

## CHAPTER 7

# RESTORATION OF CROWN PRE-EMPTION, 1846–62

### 7.1 Stanley's Instructions to Governor George Grey

Stanley had become increasingly concerned about FitzRoy's actions and decided to recall him in April 1845.<sup>1</sup> In Britain, FitzRoy had gained a reputation of 'showing too much respect for native customs. . . . in a manner inconsistent with good order and morality, and with the progress of civilization'.<sup>2</sup> Stanley believed FitzRoy had been wrong to avoid 'a line of policy respecting lands and revenue' unacceptable to Maori for fear of provoking their 'resentment and insurrection'.<sup>3</sup> The appointment of Governor George Grey, in place of FitzRoy, marked a shift in Crown policy, as Barry Rigby notes, 'away from the strictest economy, and towards direct assertion of Crown authority in Maori areas'.<sup>4</sup>

Stanley explained to Grey, in mid-June 1845, that colonisation had been 'forced' upon the British Government by the need to avert 'the evils with which unauthorized settlements of Her Majesty's subjects there appeared to threaten the inhabitants, whether European or aboriginal'.<sup>5</sup> He also stressed the importance of the Treaty, instructing Grey to 'honourably and scrupulously fulfil the conditions of the treaty'.<sup>6</sup>

Stanley emphasised to Grey the need for demarcation of Crown, Maori, and settler lands. He believed this would show the extent of 'surplus' land and make other lands available to be taxed. Stanley argued that 'if the right of pre-emption conceded to the Crown by the treaty of Waitangi, had not been waived on the terms in which it has been, the complexity of the case would have been far less than it actually is'.<sup>7</sup> He continued:

I will not undertake to deny, nor have I evidence to justify me in admitting, that the refusal to waive the Queen's right of pre-emption would have involved the colony in insurrection and war; under this, as under the preceding heads, I am reduced to the

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1. Stanley to FitzRoy, 30 April 1845, g1/13, NA Wellington
  2. Report of House of Commons Select Committee on New Zealand, 29 July 1844, BPP, vol 2, [556], p 10
  3. Stanley to Grey, 13 June 1845, BPP, vol 5, p 230
  4. Barry Rigby, 'Empire on the Cheap: Crown Policies and Purchases in Muriwhenua 1840–1850', report commissioned by the Waitangi Tribunal, March 1992 (Wai 45 rod, doc f8), p 71
  5. Stanley to Grey, 13 June 1845, BPP, vol 5, p 229
  6. *Ibid*, p 230
  7. *Ibid*, p 232

necessity of acknowledging and of regretting that my information is in a state so imperfect as to render it impossible for me to give you, with confidence in their applicability, any positive and specific instructions on the subject of lands. . . . I find no reason to retract the instructions on the subject which have already been addressed to your predecessors. It seems to me that you should still act on them, and carry them into effect, unless you should be clearly satisfied that the attempt would be either impracticable or unsafe. You will not, I am convinced, depart from them on any light grounds, nor fail to transmit to me an early report of the motives of any such procedure.<sup>8</sup>

Grey was therefore given discretion on the subject of land purchase, with the proviso that existing arrangements should be honoured.

In a separate despatch, dated two weeks later, Stanley expounded his displeasure at Fitzroy's penny-an-acre waiver (despite his previous endorsement) and suggested that Grey should not continue endorsing purchases under such a regime:

You will, of course, recognize any sales which he may have sanctioned under his last proclamation, reducing the fee to one penny per acre; but, with my present information, I am bound to say that this appears to me to have been a most impolitic arrangement; and I should earnestly impress upon you the inexpediency of allowing such purchases for the future.<sup>9</sup>

In August 1845, Stanley informed Grey that he believed that the practice of issuing pre-emption waiver certificates under the October proclamation should be discontinued 'as soon as it is practicable safely to do so'. He wished the March proclamation to be clearly limited to the northern half of the North Island, though he preferred its discontinuance also. Stanley told Grey that he favoured maintaining Crown pre-emption and that if possible the Government should revert to the original plan of purchases.<sup>10</sup>

Grey himself was against pre-emption waivers. As Rutherford, his biographer, commented, Grey preferred to keep absolute authority in his own hands.<sup>11</sup> The pre-emption waivers, which fostered independent transactions between settlers and Maori, jeopardised this authority. Within a month of his November 1845 arrival in New Zealand, Grey 'directed that no further applications for the direct purchases of land' be received by the Government until he had 'had time to inquire into the subject, and to determine what line of policy, in reference to the sale of lands, shall be adopted'. He informed Stanley:

I am inclined to think, that it would be most unwise on the part of the Government to waive the right of pre-emption secured to the Crown by the Treaty of Waitangi, as no more certain means of controlling the natives could be found than refusing to

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8. Ibid

9. Stanley to Grey, 27 June 1845, BPP, vol 5, p 233

10. Stanley to Grey, 14 August 1845, BPP, vol 5, p 245. Stanley also suggested Grey might use the Land Sales Act 1842 requiring that settlers pay at least £1 per acre.

11. J Rutherford, *Sir George Grey kcb, 1812-1898; A Study in Colonial Government*, London, Cassell, 1961, p 119

purchase any lands from those who conducted themselves improperly, and in whose intentions of surrendering their lands, no confidence could be placed. I and, moreover, that various complicated disputes have already arisen between the natives and various persons who have purchased lands from them under the terms of my predecessor's proclamation, waiving the Crown right of preemption. . . . I have therefore refused, at least for the present, to sanction any purchases made from the natives by private individuals.<sup>12</sup>

But waiving the Crown's right of pre-emption in favour of the New Zealand Company was a different matter. Stanley had instructed Grey to take measures to assist the New Zealand Company in purchasing Maori land. In February 1846, Grey waived pre-emption in favour of the Company in the entire 'Company districts' as defined in the 1840 agreement between the Company and the Crown.<sup>13</sup> The Crown's desire to encourage land acquisition by the New Zealand Company, and to operate with the Company in colonizing New Zealand, was in marked contrast to its impatience with FitzRoy's general pre-emption waiver proclamations.<sup>14</sup>

In June 1846, Grey gazetted a list of 'penny-acre' waivers totalling around 100,000 acres. He criticized these purchases as having been made 'in a manner which appears to me to have been at once unjust to Her Majesty's subjects of both races, and improvident in the extreme'.<sup>15</sup> Grey claimed that FitzRoy had been coerced to act and that such coercion should not have been tolerated. He also claimed that various Government officers had taken advantage of the proclamation.

Grey's argument that the scheme was unjust to Maori, stemmed from his view that because the waiver was granted to an individual over a particular tract of land, Maori were not able to take advantage of 'competition'. As we have seen, this was not technically correct. Waivers were made over a specific area of land and did not grant any special rights to the individual who received the certificate.<sup>16</sup> But, as also noted above, in practice, Grey's criticism appears to have had some validity. Instead, Grey believed that the waivers should have been 'publicly notified, and the sale should not have been allowed to take place until a certain specified time after the issue of this notice; and even then I think it should have taken place by public auction'.<sup>17</sup> Of course reinstating pre-emption, as Grey did (below), did not provide competition either.

Grey claimed that the injustice of the scheme to settlers was threefold. He believed those who had purchased land from the Crown by public auction, before the waivers, were entitled to know about, and have the opportunity to purchase,

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12. Grey to Stanley, 10 December 1845, BPP, vol 5, p 358

13. Proclamation, 21 February 1846, in Grey to Stanley, 14 April 1846, BPP, vol 5, p 549. Earl Grey sanctioned this waiver in December 1846 (see Earl Grey to Grey, 18 December 1846, BPP, vol 5, p 551).

14. See D Moore, B Rigby, and M Russell, *Old Land Claims*, Waitangi Tribunal Rangahaua Whanui Series National Theme a, July 1997

15. Grey to Stanley, 9 June 1846, BPP, vol 5, p 555

16. *New Zealand Gazette*, 7 December 1844, notice in encl 1 in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, p 403

17. Grey to Stanley, 9 June 1846, BPP, vol 5, p 555

lands being sold near their existing holdings. He thought every settler had a right to a public auction after due notice. And he claimed large blocks of land were going to speculators. Grey complained that the lists of pre-emption waiver applications and the Governor's response, which was to have been published in the *Gazette* from time to time, had never been published and that 'most respectable individuals' were 'wholly ignorant' of the process. He stated that regulations restricting acreage purchased had been evaded and that some land had been purchased with firearms. He believed Maori might resist settlers taking possession of the land purchased. Grey also informed Stanley of a visit he had had from some Waikato chiefs, whom he claimed had been approached by 'landjobbers' who 'had incited them to write a letter to me, asking me to permit them to sell their lands to Europeans, and urging them at the same time to stand up for their rights as chiefs'. Grey claimed these chiefs were in fact ready to 'leave the whole subject in my hands'.<sup>18</sup>

### 7.2 Grey's Notice, 15 June 1846

The Governor resolved to call upon all those who had made purchases under the pre-emption waiver certificates to 'send in all the papers, whether deeds or surveys, connected with their claims, for examination within a period of two or three months, after which time no claims will be entertained'. He notified Stanley of his intention to appoint commissioners to investigate and report on each alleged purchase. And he stated that he would not issue any confirmatory grants on these claims 'except under special and urgent circumstances of justice' until he had received further instructions.<sup>19</sup> This was gazetted on 15 June 1846. It was highly unpopular amongst pre-emption waiver purchasers. The shortage of surveyors meant that few of the purchasers could meet the requirements.<sup>20</sup>

Grey then announced to settlers that no further pre-emption waivers, under Fitzroy's scheme, would be granted. But he would:

endeavour to devise and introduce some system by which lands the property of the natives may be brought into the market, under such restrictions as are required by the interests of both races . . .<sup>21</sup>

He meant to return to the system of Crown purchasing of Maori land, which he could do because of the increased funds now available to his administration (as opposed to those which had been available to his predecessor). But he believed an interim arrangement would be prudent. So, six days later, he proposed a system of

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18. Ibid, p 555–557

19. Grey to Stanley, 9 June 1846, BPP, vol 5, p 556–557; see also Grey to Gladstone, 18 June 1846, BPP, vol 5, p 569

20. Sinclair, 15 June 1846, encl in Grey to Gladstone, 18 June 1846, BPP, vol 5, p 570; see also *Southern Cross*, 1 July 1846

21. Grey to Gladstone, 21 June 1846, BPP, vol 5, p 575

direct private purchasing thinking it may be necessary to ‘allay the excitement’ which might result from his halt on FitzRoy’s scheme.<sup>22</sup>

Grey’s proposal, although never adopted, was an interesting one. In keeping with his preferences, it retained Crown control of land transactions. His scheme required Maori to apply to the Government. They were to state the ‘position and extent’ of the land they wanted to sell, and name their own ‘upset price’ for it. The Maori owner (Grey used the singular) would then be required to prove his title to that land. If there was ‘a probability’ of it being sold, it would be surveyed by the Government and offered for sale at public auction ‘after proclamation made in the manner prescribed by the Crown Lands Act’. Settlers were to pay a fee of 15 shillings per acre to the Government, with the full amount to be paid within a month of the sale, when a grant would be issued and the Government would pay Maori for the land. If the land was not purchased at auction, it may have been purchased at any time, on payment of the upset price and Government fees, unless withdrawn from sale by the Maori vendor. Grey aimed at placing Maori in ‘exactly’ the position in which the Crown stood under the Waste Lands Act of Australia – with the difference that fees were paid to the Government. These fees were to be used to pay: first, for the expense of determining Maori title and surveying the land; secondly, for roads and public works, employing as many Maori as was possible; and thirdly, for emigration purposes.<sup>23</sup>

Notably, Grey’s proposed scheme did not involve any protective assessment of Maori interests, it did not make special provision for Maori reserves of any kind (pa, urupa, or the land about them, or blocks of land, or tenths ‘especially for the future benefit of Maori’), nor did it limit the extent of the land sold. But (as noted above) he did not implement his proposal. Grey delayed taking action until he received a response from the Colonial Office.

Grey was, however, unrelentingly scathing of FitzRoy’s scheme. He embarked upon writing, as Rutherford puts it, a series of ‘didactic dispatches designed to bring the Colonial Office to his way of thinking’.<sup>24</sup> Grey’s most vitriolic attack on the entire Church Missionary Society and Protectorate lobby went out in his 25 June 1846 ‘blood and treasure’ despatch. His attack on pre-emption waivers was undoubtedly linked to discrediting both FitzRoy and the Protectorate. He argued, in a letter to Stanley’s successor, Gladstone, that FitzRoy’s system encouraged individuals to purchase land prior to receiving a waiver and that large areas had already been purchased in this way. With a moralistic tone, playing on ideals of the ‘civilizing mission’, Grey stated that land sales led Maori to abandon their economic pursuits, and encouraged them to part with land of which ‘probably he is only part owner’.<sup>25</sup>

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22. Ibid, pp 576–577

23. Grey to Gladstone, 21 June 1846, BPP, vol 5, pp 576–577

24. Rutherford, p 123

25. Grey to Gladstone, 21 June 1846, BPP, vol 5, p 575

### 7.3 Earl Grey's Instructions to Grey

Earl Grey became the Secretary of State for the Colonies, following Gladstone, in mid-1846. As Lord Howick, he had chaired the 1844 House of Commons select committee which asserted the Crown's claim to unoccupied Maori land. On preparing instructions for Grey, in November 1846, Earl Grey sent the Governor several drafts to indicate the principles on which he would reformulate Crown land policy.<sup>26</sup> They reasserted Gipps's 'qualified dominion' doctrine, based on the imperial view that only by continuous cultivation and occupation could Maori create a property right. Since they had not 'subdued the soil' in the vast wasteland areas not used for cultivation and occupation, they could not claim property rights there, and such land should become the Crown's disposable demesne.<sup>27</sup> While aware that Maori may resist Crown claims 'to large tracts of wasteland which particular tribes have been taught to regard as their own', Earl Grey instructed the Governor to 'avoid as much as possible any further surrender of the property of the Crown'. He also reiterated the instruction to survey and register Maori and private land, with the remainder to be declared Crown demesne.<sup>28</sup>

Having received Governor Grey's reports, the Colonial Office appeared convinced by his arguments and endorsed his (15 June 1846) actions in calling for purchase details and in not issuing further certificates. But, Earl Grey explained in his (final) 10 February 1847 instructions, while FitzRoy's waivers had been issued 'plainly exceeding his lawful authority', and while it was therefore necessary to 'disallow and annul' the waivers, it was also necessary to recognize the waiver purchases. He reasoned that even though FitzRoy had exceeded his authority, his acts were done exercising powers conferred by 'Her Majesty's Commission'. It would be inexpedient and unjust to refuse to acknowledge claims made by individuals ignorant of this 'defective authority'. Nor would it be wise to imply that on principle, individuals could not safely rely on their Governors' actions. They should assume it was 'lawfully and properly done' until the contrary was declared to be the case 'by superior authority'. Because FitzRoy had 'disobeyed his instructions', and because his proclamations were so 'manifestly impolitic', the waivers should be disallowed and annulled, but this should not prejudice acts done 'in strict pursuance of the proclamations'. Grey was to refer all claims to the Attorney-General, who was to assess whether or not each claim was 'in exact conformity' with the proclamation under which it was made.<sup>29</sup>

In obvious response to the Governor's claims, Earl Grey also took steps to ensure that land had been purchased from the legitimate parties. He required the Attorney-General to certify that 'the natives from whom the purchases may have been made

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26. Grey to Earl Grey, 27, 31 November 1846, Draft Instructions, November 1846, Grey papers, f35, 36, APL Auckland, cited in Rigby, p 78

27. Royal Instructions, encl in Earl Grey to Grey, 23 December 1846, BPP, vol 5, pp 524–525, cited in Rigby, p 78

28. Royal Instructions, encl in Earl Grey to Grey, 23 December 1846, BPP, vol 5, pp 525–527, 543, cited in Rigby, pp 78–79

29. Earl Grey to Grey, 10 February 1847, BPP, vol 5, p 579

were, according to native laws and customs, the real and the sole owners of the land which they undertook to sell'.<sup>30</sup> Of course, how the Attorney-General was to do this is not clear. (Grey had already decided to disband Clarke's Protectorate.)

All evidence to support a claim was to be produced at the claimant's expense and any purchases made with firearms were to be refused a Crown grant. Earl Grey anticipated that most purchases would not be sustained. But where a grant was to be made, he specified that it should be done with 'no guarantee or warranty of the title to the lands'. The grant would merely transfer any right the Crown held, to the grantee (see below).<sup>31</sup>

It is questionable whether FitzRoy had acted contrary to his authority. While Stanley had not instructed him to waive pre-emption, he had authorized him to consider the matter, and report on it. FitzRoy had questioned him about waiving pre-emption and Stanley did not express disapproval of such a move. Stanley had, in fact, refrained from conveying the colonial land and emigration commissioners' objections to such a move. And he had even suggested two factors which he wanted FitzRoy to ensure occurred if FitzRoy did waive pre-emption. The first waiver, although done without prior sanction, was not without reasonable expectation of its acceptance.<sup>32</sup> But the second waiver was clearly in contravention of an express statement by Stanley, that perhaps the 10-shillings-an-acre fee could be increased.

#### 7.4 The Native Land Purchase Ordinance 1846

Before receiving Earl Grey's 10 February 1847 instructions, Grey took action on the question of land purchasing and pre-emption waivers. His Native Land Purchase Ordinance 1846, dated 16 November, reintroduced the Crown's right of pre-emption, as obtained in the Treaty, prohibiting all private purchases and leases of Maori land.<sup>33</sup> Claudia Orange has commented:

While the move was designed to curtail settler and Maori excesses, there was some truth in the press claim that it was a 'stealthy violation' of Maori rights. Maori had agreed to the treaty mainly because it guaranteed their rangatiratanga over their lands, forests, fisheries, and other prized possessions. The Ordinance subtly undermined that rangatiratanga, it indicated a new firmness in government dealings with Maori in all respects and it paralleled a shift to bring Maori firmly within the compass of British law.<sup>34</sup>

Grey, of course, claimed that, contrary to any fears that the resumption of the Crown's right of pre-emption 'might cause much excitement amongst the natives',

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30. Ibid

31. Ibid, p 580

32. See ch 4; Ann Parsonson, 'Ngai Tahu Claim Wai 27 in Respect of the Otakou Tenths' ('Otakou Tenths'), (Wai 27 rod, doc r35), p 112

33. New Zealand Statutes, 1846, no 19, pp 235-236

34. Claudia Orange, *The Treaty of Waitangi*, Wellington, Allen & Unwin and Port Nicholson Press, 1987, pp 105-106

no such excitement had ensued. He professed: 'I believe that the measure has given general satisfaction to the mass of the native population'.<sup>35</sup> Yet FitzRoy believed that 'no other measure gave more satisfaction to Maori than the waiver of pre-emption did'.<sup>36</sup> If Grey's statement is to be believed, how did he achieve this? What altered Maori opinion on Crown pre-emption? It may have been because Grey's administration was better financed, and so was more equipped to purchase land from Maori who wanted to sell it, and to provide land for settlers who wanted to purchase it – but this would not have been clear for some time. Grey appears to have allowed leasing, and in some cases encouraged squatting, despite its illegality, and this would have given Maori access to revenue from rents and 'grass money'. It may have abated Maori discontent – although Grey's aim, as Alan Ward points out, was ultimately to overcome Maori resistance to Crown purchases.<sup>37</sup> Maori in districts claimed by the New Zealand Company tended to be in favour of Crown pre-emption anyway because they sought protection from the Company's vast claims. Auckland Maori, who had pressed for FitzRoy's pre-emption waivers, had already had an opportunity to sell land directly to settlers. And of course, by the time Grey arrived, the war had already begun in the north. This would have detracted from other concerns. This complicated issue requires further research.

### 7.5 The Land Claims Compensation Ordinance 1846

On 18 November, Grey issued the Land Claims Compensation Ordinance 1846. This ordinance stipulated that a purchaser may submit his claim to a commissioner, who would assess whether the claimant had complied with the relevant proclamation's conditions and the 15 June 1846 *Gazette* notice. If these conditions were satisfied, the claimant would receive a debenture for the amount paid for the land. If the claimant had, in addition, occupied the land by cultivating, building a house, or by fencing, he or she was allowed to purchase part or all of the land at a price of £1 an acre (later reduced to 5s), with a credit of the cost of such 'improvements'. The ordinance's preamble, however, noted that a Crown grant could not safely be issued until it was found that the alleged purchases had been 'made from the true Native owners of such land, and that the rights of all persons thereto have been extinguished'.

Land not sold to such claimants – the 'surplus' – became demesne land of the Crown 'saving always the rights which may hereafter be substantiated thereto by any person of the Native race'.<sup>38</sup> Perhaps the Maori rights referred to here were those rights of Maori who did not receive payment for the land. If a purchase was not confirmed by the commission, there was no 'surplus' to acquire.

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35. Grey to Colonial Secretary, 7 October 1846, g25/2, p 231, NA Wellington

36. Robert FitzRoy, *Remarks on New Zealand*, Dunedin, Hocken Library, reprint/facsimile no 10, 1969, p 35

37. Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland, Auckland University Press, 1995, pp 72–91

38. New Zealand Statutes, 1846, no 22, pp 243–245

Under clause 14 of the ordinance, the claimants retained a right to purchase the ‘tenths’ reserved under the pre-emption waiver proclamations for the sum of £1 an acre also. This sale was a ‘private contract’ with the Crown. The ordinance stated that the tenths were reserved for ‘public purposes’, omitting the addition, in the original provision, of ‘especially the future benefit of the aborigines’. It claimed that ‘such reservations cannot in many cases be conveniently made’. There appears to have been no plan to compensate Maori for the loss of the waiver tenths. The Governor also refused to gazette the Native Trust Ordinance 1844, thereby invalidating it (even though London had approved it). This ordinance set up a trust which, among other things, would have administered the waiver tenths.

In December 1846, Major Henry Matson began his investigation of these claims.<sup>39</sup> The ordinance was not popular with settlers and only a few claimants took advantage of the provisions offered. Grey was disappointed. In April 1847, he wrote to the Colonial Office, explaining that he had hoped that the ‘extremely fair and liberal nature’ of the ordinance would have induced the majority of penny-an-acre proclamation claimants to use the provisions. Grey also claimed that the pre-emption waivers had caused various conflicts between Maori and settlers, and enclosed papers relating to Chisholm’s threatening behaviour towards Te Ruinga and Wiremu Hoete (see above).<sup>40</sup> In a separate memorandum, Grey claimed to have had ‘numerous instances’ brought before him in which Maori had been ‘most cruelly and unfairly dealt with’ by certificate holders.<sup>41</sup> Given Grey’s predisposition to exaggerate such stories to suit his ends, these statements cannot be accepted unreservedly.<sup>42</sup> But Clarke’s hasty approvals, especially in the face of boundary and tribal disputes, suggest that further conflict may well have taken place. This requires more research. As noted above, Grey sought to discredit both FitzRoy and the pre-emption waiver scheme. He would also have sought to provide justification for his next move.

Grey next turned to another measure to resolve the question of pre-emption. He chose to submit the question of the legality of FitzRoy’s pre-emption waiver proclamations to the local courts.<sup>43</sup> Grey claimed that ‘nothing less than [a Supreme Court] decision, formally given, will satisfy many of the claimants that they had not obtained legal rights’ over land purchased under the pre-emption waiver proclamations, and which they could not ‘compel the Government to recognise, and, if necessary, to enforce’.<sup>44</sup>

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39. Matson had commanded the first detachment which came to the Bay of Islands in 1845 and served under Colonel Despard in the northern wars. He was promoted for his services and was the first field officer gazetted to the Auckland militia. In 1849, he became a member of the Legislative Council. He represented the City of Auckland Provincial Council from 1856 to 1861), and was a member of the executive from 1857 to 1858 (see G H Scholefield (ed), *The Dictionary of New Zealand Biography*, Wellington, Department of Internal Affairs, 1840, vol 2, p 73).

40. Grey to Earl Grey, 19 April 1847, BPP, vol 6, [892], p 30; see ch 6.

41. Grey, 20 April 1847, in encl 3 in Grey to Earl Grey, 19 April 1847, BPP, vol 6, [892], pp 32–34

42. See, for example, Michael Belgrave, ‘Pre-emption, the Treaty of Waitangi and the Politics of Crown Purchase’, NZJH, vol 31, no 1, 1997, pp 31–34

43. Grey, 20 April 1847, in encl 3 in Grey to Earl Grey, 19 April 1847, BPP, vol 6, [892], pp 32–34

44. Grey to Earl Grey, 19 April 1847, BPP, vol 6, [892], p 30

### 7.6 *The Queen v Symonds*

*The Queen v Symonds* is described by David Williams as 'a politically contrived piece of litigation between two officials of the Colonial Government which was brought in order to resolve a bitter wrangle within the circles of the settler community'.<sup>45</sup>

The reason for this statement is that the Attorney-General contrived a set of proceedings for the test case. A Crown grant was to be issued to '*some third person*' (emphasis in original) for land comprised within another individual's pre-emption waiver certificate. The person holding the pre-emption waiver certificate was to petition Grey, asking that the third person's grant be set aside 'on the ground that the petitioner had acquired a prior title and that a scire facias may be sued out in the name of the Crown'.<sup>46</sup>

The certificate holder was to plead that the Crown's right of pre-emption over the land in question had been waived in his favour by FitzRoy and that he had purchased the land from the Maori owners before the grant was issued to the third person. In support of the grant, it would be maintained that FitzRoy's pre-emption waiver certificate 'did not in fact waive the Crown's right, and that this right vests in and can be exercised by the Crown alone, thus the precise point would be put in issue'.<sup>47</sup> (The petitioner's purchase of the land, being bona fide, would have been held to have extinguished native title to the land and vested it in the Crown to grant to whomsoever it chose.<sup>48</sup>)

The hearing was set for 4 May 1847, and a judgment was delivered on 9 June 1847. Unsurprisingly, Grey was vindicated. The court found that the Crown grant (held by J J Symonds) was superior to the purchase made under a pre-emption waiver certificate (held by C H MacIntosh). The judgment was based on two principles: first; the Crown is the sole source of legal title and, secondly; the Queen had the sole right to extinguish native title. This latter 'rule' was defined as one 'member' of a wider rule: 'that the Queen has the exclusive right of acquiring new territory, and that whatsoever the subject may acquire, vests at once . . . in the Queen'.<sup>49</sup>

This judgment meant that pre-emption waiver claimants could not stand support in the courts and had to turn to the Government to acquire legal title to lands they had purchased. Grey was satisfied that 'the whole of the claimants under similar waivers of the Crown's right of pre-emption' were now convinced that they had acquired no legal rights by the waivers, and that he 'could not legally issue the grants which they have been so anxious to obtain'.<sup>50</sup>

45. David Williams, '*The Queen v Symonds* Reconsidered', *Victoria University of Wellington Law Review*, vol 19, 1989, p 388. Alan Ward (personal comment) believes that this is too critical and he notes that stating a case at law is a perfectly normal way of resolving a deeply contentious issue.

46. Swainson to Colonial Secretary, 21 April 1847, BPP, vol 6, [892], p 35. A scire facias is a 'Writ to enforce or annul judgement [sic], patent, etc' according to J B Sykes (ed), *The Concise Oxford Dictionary*, Oxford, Clarendon Press, 1976, p 1014.

47. Swainson to Colonial Secretary, 21 April 1847, BPP, vol 6, [892], p 35

48. See ch 3

49. 'Judgment of Mr Justice Chapman' encl in Grey to Earl Grey, 5 July 1847, BPP, vol 6, [892], pp 64-65

## 7.7 The Three Options

Grey had taken the question to court without waiting for a reply from the Colonial Office to his earlier despatches. The court's judgment and Earl Grey's instructions to Grey, when they arrived, were at odds. The court had ruled that those who had purchased land using a pre-emption waiver certificate had no legal rights and must rely on the Government's clemency. Earl Grey stated that because they had acted on the faith that they had a legal right (despite FitzRoy's actions being beyond his lawful authority) their claims rested on a legal right, but that they may expect no mercy from the Crown if they had not strictly complied with the proclamation provisions.<sup>51</sup>

The Attorney-General, William Swainson, advised Governor Grey on the effect of Earl Grey's decision. Swainson outlined a three-step procedure which he thought would be required in investigating a claim under Earl Grey's instructions. He suggested that first, it would need to be proven that FitzRoy's actions, in waiving pre-emption in the case concerned, were in 'strict pursuance' of the proclamation. If this test was passed, then secondly, it would need to be proven that the claimant himself, or herself, had complied strictly with the proclamation. If the claim passed these two stages of inquiry, then thirdly, the claimant would need to produce evidence proving that the land had been purchased from 'the true native owner, or owners, according to native law and custom'.

Although FitzRoy had later defined the meaning of the term 'limited portions of land' in the proclamations as 'a few hundred acres' (in his December 1844 'explanatory cautions' notice), Swainson thought that a less rigid interpretation of Earl Grey's instructions would allow a claim, valid in other respects, to remain so, even if the waiver was excessive. The claimant could receive a grant, but the grant still would not exceed a few hundred ('say 500') acres. The excess would become Crown land. But where the claimant had purchased the land before obtaining the pre-emption waiver, or 'wilfully understated the quantity of land', the claim would be invalid.<sup>52</sup> He also stated that claimants complying with all the conditions could only receive a deed that released any rights the Crown had over the land (as opposed to a Crown grant). Swainson believed such titles would be subject to suspicion in the market, and be liable to 'actions and claims by native claimants'.<sup>53</sup>

Using Swainson's advice, Grey told the Legislative Council that Earl Grey's instructions did not adequately solve the pre-emption waiver problem. He argued

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50. Grey to Earl Grey, 5 July 1847, BPP, vol 6, [892], p 64

51. Rutherford, p 127

52. These were two areas of non-compliance with the proclamations which FitzRoy was particularly concerned about (see ch 6).

53. Attorney-General's report, 7 August 1847, encl 1 in Grey to Earl Grey, 4 December 1847, BPP, vol 6, [1002], p 45. Domett's interpretation of the meaning of this was that 'any grants that, by the Proclamation, the claimants would legally have been entitled to, were only grants barring the right of the Crown, and not excluding or extinguishing the claims of any European or any native whatever' (see Alfred Domett, 'Report of the Select Committee Appointed to Consider and Report as to the Nature and Extent of Outstanding Land Claims and the Best Mode of Finally Disposing of the Same', 16 July 1856, AJHR, 1856, d-21, p 10).

that 'rigid adherence' to the instructions would result in many claimants being unable to make good their claims, much expense and delay, and titles (of those who did comply with all provisions) which would be 'comparatively worthless'. It would be no more a complete settlement than there currently was.<sup>54</sup>

Grey noted that since requesting instructions on waiver purchases, the Supreme Court had given a formal decision declaring that the Governor had no power to waive pre-emption, and the legislature had passed an Act preventing any future land claims. The Crown's right of pre-emption had been resumed already for several months (and, he stated, neither Maori nor European had disobeyed). The sale of arms and ammunition had been prohibited. The Government notice of 15 June 1846 had defined the exact extent of existing claims. And the illegality, impolicy, and injustice of proceedings connected with the claims had been fully recognized by the Government. (Of course, some of these points had been subject to Grey's exaggeration.) Yet Grey argued that each point contributed to the need for a new direction in policy.<sup>55</sup>

This new policy, presented to the Legislative Council on 7 August and gazetted on 10 August 1847, was to give pre-emption waiver purchase claimants three options:

- The claimants could choose to be subject to the provisions of Earl Grey's instructions. That is, their claims could be assessed on whether they were in exact conformity with the relevant proclamation (steps one and two), and whether the Attorney-General certified that the Maori vendors were 'according to native laws and customs, the real and sole owners of the land which they undertook to sell' (step three). This would not result in a Crown grant.
- The claimants could proceed under Grey's Land Claims Compensation Ordinance 1846. That is, they would be assessed for compliance with the relevant proclamation's conditions, and provision of 'all papers, whether deeds or surveys, connected with their claims, for examination within a period of two or three months' from the 15 June 1846 *Gazette* notice. If the purchaser had complied with all these conditions, but had not occupied the land, they would receive a debenture instead of the land. If the claimant had occupied the land by cultivating, building a house, or fencing the land, they would then have the option to purchase the land at £1 per acre (later reduced to 5s), with a credit of the cost of such improvements and the option to purchase the reserve tenths at £1 per acre. The 'surplus' would revert to the Crown 'saving always the rights which may hereafter be substantiated thereto by any persons of the Native race'.
- Or, the claimants could follow Grey's new set of regulations, dated 10 August 1847. The new regulations stipulated that claimants under the 10-shillings-an-acre proclamation, who complied strictly with the terms of the 15 June 1846 *Gazette* notice, would receive 'absolute Crown grants' if their claims, once

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54. Minute, Grey to Legislative Council, 7 August 1847, encl 2 in Grey to Earl Grey, 4 December 1847, BPP, vol 6, [1002], p 46

55. Ibid

investigated by the commissioner, were favourably reported on, and if they paid the remainder of the fees due within a month from the date of the commissioner's report. The grants were to include the reserved tenths (at £1 an acre) where the whole quantity granted did not exceed 200 acres.

The rule would be extended to the penny-an-acre claimants for blocks not exceeding 500 acres (whether cultivated or not), on their paying 5s an acre within a month from the date of the commissioner's report. If claimants had received a waiver for over 500 acres, they would be under the same regulations but the land granted (and on which fees would be payable) would not exceed 500 acres. But this last restriction would not be required of claimants whose land was situated over 20 miles away from Auckland. The remaining title would be Crown land.<sup>56</sup>

Grey's new regulations distinctly specified that in no instance would they be applied, in penny-an-acre claims, should the native title be disputed. Nor would land be granted if it were required for public purposes, but any expenses such claimants may have incurred would be returned to them, and 'some compensation, in the form of land in the village or town' would be made to them.<sup>57</sup>

Concluding his presentation to the Legislative Council, in a further attempt to rally support and besmirch his predecessors, Grey claimed that these measures were based upon his:

most sincere desire to terminate speedily and satisfactorily the almost inextricable mass of difficulties which have arisen with respect to these claims, and, at the same time, from a cordial wish to promote to the utmost the interests of the really industrious settler, with whom I always warmly sympathize . . .<sup>58</sup>

Commissioner Matson was to continue his investigation under the Land Claims Compensation Ordinance 1846, but the resolution of those claims could be made under any one of the above options.

In practice, Matson's report on his inquiry into each case (see below), was passed to the Attorney-General. In cases involving either of the last two options – the ordinance or Grey's regulations – Matson's report included his recommendation. If supportive of the claim, this recommendation was either for a debenture (for a specific amount of money) or a specific acreage (to be granted to the claimant). Matson's records also included the calculation of fees still to be paid. Where he recommended a grant to include the reserve tenth, the fee included a payment of £1 per acre for the tenths land. Based on the information provided through Matson's inquiry, Swainson (sometimes with Sinclair) would either approve, or not approve, of the debenture or the Crown grant being given. He did so on the terms of

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56. Minute, Grey to Legislative Council, 7 August 1847, encl 2 in Grey to Earl Grey, 4 December 1847, BPP, vol 6, [1002], p 47

57. Ibid

58. Minute, Grey to Legislative Council, 7 August 1847, encl 2 in Grey to Earl Grey, 4 December 1847, BPP, vol 6, [1002], p 48

whichever option the claimant chose, noting whether it appeared to be in conformity either with the provisions of the ordinance, or with Grey's 'minute'.<sup>59</sup>

Where Matson's recommendation included the granting of the reserve tenths, Swainson considered whether the reserve tenth should, or should not, be included in the grant. Grey's opinion on this count was also sometimes noted. The reasoning behind the decision is not always stated. In some instances, it appears to have been based on whether the land may be required by the Government for the community as a whole (for example a hilltop, road, or roading reserve).<sup>60</sup> In others, the decision seems to have been influenced by whether the claimant had acted consistently with the 'intentions' of the Government in the pre-emption waiver scheme (for example, whether the claimant had purchased the land prior to obtaining a certificate).<sup>61</sup> These 'intentions', which as noted above provided some protection of Maori interests, were not strictly stated in the proclamations' provisions. But the preamble to FitzRoy's October proclamation had referred to the disregard displayed for the regulations by settlers either purchasing land prior to applying for and obtaining the Governor's consent to a waiver, or 'much understating' the quantity of land proposed to be purchased from the Maori vendors.<sup>62</sup>

Obviously, Swainson approved some debentures or grants despite an inconsistency with the 'intentions' of the Government, otherwise he would not have been considering the reserve tenths provision at all. But in at least one case, where the claimant, William Potter, had purchased the land prior to receiving a waiver certificate, Grey objected to the tenth being granted on the basis that Potter had acted 'in direct violation of the intentions of the government'. Grey only reluctantly recognized Potter's claim at all.<sup>63</sup> Potter had chosen to be assessed under option three (Grey's regulations). This required the case to be determined on whether the purchaser had strictly complied with the 15 June 1846 *Gazette* notice. But it also required that Matson favourably report on the claim, and Matson's terms of reference, under clause 4 of the ordinance, included an assessment of whether the claimant had 'complied with the terms and conditions prescribed' by the proclamation under which the waiver had been given. Some consideration of compliance with the proclamation would have been required, but perhaps strict compliance with the Government's intentions in option three cases was not required by Swainson.

If a claimant chose the first option – Earl Grey's instructions – Matson appears to have made no real inquiry or recommendation, but merely forwarded the report to Swainson (after asking whether the claimant had taken possession of the land and

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59. See, for example, olc 1/1054, 1/1062, 1/1125, 1/1135, 1/1155, 1/1158, 1/1166, NA Wellington

60. See olc 1/1070–1071, 1/1081–1084, 1/1115, NA Wellington. These instances are not clear cases. The hilltop was to be reserved along with the tenth, the road only took part of the reserve tenth (despite both proclamations having separate provisions enabling the Government to take land for roads), and the roading reserve was a swap for another area of the claim, initiated by the claimant, because a Crown road already separated off a portion of the claim).

61. See olc 1/1112, NA Wellington

62. See ch 6; FitzRoy's 'explanatory cautions' notice has already been cited (above) as indicating the Government's 'intentions'.

63. olc 1/1112, NA Wellington

which option he or she chose).<sup>64</sup> Swainson's decision in these cases seems to have been based solely on his consideration of whether the claimant had acted in strict conformity with the proclamation under which the waiver had been given. It appears also to have been based on compliance with the intentions of the Government with regard to the waiver proclamations, such as those specified in FitzRoy's subsequent 'explanatory cautions' notice.<sup>65</sup> In some instances, for example, Swainson stated that because the purchase had been made prior to obtaining a waiver he was 'unable to certify that the act was "in strict pursuance of and under the authority of the Proclamation"'.<sup>66</sup> As noted above, he had advised Grey that, under this option, where the claimant had purchased the land before obtaining the pre-emption waiver, or 'wilfully understated the quantity of land', the claim would be invalid.

In a further case assessed under the first option, Swainson refused a grant on the basis that the 'explanatory cautions' notice had specified that 'a limited portion of land' meant 'a few hundred acres', and the waiver over 1200 acres of land, received by the claimant after that notice, meant that it was not in strict pursuance of the proclamation.<sup>67</sup> He did so, despite having advised Grey that, under this option, he thought a claim valid in other respects would still remain so even if the waiver was excessive, and also that such a claimant could receive a grant not exceeding a few hundred ('say 500') acres.

By including FitzRoy's intentions, which were to have protected Maori interests, as part of his assessment when a claimant chose this first option, Swainson appears to have taken a harsher approach in assessing conformity with the proclamations under Earl Grey's instructions. His consideration of these matters in at least one of the other two options appears merely to have resulted in a claimant not being granted the reserve tenths (see above).<sup>68</sup>

Despite Earl Grey's stipulation that the Attorney-General assess whether the Maori vendors were, 'according to native laws and customs, the real and sole owners of the land which they undertook to sell', Swainson appears not to have assessed customary tenure at all. Had Matson's reports contained more information in these cases, Swainson may have considered the aspects of the commissioner's reports relating to the investigation of title (see discussion of this below). But only Clarke's comment on the original pre-emption waiver application would have been available, unless the claimant supplied further evidence. Swainson does not refer to considering who the real and sole owners were (according to native laws and customs) in his decisions involving first option cases I have seen to date. Yet his advice to Grey, that this was the third step in the process for assessing and granting a claim under Earl Grey's instructions, would imply that where he confirmed a

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64. See, for example, olc 1/1150 (given in payment for the loss of the cutter 'Oropiui'), 1/1154, 1/1162, and 1/1165, NA Wellington.

65. *New Zealand Gazette*, 7 December 1844, notice in encl in FitzRoy to Stanley, 14 October 1844, BPP, vol 4, pp 402–403; see ch 6

66. See olc 1/1150 and 1/1154, NA Wellington; see also olc 1/1165, NA Wellington

67. olc 1/1162, NA Wellington

68. olc 1/1112, NA Wellington

grant, he had considered the matter and found the vendors to be the real and sole owners. But where Swainson's consideration resulted in a grant under this first option, he appears simply to have noted that it was 'in conformity with the Proclamation under which it was preferred'.

The resulting grant was specified to contain 'no warranty of title on the part of the Crown'.<sup>69</sup> This was an obvious drawback in choosing option one. This option was rarely chosen. It was also the only option which did not contain provisions for the settlers to purchase the reserve tenths.

Allowing settlers to purchase the reserve tenths, under the ordinance or Grey's regulations, was clearly contrary to the commitment FitzRoy gave Auckland chiefs on Government House lawns on the day of the March proclamation. The tenths had constituted an important aspect of FitzRoy's policy, outlined to those Maori living in or immediately around Auckland who had attended the hui. FitzRoy had told those present that he had made distinct conditions that one-tenth of all land purchased was to be 'set apart for, and chiefly applied to, your future use, or for the special benefit of yourselves, your children, and your children's children'. He had also emphasised that the Government would look after the tenths for the benefit of Maori and that the tribes would be given a place in the growing settler community. The produce of the tenth, he stated, was to be applied by the Government to:

building schools and hospitals, to paying persons to attend there, and [to] teach you not only religious and moral lessons, but also the use of different tools, and how to make many things for your own use . . .<sup>70</sup>

Yet Grey, through his options for settlers, as Parsonson puts it, quietly discarded the tenths. Despite the fact that FitzRoy had exceeded his 'lawful authority', settlers had been able to rely on the Government's clemency, or be taken to have a strict legal right as long as they had complied with the proclamations. Yet Maori, who may also have relied on FitzRoy's provisions, had no comeback. The tenths could be discarded because, strictly speaking, nothing in FitzRoy's waiver proclamations themselves prevented Grey from discarding them. The proclamations bound the purchaser to make over the land to the Crown, but had not bound the Crown to use the proceeds of the tenths for the benefit of Maori – only 'for public purposes', albeit 'especially the future benefit of the aborigines'.<sup>71</sup> While Grey was willing to take the Government's 'intentions' into account in assessing the settlers' title (at least to the entirety of their claims), he was not willing to do so to preserve the tenths for future Maori benefit. Grey did not apply the proceeds of the tenths in the way that FitzRoy had outlined. He either granted the land to the purchasers, or retained it for the Crown.

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69. See olc 1/1149, NA Wellington. Alice Porter gave this grant to trustees who, wanting a better title, decided to use the power contained in the Land Claims Extension Act 1858 to 'surrender' the land to the Queen and obtain a new grant.

70. '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 198

71. See ch 4; Parsonson, 'Otakou Tenths', p 66



Most claimants who were awarded grants by the commission took advantage of this measure and purchased the tenths. Very little land was retained for Maori use and benefit in Auckland's growing settler community (see § 6). Yet FitzRoy had stated his belief that Maori needed the provision of 'at least a tenth of all lands sold, besides extensive reserves in addition'.<sup>72</sup> Grey, on the other hand, had claimed that the tenths were 'inconvenient'.<sup>73</sup> As Parsonson has queried, given FitzRoy's emphasis on the tenths in his waiver scheme, and given the acreages to which the Maori title had been extinguished, presumably in expectation of tenths, 'one wonders how Grey reconciled this act with his own statements emphasizing the need to act justly toward the Maori'.<sup>74</sup>

Grey did not inform the Colonial Office of his actions until 4 December 1847. On 19 April 1847, he had reported that few settlers had taken advantage of the Land Claims Compensation Ordinance.<sup>75</sup> On 5 July 1847, he had informed the Colonial Office of the decision in *The Queen v Symonds*.<sup>76</sup> Then, on 11 November 1847, he had forwarded some tabulated returns of the pre-emption waiver purchases to the Colonial Office, making no mention of the actions he had taken in August. Grey did, however, continue to make criticisms of the pre-emption waivers.<sup>77</sup>

On 3 December 1847, having received Grey's 5 July report, Earl Grey, in Britain, approved of Governor Grey's resort to 'a fair trial'.<sup>78</sup> But he again stressed the need for equity and justice, favouring any European claimant who acted on the faith of the proclamations. His approval was, however, subject to two conditions. He repeated his instruction that a grant could only be issued if the purchase had been made from 'the real and sole owners of the land', stipulating that every native claimant was to be 'fully satisfied'. He also specified that the European claimant should not pay 'less in all than the established minimum price of land in the colony'.<sup>79</sup> Grey's 4 December despatch to the Colonial Office (enclosing the Legislative Council minutes outlining the three options) was written before this approval was received.

## 7.8 The Matson Inquiry

### 7.8.1 Matson's reports

Matson's inquiry under the Land Claims Compensation Ordinance 1846 involved the investigation of all pre-emption waiver claims.<sup>80</sup> This section is primarily

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

73. New Zealand Statutes, 1846, no 22, pp 243–245

74. Parsonson, 'Otakou Tenths', p 67

75. Grey to Earl Grey, 19 April 1847, BPP, vol 6, [892], p 30

76. Grey to Earl Grey, 5 July 1847, BPP, vol 6, [892], p 64

77. Grey to Earl Grey, 11 November 1847, BPP, vol 6, [1002], p 13

78. Earl Grey to Grey, 3 December 1847, BPP, vol 6, [892], p 35

79. Ibid, p 36

80. Most of the records of his investigation are in the old land claims series 1 at National Archives in Wellington.

concerned with Matson's interpretation of the clauses which may have protected Maori interests. It does not consider his treatment of settler interests.

Under clause 8 of the Land Claims Compensation Ordinance 1846, Matson was required to report:

setting forth the name and address of the claimant, the situation and extent of the land alleged to have been purchased, the evidence adduced in proof of the outlay found to have been incurred under the several heads of expenditure . . . together with the total amount in respect of such outlay to which the said Commissioner shall and such claimant to be entitled.

As noted above, the expenditure referred to included the price or consideration paid to Maori, the amount paid by the claimant for the deed, survey, and other expenses of purchase; and that paid for improvements (including buildings, fences, and cultivations). These were set out in clause 4 of the ordinance as matters into which the commissioner was to inquire.

Consequently, Matson's reports included a summary account from the purchaser, with a description of the land, its acreage, the consideration paid (and to whom), whether the purchaser's possession of the land was undisputed, whether the land had been occupied, what improvements had been made and whether the claimant sought to purchase the reserve tenth. They also included a record of the statements made by a witness or witnesses to the transaction. A witness could be Maori or Pakeha. Many times the interpreter who had been involved in assisting the purchase appeared in this capacity. Witnesses generally confirmed that the plans and deeds provided by the claimant were the originals, that the purchase was fully explained and understood by the vendors, and that the vendors had received, and had appeared fully satisfied with, the payment. Record of confirmation given by the vendor (or vendors) was also made. The vendor generally confirmed that he was the proprietor of the land described and shown on the deed and in the plan; that he had full authority to sell that land; that he had sold it to the pre-emption waiver claimant; for the amount disclosed; and that he was satisfied with the price, which he had agreed to (see below).

The Domett committee, a parliamentary committee reporting on old land claims and pre-emption waiver purchases in 1856, summarised the results of Matson's investigation as follows:

*Ten-shilling Claims* – The greatest part of claims under the first Proclamation may be considered as disposed of. For out of sixty-two original claims, –

- 49 have been settled by issue of grants by Sir George Grey under [the terms of the 10 August 1847 regulations]
- 9 were disallowed for non-payment of fees on certificate of waiver of pre-emption, which therefore could never have been issued; the land affected is about 280 acres in the aggregate.
- 2, of patches, not an acre together, were disallowed, on account of plans not having been sent in.

### 7.8.1 Right of Pre-emption and Fitzroy's Waiver

The only dispute existing about these claims is as to the right of reserving lines of road through the lands.

*Penny-an-acre Claims* – The preserving and exterminating processes had the following effects respectively on these claims.

There were 189 original claims, affecting about 90,000 acres.

53 have been settled by issue of grants by Sir George Grey, under the 5s.-per-acre payment.

21 have been resigned, on receipt of compensation, or debentures, or money.

80 were disallowed, for non-compliance with the requisitions of 15 June, 1846, for sending in plans and surveys.

28 were disallowed, because certificates that the FitzRoy Proclamation had been complied with were refused by the Attorney-General. The particulars of non-compliance are not given in any case in the Attorney-General's reports of the fact.

7 were disallowed or abandoned. Reasons not given.<sup>81</sup>

Neither Matson nor the Domett committee compiled a full list of the acreages involved in the pre-emption waiver claims, nor did they establish exactly how much of the land would revert to the Crown, or how much (if any) would return to the Maori vendors. However, not all claims were surveyed, and these claims would have been accounted for in the 80 that were disallowed for non-compliance with the notice of 15 June 1846 (for not sending in plans and surveys – a requirement of both the ordinance and Grey's regulations), or the 28 disallowed by the Attorney-General. Commissioner Francis Dillon Bell, who investigated the pre-emption waiver claims (and old land claims) a decade later, provided an account of these disallowed claims and the result of his own investigation. But again the amount of land reverting to the Crown was not accurately recorded (see below).

As can be seen from the above, most claimants chose to be assessed under the ordinance or Grey's regulations. Ten-shillings-an-acre claimants fared well – most of them received grants. Penny-an-acre claimants fared less well. Matson disallowed many of their claims because they had failed to submit surveys and plans. Swainson disallowed some because they did not comply with the proclamations. None of the claims appear to have been disallowed because the land was purchased from Maori who did not have a right, or the right, to sell, or on the basis that insufficient payment was made to Maori (see below).

March waiver claimants, with land located close to the centre of Auckland, were the most successful in Matson's inquiry. Their land was valuable and readily occupied. James Rutherford (who chose the ordinance option), for example, purchased three acres from Jabez Bunting (Epiha Putini) of the Ngati Maho tribe at Remuera, south of Tamaki Road. Rutherford's evidence before the commission was recorded as follows:

I have nearly the whole of the land in Cultivation, have been in undisputed possession since the purchase, have [a] House erected on the land and resided on it

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81. Alfred Domett, 'Report of the Select Committee Appointed to Consider and Report as to the Nature and Extent of Outstanding Land Claims and the Best Mode of Finally Disposing of the Same', 16 July 1856, AJHR, 1856, d-21, p 7

myself for a considerable time. Have a man and his wife living on it since that period, and the land fenced. I am desirous of purchasing the reserve tenths in Conformity of the 14th Clause of the Land Claims Ordinance, and have made an application to that effect.<sup>82</sup>

William Turner purchased 24 acres of land on Manukau Road in Remuera (Mt St John), from Wetere. He too took a claim under the ordinance provisions, and Matson recorded him to have said:

I have been in undisputed possession of the land since the purchase, have a man residing on it, a considerable portion in cultivation, and the whole fenced in. I am desirous of purchasing the reserve tenths in conformity with the 14th clause . . .<sup>83</sup>

These claimants complied with all the regulations, and although it may have been costly to have done so, the costs no doubt were outweighed by the market value of the land if it could be given a clear title. The fact that the claimants had occupied the land added to the strength of their claim. They did not carry the stigma of being ‘speculators’. Furthermore, in most of the 10-shilling-an-acre claims examined, the Maori vendors appeared before Matson and gave oral confirmation of the purchase. At least some settlers seem to have covered the expenses of those Maori who appeared before Matson. One claimant complained that it had cost him more to keep Maori witnesses in Auckland for the investigation than his initial outlay.<sup>84</sup> Meurant’s diary entries around this time indicate that he was often employed to find Maori and ensure their presence at the hearings. Vendor confirmation was valuable. In Rutherford’s purchase, cited above, the commission recorded:

Charles Davis sworn as Interpreter. Epiha Putini, alias Jabez Bunting, Principal Native chief of the Ngatimaho tribe being duly sworn, states, I was the rightful owner of the land sold to Mr Rutherford, and described in the Preemption Certificate and Plan now laid before the Court, had full power and authority to dispose of it, received the full consideration agreed on and have no further claim whatever.<sup>85</sup>

### 7.8.2 Matson’s investigation of Maori title and protection of Maori interests

Each of the ‘three options’ given by Grey in August 1847 contained measures to ensure that the land had been purchased from the legitimate owners. Earl Grey emphasised the need to investigate the rights of Maori vendors more than the ordinance. As noted above, he instructed that the Attorney-General was to certify:

that the natives from whom the purchases may have been made were, according to native laws and customs, the real and the sole owners of the land which they undertook to sell . . .<sup>86</sup>

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82. olc 1/1059, NA Wellington

83. olc 1/1070–1071, NA Wellington

84. Hay to Colonial Secretary, 7 June 1842, in olc 1/1240, NA Wellington

85. olc 1/1059, NA Wellington

86. Earl Grey to Grey, 10 February 1847, BPP, vol 5, p 579

The preamble to the ordinance, in comparison, stipulated that no Crown grant could safely be issued until it was found that the alleged purchases 'have been made from the true Native owners of such land, and that the rights of all persons thereto have been extinguished' – although there was no such reference in the body of the ordinance.<sup>87</sup> The third option, Grey's new regulations of 10 August, also provided some reference to determining that the vendors were the correct rightholders. Those regulations stated that where there was 'any probability of the title to the land being justly disputed by adverse native claimants' in the penny-an-acre claims, the Government would not 'extend the rules' to cover it.<sup>88</sup> This provision was probably the reason for Matson's record of the purchasers' statements (above) that they had been in 'undisturbed possession' of the land concerned.

Despite these measures, Grey did not require any rigorous identification of the legitimate Maori owners of the land the claimants alleged to have purchased in the ordinance which set out Matson's terms of reference. This appears to contradict the frequent mention Grey made to the Colonial Office of the danger posed to the Government by settlers purchasing and occupying land from inappropriate parties, and the conviction that many claims could only be maintained by force. But it is consistent with his objections to Earl Grey's requirement that the Attorney-General certify that the vendors were 'according to native laws and customs, the real and the sole owners of the land which they undertook to sell'.

All the same, Matson's reports on claims being taken under either of the last two options included the results of his inquiries into the Maori vendor's title. If Swainson did consider this issue in his assessments of claims made under these two most popular options (although there is no indication that he did), his consideration would have been based on Matson's reports. The effectiveness of Matson's investigation into Maori title, therefore, is particularly important to assess.

Matson interviewed a number of Maori vendors during his inquiry. Typically, like the example above, the vendors gave affirmative answers about the pre-emption waiver transactions under question. For example, in William Turner's purchase from Wiremu Wetere (above), Edward Meurant appeared as a witness. Meurant stated that he 'was present when the Native chief Wetere sold the land described', that he fully explained the contents of the deed to Wetere, and that Wetere had 'expressed himself fully satisfied with having received the full consideration agreed on'. Matson then recorded:

Charles Davis sworn as Interpreter. Wetere, Native chief of Ngatimaho tribe . . . I sold the land described in the Pre-emption Certificates No 12 and 32 and Deed of Conveyance now laid before the Court to Mr Turner. I was the sole proprietor of the land, had full power and authority to dispose of it, have received the full consideration agreed on, and have no further Claim whatever.<sup>89</sup>

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87. New Zealand Statutes, 1846, no 22, pp 243–245

88. Minute, Grey to Legislative Council, 7 August 1847, encl 2 in Grey to Earl Grey, 4 December 1847, BPP, vol 6, [1002], p 47

89. olc 1/1070–1071, NA Wellington

This response was a formulaic one. Interestingly, its contents corresponds with one of Earl Grey's later (December 1847) 'conditions': that a grant could only be issued if the purchase had been made from 'the real and sole owners of the land' and that every native claimant was to be 'fully satisfied' (see above). But it probably actually sought to establish the stipulation in the preamble to the ordinance that a grant could not safely be issued until it was ascertained that the purchase had been made from the true owners and that the rights of all persons had been extinguished.

Although under custom no Maori was a 'sole proprietor' of land, this same mantra is repeated throughout the Matson inquiry files.<sup>90</sup> It is improbable that Maori actually made such uniform statements. Perhaps Meurant and Davis, and the other interpreters, summarised what they had been told in the form Matson required or preferred. But it is more likely, considering the formulaic responses in the claimants' and witnesses' statements also, that Matson created the uniformity himself, stating what he felt was necessary for this section of the inquiry to be satisfied.

This uniformity makes it difficult to assess what Matson's investigation into Maori title actually involved. He may have relied, to some extent, on the supposed accuracy of Clarke's earlier assessments (before the waiver of pre-emption certificate was issued). Whether Matson relied on Clarke's input or not, provisions in each of the three options, as noted above, indicate that he was required to investigate the matter. Yet, just as Clarke had relied (in some cases) on individual purchasers and vendors to state who the legitimate Maori land owners were, so Matson appears to have relied on the vendors' (and witnesses') statements. Matson, like Clarke, appears not to have conducted any significant investigation into the customary ownership of the land concerned. And the content and wording of his records indicate that his understanding of Maori land tenure was deficient.

Maori tenure was, and is, very complex. The movement of iwi over Auckland land around 1840 (above) was the outer manifestation of this complexity.<sup>91</sup> Anne Salmond and Alan Ward have stressed that understanding the nature of customary tenure is essential to any examination of sales to Europeans.<sup>92</sup> Michael Belgrave has pointed to the 'skewing' of the colonial administration's conclusions, as a result of the 'overriding intention' in identifying legitimate ownership being 'to recognise in order to extinguish'.<sup>93</sup> This is aptly shown by Angela Ballara, who has provided examples of the way the evidence presented to the Maori Land Court gave a highly selective and politically determined view of customary rights.<sup>94</sup> She has shown, as

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90. In other instances, vendors were recorded to have stated that the tribe were the rightful owners (see olc 1/1116-1117, NA Wellington); or that the vendor had acted with the permission of, or on behalf of, the principal chief of the tribe, who had full power and authority and gave his consent to the sale (see olc 1/1120-1121, NA Wellington).

91. See ch 5

92. Anne Salmond, 'Tipuna: Ancestors in Maori', paper delivered at the conference of the Australian Society of Anthropologists, University of Newcastle, 1988; Alan Ward, 'A Report on the Historical Evidence: The Ngai Tahu Claim, Wai 27', report commissioned by the Waitangi Tribunal (Wai 27 rod, doc t1).

93. Michael Belgrave, 'The Recognition of Aboriginal Tenure in New Zealand 1840-1860', paper presented to the American Historical Association, 1992, p 12

94. Angela Ballara, 'The Origins of Ngati Kahungunu', PhD thesis, Victoria University of Wellington, 1991

Belgrave states, that the process 'simplified and ossified an extremely flexible and complex system of customary rights'. Belgrave summarised:

Rights were based on whakapapa (genealogically based tradition) and on complex networks of hapu (family groups) and residential communities. Interests existed at different levels, those to use eel weirs, rat runs, weka (a native woodhen) grounds were often held by individual families. But on another level other groups had rights to share in these resources either by distribution or through reciprocal gift exchange. Rights could be diminished by a failure to exercise them, by migration or by conquest. Political authority rested with local communities, but they in turn coalesced and divided as the need arose. Leadership was held by senior rangatira (chiefs) who could speak for a cluster of hapu or communities. Authority was based on breeding but rose and fell on performance.

Migration, intermarriage and conquest layered new rights over old and gave new complexity to the arrangements between and within communities. This process was heightened in the 1820s and 1830s as different tribes exploited the advantage that European crops and muskets provided. Hapu joined into larger social groups for defense and to raid their neighbours. Tribes migrated to new parts of the country, overwhelming the existing inhabitants, pushing them in turn to new regions. Sometimes these invasions were no more than raids for slaves or bounty or to avenge old grievances, but in other cases conquest was followed by settlement . . . [and] claims to ownership on the lands over which they had raided . . .<sup>95</sup>

Yet Matson's bland records show none of this complexity. Occasionally he was given evidence suggesting that the land in question was disputed. But he does not appear to have followed this up. For example, in the sale of 405 acres by Katipa to E Foley, Katipa told the commissioner that '[t]his land belonged solely to me and if the Native Chief Wetere, or any other makes any claim, do not believe them, send for me, and bring me face to face'.<sup>96</sup>

Matson did not inquire whether any grant included pa, urupa, or land about them; areas which FitzRoy's proclamation had specifically noted would not receive a Crown grant. Nor did he inquire whether Maori vendors retained sufficient land for their present and future needs. Grey did not require this of the commission, although it was something FitzRoy had promised Maori on Government House lawns and spelt out clearly in the pre-emption waiver proclamations.<sup>97</sup> Matson's task was limited to assessing settler claims under the proclamations, and to recommending the disallowance or settlement of those claims.

Matson does not appear to have cancelled a purchase because of insufficient payment, although some of the prices paid were obviously inadequate in Maori eyes, and the resale of some of the land purchased by Pakeha claimants under the waiver proclamations resulted in large profits.<sup>98</sup> Again, Grey did not require this of the commission, although Earl Grey stipulated later in December 1847 that every

95. Belgrave, p 13

96. o/c 1/1145, NA Wellington

97. See chs 5–6

98. See, for example, o/c 1/1052, 1/1062, 1/1064, 1/1067, 1/1074, 1/1095, 1/1120, 1/1148, 1/1189, 1/1200, 1/1213, 1/1256, 1/1277, NA Wellington

Maori claimant was to be ‘fully satisfied’ (see above). Matson did at times work to ensure that Maori were actually paid what was originally agreed to (see above) – but this was not making an assessment of sufficient payment. Other times Matson seems to have passed over cases where Maori did not receive even the agreed payment.

For example, Thomas Jackson purchased Puketuhi Island from Keene of Ngati Whatua for ‘five pounds cash and 10 blankets’. The island was then sold to H Weeks for £200. A house was built on the island and Weeks employed ‘a man’ to reside and no doubt work there. Kawau, of Ngati Whatua, also appeared before the commission. He stated that Keene had sold the land with his full permission and that he did not dispute the sale. But he also said that the payment received was ‘a very little payment’.<sup>99</sup> Matson awarded a Crown grant to Weeks for 479 acres. The remaining 859 acres appears to have gone to the Crown as ‘surplus’. Despite being informed of the original sale price, the resale price, and being told by the Maori vendors that the consideration was poor (and being required by clause 7 of the ordinance to be ‘guided by the real justice and good conscience of the case’) Matson issued a grant. In another sale, completed in 1846, the Maori vendor did not receive full payment for over five years, although he complained to Matson in 1848.<sup>100</sup> Matson approved the purchase without ensuring the outstanding money was paid.

It is difficult to know what Maori understood they were aiming before Matson. There was most probably a difference in understanding between Maori and settlers over the nature of a sale, although those who participated in the pre-emption waiver sales in Auckland in 1844 and 1845 may have better understood English notions of sale than those living outside the region. But whether they were conducted on the basis of an entirely British understanding is another matter. Ongoing relationships may have been part of some of the transactions, perhaps especially where boundaries were loosely specified. This may also have been so where sales would require Maori to leave their own residences, or where sales required Maori to abandon key tribal resource or strategic areas.<sup>101</sup> Certainly some purchases involved subsequent payments. This may suggest a continuing relationship between vendors and purchasers (except, perhaps, if those payments resulted from Matson’s or, subsequently, Bell’s inquiry).<sup>102</sup> In cases where the boundaries were clearly given, and the deeds were written and signed in Maori, and conveyed clear ideas of permanent alienation, Maori may have entered on the basis of the English understanding. But irrespective of whether ‘sales’ were understood to be exclusive and absolute possession, they were the means by which Maori built relationships with settlers. Social and economic benefits followed with marriage, trade, and other reciprocal exchanges – maybe even social rights and obligations, as well as a right to the land, were conveyed.

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99. o/c 1/1256, NA Wellington

100. o/c 1/1284, NA Wellington

101. See ch 6

102. See, for example, ch 6 (6.5.1(5))

In a number of instances Maori objected to the Crown's assertion of rights over 'surplus' land which had not been granted under Grey's 'three options'. Alan Ward explains that:

when the waiver purchases by Chisholm, Hart and Hay were disallowed by the Crown the Maori vendors from Ihumatao and Papakura did not recognise the Crown's right and interrupted the Crown's surveyors on the land in 1851. Ligar [the Surveyor-General] required 'repeated interviews' and additional payment before he would make any progress. . . . [T]he taking of Crown surpluses in south Auckland, especially in regard to the Chisholm, Hart and Hay purchases was resented by Maori at the time and it is very doubtful if the actions taken by Ligar adequately addressed the Maori complaint.<sup>103</sup>

The *Southern Cross*, which publicised similar cases, perhaps with intentional naivety, asked:

How can he [Grey] be sincere in his professions to maintain a Treaty that guarantees to the natives the undisturbed right to lands and forests, while he assumes and exercises a proprietary right over lands that the natives have not alienated to the Crown?<sup>104</sup>

No record has yet been found, in the research done for this report, of Maori objection to the settlers' purchases of the 'reserve tenths'. Maori objections to the results of the Matson inquiry centred on the question of surplus lands (above). It may certainly have been difficult, with poor surveys and the wholesale acquisition of 'surplus' land, to identify what had happened to FitzRoy's promises of tenths. Perhaps, as FitzRoy had stated that the tenths were to be vested in the Crown, Maori instead remembered his promise of schools, hospitals, and services, which the 'produce' from the tenths, managed by Crown officials, was to be used to provide. Similarly, the question of which land was reserved by the Crown from purchase or granting, as FitzRoy specified for pa, urupa, and land required by Maori for their 'present' or 'own' use, does not make a significant appearance in the records.

### 7.9 The Domett Committee and the Land Claims Settlement Act 1856

In 1856, the parliamentary committee chaired by Alfred Domett reported on the old land claims and pre-emption waiver purchases. It is referred to as the Domett report.

Domett did not support Matson's inquiry, criticizing the disallowance of the majority of claims because of the failure to send in plans by the deadline of 15 September 1846 (within three months of the 15 June 1846 *Gazette* notice). The committee argued that this was unfair and unjust to settler claimants. It

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103. Alan Ward, 'Supplementary Historical Report on Central Auckland Lands', Wellington, CCJWP, 1992, pp 71–72

104. 'Native land agitation', *Southern Cross*, 16 September 1848

recommended a second investigation of the ‘unresolved’ pre-emption waiver purchases and old land claims. These recommendations were adopted in the Land Claims Settlement Act 1856.<sup>105</sup> The Domett committee appears not to have considered the interests of the Maori vendors. It recognized the need for final settlement of settler claims. Since the Matson inquiry the land had been left in ‘uncertainty of ownership’.<sup>106</sup> Some of the settlers with disallowed claims may have continued to live on the land they had purchased from Maori. But Bell’s comments (below) suggest that this land, left unsurveyed, would have reverted to Maori ownership (at least in theory).

The provisions for further investigation and settlement of pre-emption waiver purchases under the Land Claims Settlements Act were sections 29 to 31. Section 29 provided that a claimant whose claim arose under the 10 October 1844 proclamation, for which no grant or compensation had yet been given, was to pay between one and five shillings an acre for every acre of land to be granted, the amount per acre to be as close as possible to one-fourth the estimated value of the land. Section 30 provided that no grant could be greater than 500 acres, but commissioners could grant up to an additional 500 acres as compensation for damage sustained as a result of non-settlement of the claim, provided that did not make up more than the original claim. Section 31 stipulated that penny-an-acre claimants were to pay between one shilling and £1 per acre for any land granted as compensation. Again, the amount per acre was to make the payment as close as possible to one-fourth the estimated value of the land.<sup>107</sup>

The Act was designed to aid settlers who had not received compensation under the Matson inquiry. And as in previous Government investigations, any ‘surplus’ land above that awarded to the claimant would revert to the Crown. The Act was also designed to encourage surveys. It offered claimants a generous compensation scheme to complete such surveys. Section 44 provided that an allowance would be made in land for the charges of surveyors at the rate of one shilling and sixpence per acre; and that an additional quantity of land would be granted in compensation in respect of the allowance at the rate of one acre for every 10 shillings paid on account of such charges. This meant that the Crown would acquire less surplus, but the land would be surveyed. The survey-compensation mechanism may have tempted settlers to exaggerate the extent of their now 10-year-old claims. The greater the cost of survey and area surveyed, the greater the area of land given in compensation under the Act.

Section 46 provided that if a surplus was not available in a claim to provide compensation land, the Crown was to award other land, either from lands set aside specially for such purposes, or out of the wastelands of the Crown. Section 48 provided for the satisfaction of any opponent to a claim, except if those opponents

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105. AJHR, 1856, d-21, p 10

106. ‘Despatches from the Colonial Secretary to Superintendents of Provinces Relative to the Disallowance of Provincial Laws’, AJHR, 1858, a-4, p 13

107. Land Claims Settlement Act 1856, BPP, vol 10, pp 614-621

## 7.10 Right of Pre-emption and Fitzroy's Waiver

were 'of the native race or a half caste'. No doubt this provision was an attempt to resolve overlapping settler claims.

No serious consideration appears to have been given to Maori who may have objected to claims. Section 12 allowed 'any person objecting to any claims or grants to be investigated' to have their objections heard – but on payment of a fee – and of course Maori were excluded from receiving compensation under section 48. The Act was silent on the tenths.

Francis Dillon Bell was appointed commissioner under this Act and after approximately five years had completed his investigations. Premier Edward Staãord reported to the British Government in 1858 that the inquiry was proceeding well:

The operation of the 'Land Claims Settlements Act', 1856, has been even more satisfactory than was anticipated; – a very large number of claims have been brought before the Court, and many of them already adjudicated upon satisfactorily; large quantities of land, hitherto locked up from the uncertainty of ownership, have thus become available for active colonization, either from having been awarded to individuals, or from having reverted to the Crown.<sup>108</sup>

Staãord made no reference to the interests of Maori from whom much of this 'surplus' was derived. The underlying object of the Act was to open further land for settlement.

### 7.10 The Bell Inquiry, 1856–61

Bell tabulated a number of statistics on the pre-emption waiver purchases, as well as dealing with each claim individually. He found that a total of £6841 4s 2d had been paid to Maori under pre-emption claims. An additional £2520 8s 5d was expended by the pre-emption waiver claimants, including money paid under Grey's 10 August 1847 'minute'.<sup>109</sup> Bell calculated that 97,427 acres of land had been surveyed under the pre-emption claims (this was not the total of land allegedly purchased). He commented that the liberal survey allowances in the Land Claims Settlement Act 1856 had had 'a very beneficial effect', noting that:

If the Government had attempted to survey the claims themselves, the claimants would have had no interest in the whole exterior boundaries being got, and would only have felt called upon to point out as much as was actually to be granted to them. The residue would, practically, have reverted to the natives, and must at some time or other have been purchased by the Government: and a large extent of territory must have remained, as it was before the passing of the Land Claims Acts, a terra incognita. But when the claimants were told they would receive an allowance in acreage to the extent of 15 per cent. on the area surveyed, it became their interest to exert all their influence with the native sellers to give up the whole boundaries originally sold. The

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108. AJHR, 1858, a-4, p 13

109. Francis Dillon Bell, 'Land Claims Commission, Report of the Land Claims Commissioner', 8 July 1862, AJHR, 1862, d-10, pp 4–5

result has been not only to produce a large surplus of land which, under the operation of the existing Acts, goes to the Crown; but to connect the claims together, and lay them down on a map.<sup>110</sup>

Such assertions of colonial (and cartographic) order, at the expense of Maori interests, can be seen in the pre-emption waiver claim of Whitaker and Du Moulin on Great Barrier Island, where an initial purchase believed to be in the range of 3500 acres, totalled 21,845 acres when surveyed. The vast majority of the claim (being in excess of the initial waiver of pre-emption and being more than the 500 acres prescribed by the Land Claims Settlement Act 1856) passed to the Crown. However, Bell granted Whitaker the absolute maximum area of land as compensation. This gave Whitaker a grant of 1000 acres. Whitaker had also funded the survey of his claim and the survey of the lands of two neighbouring Crown purchases. Bell accepted that the total of the entire survey could entitle Whitaker to land under the survey- compensation provisions. Out of a total of 28,608 acres surveyed, Whitaker received an additional 4291 acres to his 1000-acre grant. An additional 172 acres was added because of 'Divisional lines as per regulations'. Therefore, for £172 paid to Maori and £508 in survey and court costs, Whitaker received 5463 acres. The Crown, which had paid £520 to Maori for the two areas it purchased, acquired a surplus of 17,554 acres.<sup>111</sup>

The commissioner stated he had awarded as much as he felt empowered to do. He claimed he had 'sincerely endeavoured to satisfy the claimants while I guarded the public interest'.<sup>112</sup> No mention is made by Bell of safeguarding Maori interests. The focus was on settler grievances and Crown surplus. Bell calculated the total quantity of land awarded on settlement of pre-emption claims as being 25,300 acres, including land yet to be granted. He calculated the amount of scrip, money, or debentures issued to pre-emption claimants as £8137 9s 7d. This alone was more than the £6841 4s 2d he calculated Maori were paid for the purchase of lands under the pre-emption waiver certificates.<sup>113</sup>

Bell considered that:

in the great majority of these cases the native title had been fairly extinguished, and that the Government took possession of and sold the land on the strength of the purchases made by the claimants, there can be no doubt . . .<sup>114</sup>

It appears that only where claims had lapsed, or were never referred to a commissioner, did the land revert to Maori. Bell suggested that there were many

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110. Ibid, p 5

111. See report of Commissioner Bell in olc 1/1130-31, NA Wellington; Paul Monin, 'The Islands Lying Between Slipper Island in the South-East, Great Barrier Island in the North and Tiritiri-Matangi in the North-West', report commissioned by the Waitangi Tribunal, December 1996 (Wai 406 rod, doc c7) pp 47-48, 58, also outlines purchases on Great Barrier Island.

112. AJHR, 1862, d-10, p 6

113. Ibid, pp 6-7

114. Ibid, p 7

cases where bona fide purchases were made, but that he had been unable to 'recover' the land for the Crown.

Calculation of the 'surplus' land acquired by the Crown in pre-emption waiver purchases is complicated. Bell calculated a surplus of 204,243 acres, reverting to the Crown, in all cases (old land claim and pre-emption waiver claim) investigated by him. But he did not provide separate figures for the surplus in pre-emption waiver claims alone. His sum would have excluded land granted to Pakeha claimants under the survey-compensation provisions. It also excluded 'the land actually sold by the Government'. Most of the land taken under Grey's regime, close to Auckland, was probably sold; and much of the pensioner settlement at Onehunga was built on land from a pre-emption waiver purchase.

Three separate means of generally establishing the 'surplus' land acquired from the pre-emption waiver claims give very different returns. Bell stated that in total the 250 pre-emption claims covered 97,427 acres after being surveyed. He recorded that the total acreage of land awarded or granted from the pre-emption claims was 25,300. This suggests possibly 72,127 acres was the 'surplus' acquired by the Crown from pre-emption waiver claims. But it is not clear whether the figure of 25,300 acres granted to claimants refers to all awards made under Matson and Bell, or just those made by Bell. A second calculation can be made from the acreages recorded in Bell's return, published in 1863. Taking the area awarded in each case, totalling approximately 49,150 acres, from the area surveyed in those cases, 82,489 acres, a Crown surplus of 33,339 acres is suggested.<sup>115</sup> But these figures are taken from surveyed lands only, and a number of claims had not been surveyed; although Bell may have included his estimation of unsurveyed land in his calculations. Thirdly, the Myers commission, set up in 1946 to inquire into surplus lands, calculated that 16,427 acres of surplus land had been acquired from all pre-emption waiver claims (16,418 acres arising under the penny-an-acre proclamation alone). But this did not account for land granted by the Crown to claimants under the 'survey allowance' provisions of the Land Claims Settlement Act 1856.<sup>116</sup> Whitaker's claim (above) suggests that the amount of land granted under those provisions may be considerable. A comprehensive study of each pre-emption waiver claim would be required to assess these very different results.

Bell thought it 'nearly impossible' for most cases to comply with the regulations established for the purchases. For example, FitzRoy stated that 'a few hundred acres' was meant, and then issued certificates for purchases between 1000 and 3000 acres. Bell, however, believed that under no conditions could a pre-emption waiver claimant be granted more land than he had been given a certificate for. If the purchase was found to be greater than that allowed, the 'surplus' would revert to the Crown. Bell explained that if the pre-emption claimants were to be given all the

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115. See 'Appendix to the Report of the Land Claims Commissioner', AJHR, 1863, d-14. These figures were calculated by Hutton (see introduction).

116. M Myers, 'Report of the Royal Commission to Inquire into and Report on Claims Preferred by Members of the Maori Race Touching Certain lands Known as Surplus Lands of the Crown', AJHR, 1948, g-8, pp 70-71

land they had purchased (that is, including the surplus), Auckland province would have to refund a very large sum of money for the sale of lands under the waivers of pre-emption.<sup>117</sup>

Bell's investigation opened up a number of pre-emption claims that had been left behind by previous investigations. As noted above, Matson never gave an accurate total of the amount of land that would revert to the Crown after his investigation. A number of the claims disallowed by Matson would have reverted to Maori (temporarily) because they had not been surveyed. With the 1856 Act's encouragement to settlers whose claims had been disallowed to survey the land they had allegedly purchased, these areas were reclaimed. But the survey-compensation provisions of the Act were not matched by giving Maori any significant power to challenge the surveys being undertaken, the claimant's presentation of their claim, or the Crown's acquisition of the 'surplus'. Little evidence from Maori appears to have been presented to Bell.

The treatment of FitzRoy's 'reserve tenths' under Bell is unclear. Claimants do not appear to have been able to purchase these reserves under the Land Claims Settlement Act 1856. When the Crown granted land under this Act and retained a surplus, part of this surplus would have comprised the reserve tenths, just as it had when it recognized settlers' claims under Matson. But as part of the surplus, not distinctly identified and recognized as being land 'for public purposes, especially the future benefit of the aborigines', as FitzRoy intended in his proclamations (and promised Maori in his accompanying speech), the tenths disappeared.

Bell clearly saw the value of the Land Claims Settlement Act 1856 in satisfying settler claimants' demands and in acquiring further surplus for the Crown. He celebrated the fact that the land had been 'surveyed and secured' for public use. He was proud that: '[a] country which six years ago was almost unknown except to the few people residing there, has been mapped and made available for settlement'.<sup>118</sup>

He pondered, on the problem of the rights available to pre-emption waiver purchase claimants:

I do not think that it ever can be said for certain what the rights of claimants under Governor FitzRoy's proclamations really were. Lord Stanley took one view of the obligation of the Crown, Lord Grey took another; the Supreme Court declared the proclamations were contrary to law; Governor FitzRoy said the waiver of pre-emption meant one thing, Governor Grey said it meant another.<sup>119</sup>

But he did not ponder on the rights of the pre-emption waiver vendors who, not only as subjects but as Treaty partners, were vitally affected by the Crown's failure to identify and properly act on its Treaty obligations, arising from the article 2 pre-emption clause.

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117. AJHR, 1862, d-10, p 19

118. Ibid, p 15

119. Ibid

