be waived over that area, was extended in FitzRoy's October proclamation to encompass 'any land reserved for the use of aboriginal natives' (see above).⁷³ Clarke appears to have sought such a 'reserve' to the east of Auckland, around Thames, when waiver applications spread more widely under the penny-an-acre proclamation. Clarke wrote to Edward Shortland,⁷⁴ instructing him to ask Taraia, Te Awhe, and the other Thames natives:

70. See ch 7

71. Edward Meurant, 5 and 7 March 1845, diary and letters, ms-1635, ATL Wellington

72. McLean to Clarke, 24 October 1845, McLean papers, ms-copy-micro-535, reel 045, folder 215, ATL Wellington

73. Proclamation, 10 October 1844, in encl 1 in Fitzroy to Stanley, 14 October 1844, BPP, vol 4, p 402

74. Edward Shortland was employed as Protector of Aborigines, Eastern District, in August 1842. In mid-1843, he was sent to the South Island to assist Commissioner Godfrey, but returned to the Eastern District position in early 1844. He resigned in August 1845 (Peter Gibbons, 'The Protectorate of Aborigines, 1840-1846', MA thesis, Victoria University of Wellington, 1963, fol 22-26).

6.6.2 Right of Pre-emption and Fitzroy's Waiver

What reserves they propose making for themselves and their families in the Waihou district, ascertain whether they are sufficient for their present and prospective wants and having satisfied yourself thereof you may proceed to inform the natives that His Excellency the Govr will not object to waive the Crown's right of Pre-emption over such portions as they may be disposed to alienate they having first made ample provision for themselves and families.⁷⁵

He may have required other (district) protectors to do the same. This approach is consistent with that already apparent in the March proclamation. Although it is not clear whether Clarke consulted Auckland Maori about reserving the land between Tamaki Road and the sea from purchase, he did ensure that the area was exempted from purchase prior to any pre-emption waiver certificates being issued in Auckland. It seems that Maori, Maori and the protectors, or perhaps just the protectors, were to isolate what should be so 'reserved' (presumably including pa, urupa, and the land about them, and any land required by Maori for their 'own' use). And the protectors were to assess whether the 'reserves' chosen were sufficient for the present and prospective wants of the Maori concerned. Interestingly, in stating that the Governor would not object to waive pre-emption once the 'reserves' had been identified, Clarke makes it clear that FitzRoy's consent was a mere matter of form.

In at least one instance, Clarke noted, in his comment on the waiver application, that he had had a request from a chief to reserve land from sale. Harris and Hataeld's application for a waiver over land near the head of the Waitemata led Clarke to remark:

The chief Haimona has made a request that land in this direction should be reserved for himself and the Ngatiwhatua living at Kaipara. If this land does not include a place called 'Pitoitoi' and the landing place of natives in going to and coming from Auckland, to Kaipara, I see no objection.⁷⁶

Again, Clarke did not investigate the matter himself, but relied on the purchasers to state whether the land included these places (presumably at their own risk).⁷⁷ A few days later, the applicant informed Clarke that the land was to the upper side of the (Kaipara) landing place, not including it or the dragging place (Pitoitoi) which 'the natives having reserved that part referred to for their own use'.⁷⁸ Obviously, there was some use made (at least by Maori) of the provision that waivers would not be given as a general rule over land required by Maori for their 'own' (or present) use. As with the March waiver applications, Clarke did not independently assess whether individual applications included pa, urupa, or the land about them, or land

75. Clarke to Shortland, 26 November 1844, George Clarke, letters and reports, ms-0288, folder 1, Hocken Library, Dunedin

76. olc 1/1155, NA Wellington. See also 1/1158, na Wellington

77. This indicates that Clarke did not, as the Ngai Tahu Tribunal has suggested would be required in Crown purchases, ensure that the land which the Maori owners wished to retain 'by express exclusion from a proposed sale, or by way of reserves out of land agreed to be sold' was 'sufficiently identified' (Waitangi Tribunal, *Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, vol 2, pp 240-241).

78. olc 1/1155, NA Wellington

required by Maori for their ‘own’ use, except if, as in the above October waiver application, ‘reserves’ of such areas had been requested (or made) prior to the application.

There are similarities between Clarke’s broad-brush approach to ‘reserves’ and to boundary ‘agreements’. Each was to be conducted prior to, and separately from, the day-to-day assessments of individual pre-emption waiver applications. And each was generally assisted by either a Protector or an interpreter attached to the Protectorate. The concurrence of each in relation to Clarke’s key duties, inherited after December 1842, has already been noted (see above).

But each also appears to have overridden some of the intended protective provisions in FitzRoy’s proclamations. We have already seen that Clarke’s cursory, broad-brush, approach alone was not sufficient to adequately identify and give effect to legitimate ownership. His broad-brush approach was also insufficient in relation to the ‘reserves’ provisions. The proclamations’ specifications that waivers would not, as a general rule, be given over land required by Maori for their present (or ‘own’) use, regardless of Maori desires to sell them, were not adequately carried out. Monin has noted, of the pre-emption waiver purchases of islands, or areas of islands, in the Hauraki Gulf:

The total area of land alienated through waiver purchases was insufficiently large to have much effect upon the overall resource situation of the vendor Maori groups. Locally, however, some effects were significant. The sale by Patukirikiri to Chisholm of Putiki forced Wiremu Hoete, who had been resident there since the late 1830s, to move westwards to Te Huruhi Bay (Blackpool). This was a significant setback for this Ngati Paoa chief who had done so much to facilitate the survival of early Auckland. Indeed, through waiver purchases Ngati Paoa lost the central-southern area of Waiheke, Surfdale to Hekerua to Ostend, their first agricultural base for trade with Auckland.⁷⁹

The lack of adequate procedures in Clarke’s and FitzRoy’s assessments of the waiver applications meant that the intended protective provisions in FitzRoy’s proclamations were not realized. For Wiremu Hoete, that lack of protection was immediately felt. So, apart from lands exempted from purchase before pre-emption waiver purchasing took place (and Haimona’s requested reserve of Pitoitoti and the Kaipara landing place appears to have been treated by Clarke as that), the provision that would most ensure Maori retained sufficient resources ‘to be full participants in the projected new economy’ and ‘provide an economic base for the future’ (as the Muriwhenua Land Tribunal has suggested the instructions of the British Government indicate it had in mind) were the pre-emption waiver tenths.⁸⁰

79. Monin, p 55

80. Waitangi Tribunal, *The Muriwhenua Land Report 1997*, Wellington, GP Publications, 1997, pp 389–390

6.6.3 Price paid to Maori

As with the March waiver, Clarke was not concerned with assessing the prices Maori obtained for their lands.

6.6.4 Non-compliance with the proclamation's provisions

The elimination of the fee upon receipt of a pre-emption waiver certificate did not result in any change in the settlers' decision to ensure a deed of purchase was signed before applying for, or obtaining, a certificate. A large number of deeds signed following the penny-an-acre proclamation still preceded the certificate being granted.⁸¹ With no fee upon receipt of the pre-emption waiver certificate, one wonders why. Had they taken the advice of the *Southern Cross* and ignored the proclamation? Was it difficult to organise two meetings with the chiefs? Was it too time-consuming to apply? Probably it was just a practical way for the purchases to operate. It may indicate that the purchasers did understand that FitzRoy intended this order of procedure to allow competitive bargaining, with settlers vying for specific areas of land, and Maori gaining the advantage – and that the purchasers sought actively to avoid such competition.

If they were not yet aware of this, they were made aware of it in early December 1844, when FitzRoy again tried to crack down on non-compliance with the proclamation regulations. FitzRoy instructed Sinclair to issue a notice informing pre-emption waiver applicants that in order to obtain the Governor's consent they must comply 'scrupulously' with all the relevant proclamation's conditions. Sinclair was also to give publicity to some 'explanatory cautions'. These were:

- No waiver would be given if a purchase had been made prior to the Governor's consent being formally obtained in writing.
- Waiving the Crown's right of pre-emption 'merely suspends the right of the Crown, without conferring such right on any other body, unless so specified distinctly (as in the case of the New Zealand Company), and in itself conveys no title to any land'.
- A limited portion of land meant 'not more than a few hundred acres'.
- Only a Crown grant gave legal title and:

any unauthorized occupation of, or intrusion upon land set apart or reserved for the aboriginal natives, or belonging to the Crown, whether owing to any misunderstanding or otherwise, will be dealt with rigorously according to law . . .

- A waiver 'without distinct specification in favour of anybody, has the effect only of opening that portion of land to public competition'. It was therefore 'advisable for those who make application to the Governor for the said right to

81. o/c 1/1093, 1/1129, 1/1132, 1/1134, 1/1135, 1/1137–1139, 1/1140, 1/1141, 1/1148, 1/1150, 1/1151–1154, 1/1158, 1/1161, 1/1163, 1/1165, 1/1167, 1/1183, 1/1215, 1/1217, 1/1222, 1/1235, 1/1246, 1/1256, 1/1260, 1/1262, 1/1288, NA Wellington

be waived, to make their purchases as soon as may be practicable after the consent of his Excellency is obtained’.

- Lists of applications to the Governor to waive the Crown’s right of pre-emption, ‘showing the particulars of each, and stating the answer given by the Governor’ would be ‘published from time to time in the Gazette’.⁸²

All these provisions supported the possibility of greater competition between purchasers, and consequently greater benefit for Maori.

Despite all this, as with the March proclamation, these transgressions do not appear to have resulted in a refusal to give a consent for a pre-emption certificate to be granted.⁸³ FitzRoy did object to consent to a waiver certificate in one instance I came across – but only temporarily. Charles Ring had obviously already purchased land at Mapau from Te Keene and Te Rangi. But a re-wording of the application, to state that the applicant ‘proposed to purchase’ the area from certain chiefs, allowed for his consent to be given – suggesting that FitzRoy’s notice was just show.⁸⁴ It may also indicate that FitzRoy aimed to promote a peaceful and prosperous community.

Governor Grey later criticized FitzRoy’s scheme by alleging that in practice the waivers were ‘done privately in favour of a certain individual, so that no competition did or could take place’. He suggested that:

wherever such right involved the alienation of land, such right should be made a matter of public competition after due notice, formally given, so that all Her Majesty’s subjects might equally avail themselves of their recognised privilege . . .

Sinclair stated, no doubt prodded by Grey, that:

[i]n no case was public notice given by the Government of the Crown’s right of pre-emption having been waived, and consequently competition on the part of the public to purchase, was thereby precluded . . .⁸⁵

Although FitzRoy did not intend certificates to be in favour of an individual, this appears to have been the effect.

Grey also claimed that:

the mode in which the exercise of the Crown’s right of pre-emption has been carried out is neither in form nor extent that which the proclamation and notice set forth as the contemplated mode of proceeding; but is, on the contrary, totally different from it . . .⁸⁶

82. *New Zealand Gazette*, 7 December 1844, notice in encl in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 402–403

83. But as noted above, this is based on information from the OLC files which constitute the record compiled through subsequent inquiries. They would not record instances where a waiver was refused.

84. olc 1/1121, NA, Wellington. The olc files often reveal that a so-called deed post-dating the certificate was in fact based on an agreement and payments made earlier. See for example olc 1/1125, NA Wellington.

85. Sinclair to Grey, 12 October 1847, encl in Grey to Earl Grey, 11 November 1847, BPP, vol 6, [1002], p 14

6.7 Right of Pre-emption and Fitzroy's Waiver

This was, of course, an exaggeration. There was a gap between the intent of the waiver proclamation and its practical application. But Grey did nothing to shorten it.⁸⁷

6.7 Local Response to the October Waiver

Bishop Selwyn's comments (above) were not typical of the response to the October proclamation in New Zealand. An article in the *New Zealander*, in November 1845, better encapsulates settler responses. While it described the March waiver as an 'imaginery [sic] boon', 'clogged' with 'stringent accompaniments' and 'other vexatious unnecessary impediments to amicable arrangements between the Europeans and natives', it considered the October proclamation's fee of one-penny-an-acre to be a mere 'fraction'. While noting its objection to the proclamation's other conditions, the article identified the tenths clause to be the most objectionable aspect of the October proclamation. It stated:

The system of the New Zealand Company, reserving every tenth town allotment and country section, as a native reserve, in the distribution of their lands, we presume was the example followed by the Protectorate here in framing these conditions; but as it will be obviously evident, the cases are widely different. In the one, every tenth portion is reserved:— in the other, one tenth part of each portion is to be conveyed to her Majesty.⁸⁸

It foresaw 'endless confusion' would result 'if this senseless condition is carried out'. Instead, it suggested that Europeans could pay 'an equivalent' in money. And it proposed that if reserves of land were considered indispensable for the future maintenance of Maori, large blocks of tribal land should be prohibited from sale. Of course, this proposal ignored FitzRoy's belief that both extensive reserves and tenths were necessary for Maori (see above).⁸⁹ The article concluded:

But we are of opinion that all restrictions regarding the sale of land by the natives, and the purchase by Europeans, must be very soon put upon a very different system, than that attempted by these two proclamations.

Common sense dictates the future policy and measures,— and recent events declare that all enactments of the local government affecting, or assuming a dictation over the property of the natives, are perfectly nugatory.

The natives will henceforth do as they please with their lands. The Government will neither be able to sell an acre of their own land at twenty shillings per acre,—or to

86. Grey, 'memo', 20 April 1847, encl 3 in Grey to Earl Grey, 19 April 1847, BPP, vol 6, [892], p 33. Note also that Grey implies Maori gave the Queen the right of pre-emption 'to be exercised for the benefit of her Majesty's subjects of both races'. This is rather different from the impression given to the chiefs at the Treaty-signing hui.

87. See ch 7

88. 'Purchases of land from the natives under the proclamations for waiving the right of pre-emption', *The New Zealander*, 8 November 1845

89. FitzRoy, 'Memorandum on the Sale of Land in New Zealand by the Aborigines', 14 October 1844, encl 2 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, pp 403–404