

## CHAPTER 8

# CONCLUSION

This report looks at one of the earliest practical expressions of British sovereignty in New Zealand – the Crown’s right of pre-emption. Ian Wards highlighted the experimental waxing and waning of colonial minds on the matter when he described pre-emption as a ‘matter of convenience, to be modifiæd at will’.<sup>1</sup> But this description fails to acknowledge the fundamental importance of pre-emption in New Zealand. Others have emphasised the role of Crown pre-emption as a means (to various degrees) to achieve either the protection of Maori interests, or the exploitation of those interests by the Crown through its monopoly. Pre-emption provided the Crown with the potential to achieve both these things. But the Crown’s exclusive right to extinguish native title by purchase also enabled it to establish its own system of land administration. Pre-emption allowed the Crown to gradually enhance its control of (or sovereignty over) the land – as the Native Land Court (a modifiæcation, rather than a full abandonment of pre-emption) continued to do from the mid-1860s.

The potential use of Crown pre-emption to protect aboriginal interests was identiæd in the seventeenth century in colonial North America. Crown pre-emption there was deæned by colonial authorities as being introduced to protect indigenous peoples and their interests (as well as British interests generally) and to maintain the peace through control of British settlement in the new colonies. By the time the humanitarian movement reached its heights in the 1830s, its members agreed with the British Crown using its right of pre-emption to ‘protect’ native peoples, because it furthered the movement’s aim to Christianize and introduce British civilization (which it believed was beneæcial to those peoples), rather than leave native peoples to the mercy of private speculators.

These acknowledged purposes of pre-emption may have been more predominant in New Zealand if colonial oïcials had kept to their initial plans, to provide for the good government of existing British settlements, the promotion of trade, and the protection of Maori. But the Crown’s decision to be actively involved in the colonization of New Zealand, using contemporary economic theories of ‘organized immigration’, undermined the protective possibilities of its pre-emptive right. Purchasing Maori land at a nominal sum, and on-selling it to settlers at a higher price, created a conæict of interest which Lord Normanby, the Secretary of State for

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1. I M Wards, *The Shadow of the Land, A Study of British Policy and Racial Conæict in New Zealand 1832–1852*, Wellington, Historical Publications Branch Department of Internal Aæairs, 1968, p 28

the Colonies, failed adequately to acknowledge. He argued in August 1839, that paying a merely nominal sum was justified by the Crown's unique ability to provide for community (including Maori) interests. He claimed that Maori would gradually participate in the benefits of the increased value of the land they retained, through the introduction of capital and settlers from Britain.

Normanby instructed Governor William Hobson to attain Maori agreement to both British sovereignty and the Crown's right of pre-emption. The positioning of the pre-emption clause in article 2 of the Treaty, behind the rangatiratanga guarantee, and the wording of the clause, indicated that pre-emption was a mere limit upon that essential guarantee. It was not directly linked to the article 1 cession of sovereignty. Had it been so, it may have alerted Maori to its value to the Crown, as a Crown 'right' and expression of that sovereignty. The translation of 'the exclusive right of pre-emption' as 'te hokonga' did not help to establish this link either. The term 'hokonga' does not clearly indicate that the Crown's right to purchase was an exclusive one. Emphasising this exclusivity may have drawn a similar reaction to that of Tuhawaiki and other Ngai Tahu chiefs, who would not sign the New South Wales Governor, George Gipps's, intended treaty in Sydney. Gipps's treaty had stipulated that the chiefs agreed not to sell their land to 'any person whatsoever except to Her said Majesty'.<sup>2</sup> The expression and translation of pre-emption in the Treaty of Waitangi may have been influenced by Gipps's treaty's lack of success.

Whether or not this was the case, chiefs being asked to sign the Treaty of Waitangi would have been less dependent on the Treaty text itself than on the explanations and discussion of the 'exclusive right of pre-emption' at the Treaty debates. Their understanding of this clause would also have been shaped by the explanations given of the Treaty's purpose as a whole. George Clarke (who became the Chief Protector of Aborigines) reflected years later, that the Treaty 'would never have been signed' had the British negotiators not assured Maori that the Queen's object was solely to protect Maori rights, suppress disorder, and increase commerce and prosperity.<sup>3</sup>

Records of the Treaty debates show that some specific discussions of the pre-emption clause occurred. The Crown negotiators stressed the protective purposes of pre-emption, as something which was purely for Maori benefit. Maori were told that the Crown would use pre-emption to prevent individual settlers from buying Maori land (and to hold invalid any purchases after Hobson's January 1840 proclamation). They were told that pre-emption would enable the Crown to prevent them from being cheated in land dealings and to check the 'importunities' of Europeans. They were told that pre-emption would enable the Crown to check any imprudent sales of their land 'without sufficiently benefiting themselves or obtaining a fair equivalent', to provide them with a 'juster' valuation, and to foster the establishment of industrious and responsible Pakeha in their communities.

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2. E Sweetman, *The Unsigned New Zealand Treaty*, Melbourne, Arrow Printery, 1939, pp 61–65

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

Rumours that Maori who signed the Treaty would be no better than slaves, that their land would be taken from them, and that their dignity would be destroyed, led to assurances that the Queen ‘did not want the land, but merely the sovereignty’, so that she may be able to govern British subjects in New Zealand, and to punish those of them who committed crimes. Maori were told that land would never forcibly be taken from them. The Queen was ready to purchase land Maori did not require for their own use, to dispose of again to responsible British subjects who would not ‘injure’ them. If she wanted land, she would purchase it. (Perhaps this was an early indication that the Queen may not have wanted to purchase land; although it was not clearly so. It followed a statement that land would ‘never be forcibly taken’.)

But of equal relevance is what the Crown negotiators, including Hobson, did not explain. Records of the debates suggest that the Crown’s negotiators did not explain the practical meaning (and effect) of pre-emption. They did not spell out that the Crown would have the exclusive right to purchase Maori land, or conversely that pre-emption would affect the chiefs’ authority to sell to individuals. They did not explain the idea that pre-emption would provide the Government with cheap land to be sold at higher prices, which would in turn fund the Government and settlement of the colony. They did not explain that once the Crown bought their land, Maori customary law with regard to that land would no longer apply.

Instead, Maori ‘agreement’ to this aspect of the Treaty hinged on the statements which were made emphasising the protective functions of Crown pre-emption, and the implication with them, that the Crown lacked the economic self-interest of private purchasers. The Crown negotiators implied that the British administration of land transactions was to provide a protective cloak around land dealings, consistent with the Queen’s object (see above).

The concept of British administration of land matters, to gain more controlled interaction with Pakeha, did not necessarily mean Maori submission to British authority. A Crown representative, halting or regulating unruly Pakeha actions, to protect Maori interests, would be useful to Maori whose tino rangatiratanga was kept intact. James Busby, and the missionaries before and during Busby’s residency, had set precedents for such administering of British-Maori relations, without a lessening of Maori chiefy authority. There is some indication that Hobson’s authority may have been seen by Maori as more substantial and significant than Busby’s, but still restricted to controlling Pakeha. Maori were not told about, and did not realise, the effect Crown pre-emption would have on their chiefy authority. But pre-emption soon provided a more tangible illustration of the elusive British notion of sovereignty and the concepts which linked title to land, power, and authority.

Theoretically, pre-emption may have been limited to providing, as Normanby put it in 1839, ‘at least some kind of system, with some degree of responsibility, subject to some conditions and recorded for general information’.<sup>4</sup> But one of the fundamental aspects of the Crown’s right of pre-emption was its role in cementing

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4. Normanby to Hobson, 14 August 1839, BPP, vol 3, p 86

and extending British sovereignty. This role was belied by its seemingly innocuous introduction through the control of land administration. The concept of a merely administrative Crown was a vastly different proposition from one which sought to gain ever-increasing control of its dominion – and to do so at a nominal sum to boot.

The difference between these two concepts could only have been comprehended through an understanding of the British assumptions and theories underlying the Crown's right of pre-emption. These assumptions and theories were based on contemporary notions of the nature of sovereign title to land and the nature and extent of aboriginal property rights. British colonial officials believed that, by proclaiming British sovereignty, the Crown had acquired the radical title to, or ultimate dominion in, all New Zealand land. Native (or aboriginal) title was considered by them to be a lesser title – one of occupancy of the soil only. The Crown's right of pre-emption allowed the Crown the exclusive right to extinguish that native title by purchase, so that it may then 'perfect its own dominion over the soil, and dispose of it according to its own good pleasure'. Perfecting its dominion through pre-emptive purchasing allowed the Crown to transfer that land from indigenous land tenure and customary law, to British land title controlled by British laws of land administration. It smoothed the transition of control of all land by the sovereign.

In some instances in colonial North America, the exclusive right of pre-emption had been described as all that was 'really surrendered' when sovereignty was ceded. In those cases, pre-emption was even described as sovereignty itself because all that sovereignty consisted of was 'the exclusive right of acquiring and of controlling the acquisition by others' of native lands.<sup>5</sup> This was a substantial right to obtain, as the existence of such transfers suggests. The exclusive right of pre-emption opened the way, not only for increasing the foreign sovereign nation's interests in the land, but for establishing and extending its control (or sovereignty) over that land and its resources.

But in the early 1840s, and for many years subsequently, British officials discussing the purpose of pre-emption in New Zealand, and the possibility of its waiver, did not refer to the legal or administrative control over the land, or the establishment of its own laws of land administration, which was provided through its right of pre-emption. Their debate centred on its protective possibilities and its economic benefits in enabling the Crown to purchase land cheaply and sell it dearly. It is interesting, for example, that when FitzRoy proposed waiving, and waived pre-emption, there was no objection on the basis that it may upset the Crown's ability to gain full (legal- administrative) control over the land. There was merely a recognition that it was a 'precedent' in British colonial practice which ought to be followed. Yet this aspect of Crown pre-emption became its most prominent legacy.

But the theories underlying the above British (colonial officials') assumptions were debated by Gipps, in New South Wales, in the New Zealand Land Claims Bill

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5. See Gipps's speech on the second reading of the Bill, 9 July 1840, in Gipps to Russell, 16 August 1840, BPP, vol 3, p 188

1840 (NSW). Gipps's arguments focused on two key principles, reflecting contemporary officials' beliefs. His first 'general principle' was that the 'uncivilized' inhabitants of any country had a mere qualified dominion over it (or a right of occupancy only). He argued that until they established a 'settled form of government', and 'subjugated' the ground to their own uses through cultivation, they could not grant land to individuals outside their tribe because they had no individual property in it. Gipps's second 'general principle' was that if a 'civilized' power created a settlement in such a country, the right of pre-emption was exclusive to the Government of that power. Individuals could not 'enjoy' this right without the consent of this Government.<sup>6</sup>

Gipps's arguments, in which the Crown's assumptions and theories were outlined, set the groundwork for land policy in New Zealand. But the New South Wales debate was not available to Maori. The debate was not translated into Maori. Neither Gipps, nor Hobson, explained the notions elaborated on in the debates to Maori. Nor did they explain their proposal to apply these theories to Maori title and New Zealand land. They failed to openly discuss, with Maori representatives, the basis for Crown assumptions and actions. Settler interests were expressed in the debates, but no independent representation was made to ensure that Maori interests were protected. In line with his arguments, Gipps viewed the issue in the Bill (the establishment of a land claims commission to inquire into pre-Treaty private land transactions and grant title to settlers) to be between the Crown (which, having the ultimate dominion, was the proprietor of any land for which the native title was 'extinguished') and British settlers (who may have 'extinguished' it through their purchases).

Maori were privy only to the immediate practical effects of British sovereignty on the ground, and to what they were told, usually second-hand, by settlers. What they were told, and what they saw and experienced, of Crown actions regarding their land, was almost immediately alarming. Maori began to question whether they had been misled, and whether the British Crown's motives were truly for their benefit, as had been portrayed by its Treaty negotiators.

Self-interested settlers told Maori that the prohibition on their selling land except to the Queen, and other laws soon to come, would 'make them no better than slaves'. Others were told that Gipps was 'about taking their land from them'. In the limited instances where the Crown bought land, settlers also helped to highlight the incompatibility of Clarke's roles as Protector and purchaser, and the higher prices the colonial administration received for land which it had bought from Maori. Elsewhere, Maori were frustrated by the Crown's unwillingness or inability to purchase the land they offered for sale, and its unwillingness to allow others to do so. Many northern Maori began to feel stifled by the restrictions pre-emption imposed on them and conversely the power it gave the Crown. This was heightened by the fact that pre-emption deprived some Maori of the revenue they had been accustomed to receiving from land sales. The idea that the Crown had merely been

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6. Ibid, pp 185–186

given first right of refusal, only became apparent once the Crown had refused to purchase Maori land offered to it.

Clarke later stated that if provision had been made for buying all the Maori land which had been offered to the Crown (which he thought 'ought to have been done in order to preserve the consistency of their own regulations') then 'all might have proceeded quietly'.<sup>7</sup> This may have been so, if it had also quelled the knowledge that Maori authority had been undermined by pre-emption. But the apparent loss of their autonomy, or freedom, to sell to whomsoever they chose, led Kororareka Maori to describe the pre-emption clause as a 'badge of slavery' and to threaten to regain independence unless it was removed. They, and other northern Maori, were not convinced that in signing the Treaty they had surrendered their authority to dispose of their lands to whomsoever they pleased. Nopera Panakareao and other chiefs of Kaitiaki declared that they would sell no more land, either to individuals or to the Government. The chiefs claimed that instead they would exercise all their ancient rights and authority of every description.

Concern had led some Maori to call for translations of Government regulations to be made available so that they could read and judge the Crown's Acts themselves. The introduction of *Te Karere o Nui Tireni* (the *New Zealand Messenger* or *Maori Gazette*), from January 1842, was designed to inform Maori of Crown policies and Acts directly. Although it was eagerly received by Maori, the value of its contents was dubious, as was the adequacy of its translations. Its limited print run and its irregular and unsystematic distribution also did not bode well for Crown communication with Maori. The continued sense of the basic injustice surrounding issues such as the Crown's veto on the chiefs' authority to conduct private land transactions through pre-emption, and its acquisition of 'surplus' land, which could only be explained through an understanding of the underlying British assumptions about sovereign title to land, remained. The Crown did not explain to Maori the theory behind its actions on this perplexing, yet vitally important, topic.

In 1843, Acting Governor Shortland noted that the Government's position was weakened, and its dignity lowered, because Maori saw the Crown to be like any other buyer of land. He proposed waiving pre-emption himself in October of that year, in part because he, like FitzRoy to follow him, was influenced by a perception, shared with Clarke, that Maori rebellion against Crown authority would occur unless immediate measures were taken to allow private land sales and demonstrate the Crown's disinterest. Yet, without Colonial Office approval to do otherwise, he held to the letter of the Treaty's pre-emption clause, just as his predecessor, Hobson, had done. He did so despite growing settler and Maori complaints, and a virtually paralysed local economy.

The shift in control, from the chiefs to the Crown, inherent in the Crown's right of pre-emption, was perhaps the key aspect of pre-emption against which Maori of the north reacted. This raises a number of important questions for the Tribunal. The Motonui–Waitara Tribunal has stressed that rangatiratanga denotes mana, not only

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

to possess what one owns, but to manage and control it in accordance with the preference of the owner.<sup>8</sup> More recently the Muriwhenua Land Tribunal, recognising that the Treaty debates are ‘more significant for what was not said than for what was’, cited, as an example, that it was not said that for the British, sovereignty meant that the Queen’s authority was absolute. That tribunal hastened to say that the British negotiators intended no deception, but merely assumed that Britain would rule on all matters. It also identified three Treaty promises which it believed had influenced Maori at that time, and should be kept in mind: (a) that Maori law or custom, and Maori authority, or rangatiratanga, would be respected; (b) that the pre-Treaty transactions would be inquired into, and lands unjustly held (that is ‘surplus’ land) would be returned; and (c) that all future dealings would be with the Governor, who would provide for and protect Maori interests.<sup>9</sup>

Just what degree of control the pre-emption clause allowed the Crown to have is at issue. Was it a solely administrative function, or a ‘check’ to protect Maori? Or would it extend to enhancing the sovereign’s control, including implicit acceptance of the Crown officials’ assumptions about sovereign title to land? One person who, probably unknowingly, tested the acceptability (to British officials, at least) of what may have evolved into merely an administrative model, was Governor Robert FitzRoy.

FitzRoy had already been thinking about waiving pre-emption before he left Britain. In May 1843, he sought advice from Lord Stanley, then the Secretary of State for the Colonies, about the possibility of a waiver. FitzRoy’s question resulted in a series of opinions being given in Britain about the advisability of such a move, and on how such a venture may be regulated. As noted above, the key concerns discussed at this time were the protective and economic purposes pre-emption may fulfil.

Stanley informed FitzRoy that he was to make any recommendation regarding pre-emption he felt it expedient to make, after inquiry on the spot. When FitzRoy reached New Zealand, he found groups of Maori and Pakeha Aucklanders pushing for pre-emption to be waived. Maori claimed that they understood that the Treaty had merely given the Crown the first offer. They argued that article 2 gave them the right to sell to whomsoever they chose, as did article 3.<sup>10</sup> Pakeha Aucklanders too expressed their distaste at the Crown’s right of pre-emption because it restricted ‘free trade’.

FitzRoy believed that the protective ideals of the Treaty’s pre-emption clause were paramount, rather than its specific terms. He also wanted to put the Crown

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8. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, 2nd ed, Wellington, Government Printing Office, 1989, p 51

9. Waitangi Tribunal, *The Muriwhenua Land Report 1997*, Wellington, GP Publications, 1997, pp 115, 118

10. Interestingly, FitzRoy’s approach prior to waiving pre-emption, of consulting Maori as to their preferences, is consistent with the Tribunal’s recognition in Ngati Rangiteaorere’s claim that kawanatanga, or sovereignty, clearly included the right to legislate, but that this should not be exercised ‘in matters relating to Maori and their lands and other resources, without consultation’ (Waitangi Tribunal, *The Ngati Rangiteaorere Claim Report 1990*, Wellington, Brooker and Friend Ltd, 1990, p 31). However, the adequacy of this consultation must also be questioned.

more clearly in the role of an intermediary, or umpire, rather than an interested party. He believed that the Crown should distance itself from land purchasing (giving up the Crown's monopoly). And he no doubt agreed with Clarke's view that prosperity in the colonial community would be beneficial to Maori. FitzRoy insisted, in his responses to the Auckland groups, that the Treaty's pre-emption clause had originated solely for Maori benefit. If it was not to Maori advantage, he thought that it should be discontinued.

Stanley, in contrast, was almost solely concerned with the economic function the Crown's right of pre-emption was to provide in assisting the Government to establish British settlement in the colony. He insisted that, if FitzRoy waived pre-emption, purchasers should not pay less than they would otherwise have paid to the Government, and that they should also pay a substantial portion of their overall payment as a contribution to the emigration fund. He later stated that the 'original intention' of the pre-emption clause was solely its economic advantage to the British Crown – to enable the Crown, as sole purchaser, to obtain land on easy terms and apply a portion of the proceeds, when resold, to emigration and local objects (especially the purchase of more land, which would again be resold at a profit). Stanley's interpretation of the intention of pre-emption, unlike FitzRoy's, was at odds with the explanation given to Maori at the Treaty debates. The time-delayed tug of war which followed between FitzRoy's and Stanley's philosophies reflected these opposing views.

But these comments applied only to individual private purchasers. The New Zealand Company had successfully established its own special agreements with the Crown concerning its purchases. In September 1841, in Port Nicholson (Wellington), Hobson had allowed the Company to 'perfect' its 'defective' pre-Treaty transactions by making additional payments to Maori. He did so despite local Maori requests and expectations that the Crown would protect them from the encroachments of the New Zealand Company on their lands. The marked difference in response, by Wellington Maori, from that of Northland and Auckland Maori (with whom the Company had not transacted), indicates that Maori objection to pre-emption, in addition to having various potential bases, was not universal. FitzRoy then waived pre-emption in the New Zealand Company's favour, for defined acreages, in both the South Island and the North Island, when in Wellington in 1844.

Although these Company waivers have not been studied in depth in this report, FitzRoy appears to have made them without the same protection of Maori interests specifically envisaged in the conditions of his general proclamations to follow. He relied, to some degree, on the responsibility of the Company's representatives, but he also charged officials in his administration with superintending the transactions in the interests of Maori. The Crown's actions in dealing with the Company's transactions with Maori, and the relationship which subsequently developed between the Crown and the Company around these and later transactions (such as Grey's pre-emption waiver in favour of the New Zealand Company in February 1846), are the subject of a separate report by Duncan Moore.<sup>11</sup> This should be read

in conjunction with my report. These Company dealings were completely separate from FitzRoy's and Stanley's consideration of the general system, allowing waivers for private individuals, to follow.

FitzRoy returned to Auckland in March 1844 where, having already indicated he would implement provisions to waive pre-emption, he drafted his first general pre-emption waiver proclamation.<sup>12</sup> Dated 26 March 1844, it was proclaimed before receiving Stanley's reserved and temporary sanction. The March proclamation kept the ideals of protecting Maori interests to the fore. It specified that waivers could only be made over 'certain limited portions of land', defined in acres and physically described. (Later, in December 1844, FitzRoy stated that 'certain limited portions of land' meant 'only a few hundred acres'.) And it stated that FitzRoy would either consent or refuse a waiver application, as he judged best 'for the public welfare, rather than for the private interest of the applicant'. He would fully consider the 'nature of the locality; the state of the neighbouring and resident natives; their abundance or deficiency of land; their disposition towards Europeans; and towards Her Majesty's Government'. He would also consult the Protector of Aborigines before consenting 'in any case'.

The waiver proclamation specified that certain lands were to be excluded from purchase or 'reserved' specifically for Maori, or for Maori benefit. No Crown title would be given for any pa or urupa, or land about them, 'however desirous the owners may now be to part with them'. As a 'general rule', pre-emption would not be waived over land required by Maori for their present use 'although they themselves may now be desirous that it should be alienated'. No waivers were to be given over land lying, in Auckland, between 'Tamaki road and the sea to the northward'. And of all land purchased under a waiver, 'one-tenth part, of fair average value, as to position and quality' was to be conveyed by the purchaser to the Queen 'for public purposes, especially the future benefit of the aborigines'.

The proclamation included other measures designed to protect Maori interests. At least 12 months were to pass from the time the applicant received the Governor's consent (by paying the fees and being issued with a pre-emption waiver certificate), to the issue of a Crown grant. FitzRoy intended this provision to encourage long term relationships between purchasers and Maori. Surveys of the land purchased under a waiver certificate were to be deposited at the Surveyor-General's office prior to a Crown grant being prepared. Deeds of transfer were also to be lodged there as soon as practicable:

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

FitzRoy elaborated on his reserves policies in an address he made to Maori on Government House lawns that day. He stressed again that pre-emption had been for

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

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

Maori protection and benefit, indicating that his permission was required so that he could 'inquire into the nature of the case' and ascertain from the protectors whether they could 'really spare it, without injury to yourselves now, or being likely to cause difficulties hereafter'. FitzRoy told the chiefs that he had made distinct conditions that one-tenth of all land purchased was to be 'set apart for, and chiefly applied to' their future use 'or for the special benefit of yourselves, your children, and your children's children'. He stated that the produce of the tenths would be 'applied by Government to building schools and hospitals, to paying persons to attend there' and to teach Maori 'not only religious and moral lessons, but also the use of different tools, and how to make many things' for their own use. He stated that the tenths would be managed by a board or committee of Crown officials.

FitzRoy's pre-emption waiver regulations appeared in the April 1844 issue of *Te Karere*. But despite this publicity, translations of extracts from the issue indicate that even Maori who did receive it, may not have been enlightened by it. Maori who did not have the benefit of FitzRoy's personal explanations would probably have remained confused about the Government's policy. Those were, at the very least, Maori outside Auckland.

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

Normanby's instructions had stipulated that Crown purchases of Maori land were to be 'fair and equal'; they were to be conducted with 'sincerity, justice, and good faith'; they were not to include any land essential to Maori, or land which would be 'highly conducive, to their comfort, safety or subsistence'; nor were they to include lands the alienation of which would cause Maori any 'distress or serious inconvenience'. In all dealings, the Crown would provide for and protect Maori interests. Normanby had stated that a Protector was to be appointed to ensure the observance of these specifications. This person's express duty was 'to watch over the interests of the aborigines as their protector'.

These principles were the guidelines under which the Crown was to exercise its pre-emptive right of purchase. There is no reason to assume that they should not equally be applied to any purchases the Crown allowed under a waiver of that right. Crown pre-emption was not entirely abandoned, it was only modified; the settlers' 'privilege' of purchase under a pre-emption waiver was a limited one. It was one which involved only 'certain limited portions' of land. It was one which was

intended to be vetted by the Governor and Protector in each instance. And it was one which was considered (in Britain at least) to be a temporary measure; with a reversion back to Crown pre-emption when circumstances allowed.

These points were not lost on the British colonial land and emigration commissioners (whose job it was to manage the sale of land in British colonies and promote a well-regulated emigration to them). They were concerned about FitzRoy's May 1843 proposal to waive pre-emption precisely because they believed that, by allowing pre-emption to be waived in favour of private individuals, the Government would become 'mixed-up' with, and therefore responsible for, the purchases those individuals undertook. The commissioners had commented that, contrary to a waiver of pre-emption freeing the Crown from responsibility, any deviation from pre-emption 'must greatly enhance the responsibility of Govt for any unforeseen ill-consequences to the Natives'.<sup>13</sup> Their opinion would seem to imply that the principles Normanby outlined as limiting Crown purchases of Maori land, would be the very least for the Crown to uphold with respect to private purchases of that land.

Stanley too commented as if to warn of this effect. In approving the March proclamation, he referred for the first time in this context to the Treaty of Waitangi, noting that FitzRoy had taken:

the serious responsibility of waiving, on the part of the Crown, an important stipulation of the original treaty, and of permitting the direct sale, by natives, of portions of their land.<sup>14</sup>

But Stanley's primary concern was whether the new policy would still yield sufficient funds for Government purposes, and for emigration, rather than the Crown's responsibilities toward Maori.

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

The Orakei Tribunal found that the Crown's exercise of its pre-emptive right of purchase was limited by two principles. The first, stated in the *Orakei Report*, was that the Crown had a duty 'to ensure that the Maori people in fact wished to sell'.<sup>15</sup> The *Ngai Tahu Report* took this point further. In ensuring Maori wished to sell, that

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

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

Tribunal held, the legitimate owners of the land had to be ascertained, the boundaries of the area to be sold had to be established (so that the Maori owners 'knew with reasonable certainty' the area they were being asked to sell), and the land which the Maori owners wished to retain 'by express exclusion from a proposed sale or by way of reserves out of land agreed to be sold' needed to be 'sufficiently identified'.<sup>16</sup>

FitzRoy did not specifically require a process for identifying the legitimate owners of the land being sold, in either Clarke's, or his own role in assessing the pre-emption waivers. He did not require a survey of purchased land to be provided until after his assessment and consent to a waiver had been given. And he did not require surveys to be published in the English and the Maori *Gazettes*, unlike the deed or deeds, which were to be provided as soon as practicable for inquiry and publishing by *Gazette* notice (but this does not appear to have occurred in practice).<sup>17</sup> The reserves provisions suggested by the Tribunal (above) may require less weight here, given the smaller purchases made under FitzRoy's waiver scheme and the 'reserve' provisions built into it (if effective).

The second principle which the Tribunal (in its *Orakei Report*) found limited the Crown in exercising its pre-emptive right, was that it was responsible for ensuring that Maori 'were left with sufficient land for their maintenance and support, or livelihood' (or, as in its *Waiheke Report*, each tribe should be left with 'a sufficient endowment for its foreseen needs').<sup>18</sup> The Ngai Tahu Tribunal further addressed what may constitute a sufficient endowment for the tribe's foreseeable needs. It suggested that the Crown would need to take into account a 'wide range of demographic factors' such as the size of the tribal population, the land they were occupying (or over which various members enjoyed rights), the principal sources of their food supplies and location of such supplies, and the extent to which they depended upon fishing of all kinds, and on seasonal hunting and food gathering.<sup>19</sup>

FitzRoy's exclusion from purchase or granting of pa, urupa, and the land about them, land required by Maori for their present use, and land between Tamaki Road and the sea, and his provision for tenths to be reserved in the Crown and managed to provide schools and hospitals, were obviously intended to ensure that Maori were left with some land (as well as education and health services) for their foreseeable needs. FitzRoy was clearly concerned with the position Maori would occupy in the new community, including the new economy. But his scheme did not incorporate procedures to identify pa, urupa, and the land about them, or land required by Maori for their present use. Nor did it create defined (that is, surveyed) reserves of these areas or the area between Tamaki Road and the sea. FitzRoy's

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

16. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, pp 240–241

17. He also did not require plans to be inscribed on Crown grants.

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

19. *Ngai Tahu Report*, p 239

proclamation also merely bound the purchaser to make over a tenth of the land purchased to the Queen. It did not bind the Crown to use the proceeds of that tenth for the benefit of the Maori vendors. His proclamation specified that the tenths were to be 'for public purposes', albeit 'especially the future benefit of the aborigines'. Despite FitzRoy's clear intention that the tenths be used for the purposes he stipulated in his address on Government House lawns, his proclamation did not, in the event, ensure that they were used to benefit Maori.

FitzRoy's attempt to provide the Government with funds through the 10-shillings-an-acre fee – something which his administration sorely lacked, and which no doubt influenced his ability to ensure that his protective procedures, and adequate documentation and record, were carried out – was his saving grace with Stanley, who suggested that if the scheme worked the fee may be increased. But FitzRoy did not appear to establish an adequate means of controlling land purchase and its administration. This was a problem which Governor Grey inherited.

The March proclamation resulted in 57 pre-emption waiver certificates being granted for around 2337 acres. The areas sought ranged from 9½ perches to 200 acres. Most certificates were for waivers over areas of 20 acres or less. Initially, at least, Maori received around £1 per acre. This was the figure FitzRoy had originally proposed Maori should receive. But on average, although the prices ranged widely, 16 shillings per acre was paid.

Almost all of these certificates were issued for Auckland land (only five were for areas outside Auckland). By far the greatest number of these certificates were for the land around central Auckland, in the vicinity of Remuera and One Tree Hill, where a 'tripartite agreement' between 'Ngati Maho' (or Ngati Tamaoho or Ngati Te Ata), Ngati Whatua, and Ngati Mahuta (Waikato) determined which chiefs sold the land. This boundary division had been initiated by FitzRoy, following some dissension amongst these tribes. FitzRoy (with Clarke's obvious concurrence or instigation) had asked Edward Meurant, a Government interpreter, to oversee the division.

Each application for a pre-emption waiver was passed to Clarke for approval prior to FitzRoy's consent being given. Clarke's assessment of waiver applications in FitzRoy's system, although pivotal, was cursory. In most instances of the March proclamation applications, Clarke noted that he 'knew of no objection to', or 'knew of nothing to prevent', the purchase. His comment was usually given either the day or at most a few days after the application's receipt. This timing, the wording Clarke used, and the lack of separate reports of Clarke's enquiries, suggests that he did not necessarily investigate the claims, or establish customary rightholding, but relied instead on his own personal knowledge (including contemporary tribal boundary agreements, such as that referred to above). Yet FitzRoy relied heavily on Clarke's recommendations, and his consent in such instances quickly followed, suggesting that he too did not investigate further.

There were few exceptions to Clarke's brief approvals. The exceptions were not outright refusals to approve a waiver as such. Of these cases, under the March proclamation, Clarke required applicants to obtain a further consent (or consents)

from certain chiefs before approval would be given. In other cases, clarifications of existing settler rights were required. Clarke's purpose in requiring further consents appears to have been to ensure that the key chiefs he knew of with rights to a particular area of land were consulted. In his rare comments, he referred applicants specifically to particular individual chiefs. He appears to have accepted that legitimate sales could be made by these individual chiefs, without any need for wider consultation with the iwi as a whole. He also appears to have initiated further contemporary tribal 'agreements' as to ownership, such as the three-way division of central Auckland land, assisted by Meurant. In April 1844, he sent Protector Donald McLean to assist in a similar type of division of land, at Waiheke. These boundary divisions appear to have been made between those on the ground at the time, and initiated informally by Protectorate employees. No wider notice, or actual and thorough investigation of customary rightholding, appears to have occurred.

The considerations FitzRoy was to have taken into account, according to the proclamation and FitzRoy's explanation of it to the chiefs on Government House lawns – particularly any assessment of the 'state of the neighbouring and resident natives', the 'abundance or deficiency' of land, or any assessment of land that Maori could 'really spare' – could not have been properly assessed within this approach.

Clarke's approach to 'reserves' under the pre-emption waiver scheme appears to have been similarly broad-brush. He sought to exempt key blocks of land from purchase prior to his consideration of individual waiver applications. The reservation from purchase, in FitzRoy's March proclamation, of an area of land between Tamaki Road (Remuera Road) and 'the sea to the northward', was evidently made on Clarke's suggestion, prior to the Executive Council meeting discussing the proclamation and, of course, prior to his consideration of each individual waiver application. No doubt he did so in expectation that the majority of applications under the March proclamation would be for Auckland land.

Despite FitzRoy's provisions reserving from purchase or granting any pa, urupa, and the land about them, and any land required by Maori for their present use, there is no indication that Clarke inquired whether the land sought contained pa, urupa, or areas used by Maori, in his assessments of the individual March pre-emption waiver applications. Clarke seems to have left the question of 'reserved' areas to a separate and prior decision (above), independent from his day-to-day role in approving pre-emption waiver certificates (much as the divisions of land ownership were). The proclamation provisions regarding pa, urupa, and land required by Maori for their present use, may have been intended largely as a warning to Europeans that these areas were exempt from the scheme. Clarke may also have believed that the area between Tamaki Road and the sea, for which waivers would not be given, already included these places.

Clarke's two key areas of focus appear to have been the identification of key ownership and the setting aside of areas to be reserved from purchase. These two considerations may have been a reflection of the duties he inherited after December 1842 (in which he was to report on whether Maori were disposed to sell any land

recommended by the Surveyor General for purchase, and what reserves he considered it necessary to be made for their benefit). Clarke appears to have applied these two key areas of focus from his role in Crown purchases to his new role in assessing applications for private purchases.

There was no inquiry by Clarke into the price settlers intended to pay Maori vendors for their lands. He was not required by FitzRoy's proclamation to assess this. In fact, FitzRoy made it clear in his speech on Government House lawns that this would be left up to Maori, warning that they should sell for the best price, not simply the first offer. FitzRoy's subsequent proposed form for waiver applicants also omitted any reference to stating what price would be paid. This omission did away with Normanby's (Crown purchase) requirement that the Crown ensure purchases be 'fair and equal'. Yet the British colonial land and emigration commissioners appear to have believed that this requirement would continue should pre-emption be waived. It was also contrary to the Treaty negotiators' promises of a 'fair equivalent' or 'juster valuation' in land purchasing.

As the Muriwhenua Land Tribunal has noted, pre-emption was 'intended not only to augment State revenues but to protect Maori by enabling State supervision of land sales'. But the trouble with this was: 'who would supervise the State?'.<sup>20</sup> The necessity of the Protector's independence in carrying out his role was recognized by Clarke when he pointed out the incompatibility of his initial two roles of Crown land purchase agent and Protector of Aborigines. Yet, in the pre-emption waiver experiment, although without the same clear conflict of interest (but still assisting the process of colonisation), Clarke's role was again confused. FitzRoy's complete reliance on Clarke, meant that the Protector was not an independent assessor of Government actions, but an integral part of that Government action. The Tribunal's query of 'who would supervise the State?', although made in light of the clear conflict of interest between augmenting State revenues and protecting Maori interests, may still be at issue.

The potential for role confusion, exacerbated by the limited number of even near-adequately experienced or skilled personnel within the colonial administration, extended to others employed by the Protectorate. Edward Meurant and Charles Davis, both Government interpreters, also acted as agents and interpreters for both Maori and Pakeha wishing to negotiate pre-emption waiver purchases. They assisted in the sales, drew up deeds, made deposits on behalf of the parties, and witnessed payments. For Meurant, this involvement began before the March proclamation. Although Grey later attempted to highlight the incongruity of these interpreters being employed simultaneously 'to watch over and protect the interests of the natives' while 'acting privately as the paid agents of Europeans', his complaint appears to be questionable. Meurant and Davis were Government interpreters employed by the Protectorate, not protectors. Protector Thomas Forsaith claimed that he and other protectors were not involved in the waiver purchases in the above capacities (although he does appear on some deeds as a

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20. *Muriwhenua Land Report*, pp 117-118

witness). But Meurant and Davis's dual source of payment may have been an issue, as may their subsequent involvement in confirming that Maori had understood Meurant and Davis's own translations in Major Matson's 1846 inquiry into the pre-emption waiver purchases.

Although Clarke claimed that the March proclamation had satisfied Maori, it did not satisfy settlers. Advocates of 'free trade' complained about the fees and encouraged direct purchases regardless of the proclamation, arguing (amongst other things) that the Government could not control mass disobedience and that Britain would rather abandon New Zealand than resort to force. FitzRoy repeatedly warned settlers, in the proclamations and notices to follow, that their claims to land would be invalid unless confirmed by a Crown grant. But his lack of control of these settlers (and Maori), and the consequent confusion of land ownership, continued to plague him.

Clarke had foreseen that settlers may have acquired and held large tracts of land on native title only, without complying with the proclamation. He had also predicted that Maori outside Auckland would soon be dissatisfied, as the fee prevented such purchases being worth the settlers' outlay. Clarke claimed to look upon the proclamation with 'considerable anxiety', and saw it 'merely in the light of an expedient'. Perhaps he too thought of it as a temporary measure designed to appease existing and threatening problems. His hasty assessments are consistent with his view that unless he and FitzRoy acted quickly, rebellion may soon result. They are also likely to have been influenced by the lack of funds available to FitzRoy's administration. Adequate funding may have allowed a fuller investigation to be carried out. Despite his cursory assessments, Clarke noted that the waiver did not adequately deal with land disputed between Maori groups, which he thought would 'in all probability' be that ordered first. He did not share FitzRoy's expectation that such disputes would be fully solved by the regulations preventing very extensive purchases.

While Hone Heke's questioning of British sovereignty (absolute authority) transcended the pre-emption issue, it helped to highlight the discontent the Crown's right of pre-emption (one aspect of that sovereignty) had evoked in Northland Maori. FitzRoy attempted to appease northern chiefs on this particular count, by telling them that the flag was the signal of freedom, liberty, and safety, and (again) that the pre-emption provision was to protect Maori from 'those who would buy more from you than you could spare'. Arguments likening pre-emption to slavery, and identifying the Government as the Maori oppressor, resurfaced in the Hokianga, where Maori were extremely poor, in debt, and where Europeans refused to trade with them because they claimed that the Government was taking too much through customs and other fees.

FitzRoy's attempts to tighten compliance with the conditions of the March proclamation, which were intended to enable Maori to benefit from competition and restrict the extent of sales (to combat purchasers purchasing prior to receiving a certificate or citing incorrect acreages, continued. By early October 1844, Clarke again expressed his apprehension about the peace of the country. He stated that

Maori were complaining about the fee and calling for its removal, and he claimed that its removal was absolutely necessary to prevent insurrection.

The result was FitzRoy's 10 October 1844 pre-emption waiver proclamation. As reasons for his actions, FitzRoy pointed to the disregard of his regulations, and the misrepresentation of the objects and intentions of the Government in requiring the fee and in obtaining the Governor's consent (it being asserted by Maori as a mark of oppression, even slavery). He also claimed that Maori were now aware of the full value of land, and able to look after their own interests, if indifferent to those of their descendants.

FitzRoy's October proclamation was almost identical to his March one.<sup>21</sup> The most obvious difference was of dubious value to Maori. No fees would be demanded on FitzRoy's consent being given to waive the right of pre-emption, and the greatly reduced fee of one penny an acre was only payable on the issuing of a Crown grant. But it included a series of measures which were intended to fine-tune the pre-emption waiver experiment and make it more effective in protecting Maori interests than the March proclamation had been.

FitzRoy extended the provision for 'reserves'. He stipulated that the Crown's right of pre-emption would not be waived over 'any land reserved for the use of the aboriginal natives', not just the area between Tamaki Road and the sea to the northward (it appears that he meant land 'reserved from purchase' here too). And as a general rule, no waiver would be given over land required by Maori for their 'own' use, rather than their 'present' use, as it had appeared in the March proclamation. He also required the lapse of 12 months before issuing a Crown grant to commence 'after the receipt at the Colonial Secretary's office of certified copies of the surveys and deeds of sale', rather than from the time of paying the fees on receiving a pre-emption waiver certificate. This important alteration meant that settlers, wanting to secure their Crown grant, could not leave the survey of their land until immediately prior to the issuing of the Crown grant. Nor could they get away with supplying deeds merely 'as soon as practicable'. This provision would have enabled FitzRoy to gazette purchases a year in advance of issuing a Crown grant, allowing objectors a reasonable chance of appearing. FitzRoy also omitted the statement that the Governor was to give or refuse his consent to waive pre-emption 'to a certain person, or his assignee'. This presumably clarified FitzRoy's intention not to provide a waiver to a specific person, but to open the land concerned up to competition.

Under FitzRoy's October proclamation, much more land was bought overall, larger areas were purchased, a wider area encompassed, and Maori received less per acre. One hundred and ninety-two certificates were issued waiving the Crown's right of pre-emption over around 99,528 acres. The areas under waiver certificates ranged from 13 perches to 3000 acres. Almost three-quarters of these were for waivers for areas of between 100 and 1000 acres (and most of the rest were for less than 100 acres). Many purchasers overcame FitzRoy's December 1844 declaration

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

that 'limited portions of land' meant 'not more than a few hundred acres' simply by submitting a series of applications for adjacent areas of land, or by submitting applications for adjacent areas for each individual family member, pushing up their claim to waivers for areas of around 2500 to 4500 acres.

Over three-quarters of the October waiver certificates were for land in the wider Auckland area, including the islands around it. Many of these 'Auckland' certificates were for blocks around the Waitemata at Riverhead, Rangitopuni, Lucas Creek, Paremoremo, and Te Whau. Nearly as many were for land around the Manukau at 'Manukau', Three Kings, Onehunga, Papakura, Waiuku, and Titirangi. Some certificates were for Remuera and Epsom land. The other quarter of the October waiver certificates were issued for land outside the Auckland area, in the Bay of Islands, Whangaroa, Ngunguru (near Whangarei) including the Poor Knights and Hen and Chicken Islands, Mahurangi, Hokianga, Kaipara, Coromandel (or Thames), the Bay of Plenty, and Waikato.

Almost four-fifths of the purchases made under the October proclamation involved payment of less than 10 shillings an acre. On average only two shillings an acre was paid for the land. This was far lower than the prices Maori received per acre under the March proclamation.

Settlers still did not comply with the proclamation provisions. Many purchased land before gaining FitzRoy's consent. Some purchases had even been made before the March proclamation. FitzRoy responded by further clarifying the waiver proclamations' specifications as to the extent of acreage acceptable to be applied for, the order of procedure, his intention to publish details in the *Gazette*, and the waiver's role in opening up the land applied for to public competition in his 'explanatory cautions' *Gazette* notice of December 1844. All these provisions potentially protected Maori interests. Nevertheless, FitzRoy appears not to have sanctioned those settlers who failed to comply.

Clarke's assessment of pre-emption waiver applications under the October proclamation proceeded, in many ways, much as it had done with the March proclamation. He continued to interpret his key role as being to assure FitzRoy that he knew of no objection to the sale proceeding if the land in question was bought from the proposed vendor or vendors. He also continued to require prospective purchasers to consult particular chiefs he knew had rights to the area of land concerned.

But as the applications came in for pre-emption waivers over land beyond central Auckland, where most purchases under the March proclamation were made, there were some modifications to Clarke's approach. These modifications further reduced any protection he may have provided for Maori. Clarke appears to have been satisfied not to ascertain in every instance whether certain individual tribal members, listed as intended vendors, had the right to sell. He even approved a waiver when he knew neither where the land lay exactly, nor the individual chiefs stated as vendors, nor even the tribe from whom the applicant proposed to purchase the land. Clarke believed there 'need be no further caution' as long as the applicant was 'satisfied as to having purchased from the right owners'. He was also content to

leave it up to intended purchasers to ascertain whether the land they sought was disputed between Maori groups. In doing so, perhaps Clarke was relying on the proclamation provision that purchasing was to be at the buyer's risk until allowed and confirmed by a Crown grant. Once the deed was lodged at the Colonial Secretary's office, 'the necessary inquiries' were to be made, and notice given in the English and Maori *Gazettes* that a Crown title would be issued 'unless sufficient cause should be shown for its being withheld for a time, or altogether refused'. (But this too appears not to have occurred.)

In other instances, where Clarke thought Maori groups may dispute ownership of the land sought for purchase, he required the applicant to consult each group, appearing to recognize multiple Maori rights in the land under transaction. But Clarke sometimes altered this requirement after speaking with an individual chief and being satisfied following that discussion to allow the applicant to purchase from that chief alone. He does not appear to have conducted any wider investigation into customary rightholding involving the other tribes with rights in the area. In at least one instance, Clarke failed to object to a waiver certificate being approved, despite knowing of a dispute over the sale of the land in question, by such another tribe.

Clarke continued to prefer a separate and former inquiry into establishing areas to be reserved from purchase. He instructed at least one of his District Protectors to ask Maori (of that district) to identify areas they wanted to reserve from sale. The Protector was then to assess whether these areas would be sufficient for the 'present and prospective wants' of those Maori. These 'reserves' were intended to be identified prior to any pre-emption waiver certificates being issued, just as the area reserved from purchase for Auckland Maori in the March proclamation, between 'Tamaki road and the sea to the northward', had been. Again, they were not defined (that is, surveyed) reserves, but areas reserved or exempted from purchase under FitzRoy's pre-emption waiver scheme.

Presumably these 'reserves' were to include pa, urupa, and the land about them, and any land required by Maori for their 'own' use, because again, in his consideration of each individual application, Clarke did not assess whether such areas were contained in land for which a waiver was sought. Combined with an inadequate assessment of ownership, this resulted in at least one Maori chief having to move from his residence. Clarke did note lands Maori identified for such purposes before purchasing took place. He stated on one waiver application that he had had a request from a chief to reserve land. The chief Haimona (Ngati Whatua) had requested that the Kaipara landing place and Pitoitoi (the dragging place), used for travel between Auckland and Kaipara, be reserved for himself and Ngatiwhatua living at Kaipara. When Clarke received an application for land near this area he noted that he saw no objection to the waiver if the land sought did not include these places. Again Clarke did not investigate the matter himself, but relied on the purchaser to state whether the land included these places.

Although settlers were pleased with the October proclamation's decrease in the fee to a mere fraction, they now spent their venom on the waiver tenths. They claimed that the Government's assumption of dictation over Maori land was

'nugatory' – Maori could, and would, do as they chose. These ideas continued to be evident when Stanley replaced FitzRoy with George Grey. They were part of a long tradition of settler protest at anything which seemed to limit the profit potential and freedom of private dealing in Maori land.

Grey's appointment as Governor led to the reimposition of pre-emption and a movement back to Crown purchasing, able to be carried out with new vigour by Grey because of the increased funds available to him. (It also involved agreements for land purchases to be made by the New Zealand Company.) Grey's, and the Colonial Office's, preference for renewed State control led to a new recognition of the control (administrative and otherwise) pre-emption could provide. Grey saw pre-emption as a potential means of controlling Maori actions and acceptance of British law in general, by refusing to purchase lands from those who 'conducted themselves improperly' (something FitzRoy had also acknowledged his waiver scheme could do). And he used it to begin to reassert Crown control also over pre-emption waiver purchasers and the legal administration of the lands they claimed.

The Governor's preference for re-establishing such Crown control was evident in his actions to follow. In June 1846, Grey announced that no more waivers would be granted and required settlers to provide all documentation of their purchases (including surveys) within three months. By the end of that year he had reintroduced Crown pre-emption and set up a commission to assess settler claims, and provide debentures in lieu of land, or land where the claim had been occupied by the purchaser. But very few settlers had bothered to take advantage of these provisions.

Grey then turned to another means of resolving pre-emption waiver purchases, submitting the question of the legality of FitzRoy's proclamations to the local courts. He believed that 'nothing less' than a Supreme Court decision 'formally given' would 'satisfy many of the claimants that they had not obtained legal rights over land purchased under pre-emption waiver proclamations' and that they 'could not compel the government to recognise, and if necessary to enforce' them. The vindication of Grey in *The Queen v Symonds* meant that pre-emption waiver claimants could not find support in the courts and had to turn to the Government to acquire legal title. The judgment was based on a reassertion of the two key principles of British colonial land administration. First, that the Crown was the sole source of legal title, and secondly, that the Queen had the sole right to extinguish native title. Grey was satisfied that all such claimants were now convinced that they had acquired no legal rights by the waivers.

But while the court had ruled that those who purchased land had no legal rights and had to rely on the Government's clemency, in Britain the then Secretary of State for the Colonies, Earl Grey, came to the independent view that because pre-emption waiver claimants had acted on the faith that they had a legal right, their purchases should be granted land on the basis of a strict legal right, but they could expect no leniency if they had not acted in conformity with FitzRoy's proclamation conditions.

Faced with these conflicting views, Governor Grey came up with three options for pre-emption waiver claimants in August 1847. The focus of his scheme, carried out by Commissioner Henry Matson under the Land Claims Compensation Ordinance 1846, was to settle Pakeha land claims, identify the Crown's demesne, and gain Crown control of the administration of those lands. Matson's inquiry, set up on the basis of the Crown's theories on sovereign title to land, did not adequately recognize or protect Maori interests. His interviews with the Maori vendors, from whom the pre-emption waiver purchases had been made, were conducted to provide evidence to support or refute settler interests, rather than to protect or uphold the interests of Maori.

Each of Grey's three options contained measures to ensure that the land had been purchased from the legitimate Maori owners. But Grey did not specifically require identification of those Maori owners in Matson's terms of reference (which were set out in the 1846 ordinance). All the same, for the purposes of his inquiry, Matson recorded responses from Maori vendors and witnesses regarding the ownership of the land, who held the right to sell, and whether any claim to the land remained (based on whether the full payment had been given). He relied on their confirmations of these points. Like Clarke, Matson does not appear to have conducted any significant investigation into the customary ownership of the land.

Grey thought that the waiver proclamations' reserve tenths were 'inconvenient'. He chose to recognize merely that FitzRoy's proclamations had set them aside 'for public purposes', omitting the addition 'especially the future benefit of the aborigines'. Two of Grey's three options, under which almost all the pre-emption waiver claims were made, allowed the settler claimants to purchase the reserve tenths from the Crown at £1 per acre if they met certain criteria. Most settlers awarded land following the Matson inquiry took advantage of this opportunity. This was clearly contrary to FitzRoy's commitment to Maori on Government House lawns, and his intention in the pre-emption waiver proclamations. FitzRoy's view that Maori needed at least both reserves and tenths, expressed in October 1844, was set aside.

Although Maori complaints about the Crown's acquisition of the surplus followed, no complaints have yet been found about the loss of the tenths. The confusion regarding land ownership at this time would have made it difficult for Maori to keep track of what happened to the tenths. Perhaps Maori who attended the Auckland hui remembered FitzRoy's promise of schools, hospitals, and services, which were to be provided from the produce of the tenths, more than the tenths themselves (which FitzRoy had clearly stated were to be vested in, and administered by, the Crown).

Grey does not seem to have thought about whether Maori had retained sufficient reserves for their future needs. (A plan attached to a report of Grey's of November 1847 indicated the area between Tamaki Road and the sea as 'Native land'.) He did not require Matson to assess whether the Maori vendors had retained sufficient land, nor did he require him to inquire whether any of the land sought by the Pakeha claimants included any pa or urupa (which were not to receive a Crown grant) or

land Maori required for their own use (which was not to have been waived). The past protective purposes of pre-emption were overshadowed by the new assertion of Crown control and land administration (and the establishment of the Crown's demesne which could in turn be used to create revenue).

As noted above, the Maori vendors and witnesses' evidence in Matson's inquiry included confirmation of the amount they had been paid in compensation for the land. But Matson was not required to assess whether the payments Maori received were sufficient. This confirmation was used instead in assessing a Pakeha claimant's entitlement. (It was probably also used to establish that Maori were 'fully satisfied' and had no further claim – that is, that their interests were 'extinguished'.) Despite some Maori complaining that the price they had been paid was inadequate, and evidence that the resale of some of the land had resulted in large profits for the original settler purchasers, Matson's best response was to ensure, at times, that Maori were paid the amount that was originally agreed to. At other times, he passed over cases where Maori did not receive the agreed payment.

A decade later, settler concerns about the pre-emption waiver purchases were again raised. Many claims had been disallowed in the 1847 investigations through the claimants' failure to send in plans within Grey's deadline. Colonial officials considered this unfair and unjust. The Land Claims Settlement Act 1856 allowed Commissioner Francis Dillon Bell to maintain the focus on settler demands and Crown interests. Survey compensation provisions encouraged settlers, whose claims had formerly been disallowed, to survey the full extent of their claims. This resulted in large quantities of land, previously 'locked up' because ownership was 'uncertain', becoming available for colonisation, either by being awarded to a settler or reverting to the Crown as 'surplus'. But these provisions were not matched by giving Maori any significant power to challenge the surveys being undertaken, the claimant's presentation of their claim, or the Crown's acquisition of the 'surplus'. Only where a claim had lapsed, may the land have reverted to Maori.

Bell tabulated a number of statistics on the pre-emption waiver purchases. He calculated that 97,427 acres of land had been surveyed under the pre-emption waiver claims (although this was not the total of the land allegedly purchased). And he found that a total of £6841 4s 2d had been paid to Maori for land purchased under FitzRoy's pre-emption waiver proclamations. Calculations of the amount of surplus acquired by the Crown under pre-emption waiver purchases vary widely, and will need to be reassessed. The surplus probably included FitzRoy's pre-emption waiver reserve tenths. There were no provisions in the 1856 Act for settlers to purchase the tenths. As an undeclared part of the surplus, these tenths appear to have simply disappeared into the Crown's demesne.

By this time Grey, with McLean, had set up an effective system of Crown purchasing of Maori land. The Crown obtained enough land under this system to stem the settler demand for the abolition of pre-emption until the late 1850s. But Maori opposition to sales, and a rapid increase in settler immigration, then put pressure on Crown land purchase agents. In 1858, there was an unsuccessful attempt to waive pre-emption. Growing demand for more Maori land for settlement

led the New Zealand General Assembly to propose abolishing pre-emption and the placing of Maori land in an open market through the Native Territorial Rights Bill. The British Government disallowed the Bill on the ground that it was an infringement of the Treaty. But after the control of Native Affairs passed to the New Zealand Government in 1862, the Crown's exclusive right to purchase Maori land was finally abolished.

The protection of Maori interests in land, which pre-emption potentially allowed the Crown to achieve, had long since faded in the face of settler interests. The legal-administrative control which pre-emption provided for the Crown – facilitating the transfer of land from customary to British land title and law – continued in a modified form through the Native Lands Act 1862 and subsequent land Acts. The Crown's sole power to extinguish aboriginal title continued (and continues) through the Native (later Maori) Land Court. Restrictions on the alienability of Maori land were not wholly abandoned after 1862 either. The Crown reasserted this aspect of pre-emption by proclamation, whenever it deemed it necessary, to again monopolize the purchase of particular areas of (and for a brief period all) Maori land, well into the twentieth century.