CHAPTER 4

FITZROY'S WAIVER OF CROWN PRE-EMPTION

Note: The research underlying this chapter has unfortunately been limited by the illness of the principal researcher concerned, Ms Rose Daamen. In particular it has not been possible to examine in detail the investigation of the waiver purchases by Commissioners Matson and Bell or the Myers commission of 1948. This chapter nevertheless draws upon Daamen's 'Draft Report on Pre-emption', September 1996, and on Mr John Hutton's 'Land Purchases under FitzRoy's Waiver of Crown Pre-emption: an Analysis', October 1996, both written for the Waitangi Tribunal Rangahaua Whanui Series. John Hutton also wrote a summary of his report, which formed the basis of this chapter; the references to parliamentary papers and other sources are mostly drawn from his citations of them in his report.

4.1 Origins of Pre-emption in New Zealand

The issue of the Crown's pre-emptive (monopoly) right to purchase Maori land arose in the late 1830s in relation to the increasing numbers of people settling in New Zealand and to the increasing awareness by the British Government that it would have to take some responsibility for the actions of British subjects there. Pre-emption had been used in North America, both to control the spread of settlement and to provide opportunity for local governments to gain revenue from land sales. On a more humanitarian level, pre-emption was supported as a means of protecting indigenous people from unscrupulous land dealers.

In August 1939 Captain William Hobson was instructed by Lord Normanby that, on the establishment of British sovereignty in New Zealand, 'the chiefs should be induced, if possible, to contract with you, as representing Her Majesty, that henceforward no lands shall be ceded, either gratuitously or otherwise, except to the Crown of Great Britain'. This, it was hoped, would ensure a degree of responsibility in land transactions. Even before the Treaty negotiations, Hobson was to proclaim on his arrival in New Zealand that the Crown would not 'acknowledge as valid any title to land which either has been, or shall hereafter be acquired . . . which is not either derived from, or confirmed by, a grant to be made in Her Majesty's name, and on her behalf'. With regard to land that had already been acquired by British subjects, a commission was to be appointed to investigate title, and upon making its recommendations to the Governor, he would decide if the claimants were entitled to any confirmatory grants.

Normanby envisaged a system whereby '[t]he re-sales of the first purchases that may be made, will provide the funds necessary for future acquisitions; and, beyond the original investment of a comparatively small sum of money, no other resource will be necessary for this purpose.'[1]

On 14 January 1840, Governor Gipps of New South Wales issued a proclamation stating that any private purchases of Maori land were to be considered 'null and void' until investigated and confirmed by the Crown. Hobson confirmed Gipps' stance with an identical proclamation on 30 January 1840, the day after his arrival in the Bay of Islands.

4.2 Pre-emption and the Treaty of Waitangi

The second article of what was to become the Treaty of Waitangi was initially drafted by Hobson's secretary, J S Freeman, and asked that '[t]he United Chiefs of New Zealand yield to Her Majesty the Queen of England the exclusive right of Pre-emption over such waste Lands as the Tribes may feel disposed to alienate'. By 'waste' Freeman probably meant 'uncultivated'. Busby revised the draft and included at the beginning of the article (article 2) the guarantee to Maori of the 'full exclusive and undisturbed possession of their lands and estates, forests fisheries and other properties' as long as they wished to retain them. The pre-emption clause then followed and read: 'the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treaty with them in that behalf', or in Maori 'Otiia ko nga Rangatira o te wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te wenua – ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona'.

Controversy has surrounded the translation of the English text into Maori. Henry Williams used the word 'hokonga' to translate the concept of pre-emptive right of purchase. According to Orange, Williams' translation into Maori 'did not stress the absolute and exclusive right granted to the Crown'.[2] By implication then, the verbal explanations of the concept at Treaty signing meetings and Maori understanding of the explanation were to be crucial, 'particularly in a Maori tradition in which relationships were customarily sustained and modified through lengthy discussion'.[3]

According to Orange, treaty negotiations suggest 'that the exclusive nature of pre-emption was not always clearly understood. Nor did Maori grasp the financial constraints that pre-emption might bring; it was presented, it seems, either as a

1. Normanby to Hobson, 14 August 1939, BPP, vol 3, pp 85–87. For a lengthier quoting of these instructions, see chapter 1.
2. Claudia Orange, *The Treaty of Waitangi,* Wellington, Allen and Unwin,1987, p 42
3. Ibid, p 56

benefit to be gained or as a minor concession in return for the guarantee of complete Maori ownership'.[4] At the negotiations at Waitangi, Orange concludes, Maori understanding was possibly restricted by 'inadequate explanations'. Observers such as William Colenso and William Brodie noted that a number of chiefs did not fully understand pre-emption. Colenso did not 'for one moment' suppose that the chiefs were 'aware that by signing the Treaty they had restrained themselves from selling their land to whomsoever they will'.[5] Only one chief, Moka, demonstrated a knowledge of the workings of pre-emption by doubting Hobson's ability to enforce Crown pre-emption because, despite the 30 January proclamation, settlers were still privately purchasing land from Maori. Shortly after the signing Tamati Wiremu, a Paihia chief, appealed to the Governor to stop overtures being made by Pakeha individuals. This can be seen as evidence of an understanding of the exclusive right of pre-emption, or as evidence of the chief's understanding of the Crown's protective role towards Maori. Other Maori, like the chief Hara, continued to offer land for sale to private purchasers.

Hobson's instructions to the negotiators, mostly missionaries, who were to seek signatures to the Treaty from other parts of New Zealand do not appear to have contained any specific references to pre-emption. The negotiators were instructed to explain the Treaty's principles, which Maori were to understand clearly before they added their signatures. These negotiators then, had an important role to fulfil. It would appear that pre-emption was presented as a form of Crown protection for Maori. At Mangungu, John Hobbs, a Wesleyan missionary, told those Maori present that land would never be forcibly taken from them and would be purchased by the Queen if needed.[6] Major Bunbury told Maori at Coromandel and Thames that pre-emption was 'intended equally for their benefit, and to encourage industrious white men to settle amongst them', to share skills with them. Furthermore, rather than allow speculators to purchase large areas of land, Maori were told that the Queen would purchase their land at a 'juster valuation'.[7] Henry Williams also justified pre-emption in a similar manner to Maori south of Cook Strait and up the west coast to Wanganui, who were pleased to hear that there existed a check against land speculators.

Maori responses to pre-emption understandably depended upon their circumstances. In the areas of New Zealand Company settlements, Maori were anxious to gain assistance against the settlers who were claiming to have purchased large areas of land which Maori believed they had never sold. As Orange points out, '[i]t does not seem to have occurred to Maori to question whether the Government had sole right of purchase or only first offer'.[8] What they required was Crown protection. In the north, many Maori were still keen to sell land and made offers to Hobson. Financially constrained, Hobson had to turn down these offers, disappointing Maori

4. Ibid, p 100
5. R M Ross, 'Te Tiriti o Waitangi: Texts and Translations', *New Zealand Journal of History*, vol 6, no 2, October 1972, p 145
6. Orange, p 65
7. Cited in Orange, p 101
8. Orange, p 102

who consequently resented Crown pre-emption. In Auckland, where the Crown was buying land for the new capital (which was shifted from Kororareka in 1841), Maori quickly came to realise that the Government was greatly benefiting from the margin between purchase and re-sale price.

4.3 The New Zealand Company and Hobson's Pre-emption Waiver

In November 1840 the New Zealand Company secured an agreement with the British Government whereby it would be granted one acre of land for each five shillings spent on colonisation in New Zealand. A charter of January 1841 listed a schedule of 110,000 acres in Port Nicholson and 50,000 acres in Taranaki, to be selected from *validly purchased* land within the vast zone from Mokau to Kaiapoi that the company claimed to have purchased in 1839. Doubts then arose as to the application of the Land Claims Ordinances of 1840 (New South Wales) and 1841 (New Zealand), to these lands. In September 184, having visited Port Nicholson, Hobson wrote to Wakefield:

> Understanding that some doubt is entertained as to the intentions of the Government with respect to the lands claimed by the New Zealand Company, in reference both to the right of pre-emption vested in the Crown, and to conflicting claims between the Company and other purchasers. It may be satisfactory for you to know that the Crown will forego its right of pre-emption to the lands comprised within the limits laid down in the accompanying schedule, and that the Company will receive a grant of all such lands, as may by any one have been validly purchased from the natives.[9]

The schedule added to that already agreed by Lord John Russell, 50,000 acres at Whanganui, and 221,000 acres at Nelson was soon included. This waiver permitted the company to attempt to complete purchases already accepted as begun, but they were still subject to the inquiries of the Land Claims Commissioner (William Spain). The subsequent relationship between the Crown and the company has been discussed above in chapter 3.

4.4 Fitzroy Proposes a Waiver on Pre-emption

By the time Governor FitzRoy had arrived in New Zealand in December 1843 (Hobson had died in September 1842) expectations were running high that the pre-emption clause of the Treaty would be relaxed. Before leaving England, FitzRoy had written to Stanley, Secretary of State for the Colonies, about the possibility of waiving pre-emption in favour of certain other individuals or companies, besides the New Zealand Company. This, he believed, would allow settlers who had laid out capital on buildings or other improvements to acquire title, and meet the objections

9. Hobson to Wakefield, 6 September 1841, Wai 145 rod, doc a29, p 308

of Maori who would not sell their land to the Government at a low value knowing that it would be resold for a higher price. FitzRoy noted that '[s]ome powerful tribes are said to have already combined to refuse to sell land to the Government, and such combination is likely to be extended while the aborigines look upon the Government as opposed to their interest, seeking only its own advantage'. His tentative solution was that companies or individuals be permitted to purchase land from Maori as long as they were willing 'to give not less than the fixed upset price (say one pound an acre) to aboriginal landowners', and as long as each transaction was not only authorised by the Governor, but 'inquired into, witnessed and registered by a Government officer'.[10]

Stanley considered FitzRoy's proposal to be premature and instructed him to wait until he had arrived in New Zealand and viewed the situation first hand. Stanley did ask FitzRoy to keep two points in mind: firstly, that Europeans were to be prevented from acquiring land from Maori at a cheaper rate than if they had acquired it from the Government; and secondly, that if such purchases were made, a contribution was to be made by the purchaser to the emigration fund.[11]

Immediately after FitzRoy's arrival in New Zealand, Maori voiced their concerns to him. According to a *Southern Cross* report, Te Kawau, Tinana, and others of Ngati Whatua explained their understanding of pre-emption: '[a]t the meeting at Waitangi you pledged your Government that we should be British subjects, and that our lands should be sold to the Queen. But we understand from that part of the Treaty that Her Majesty should have the first offer; but in the event of Her Majesty not being able to bargain with us, we should then be able to bargain with any other European'.[12]

Te Wherowhero, Kati, and others of Waikato were reported as expressing very similar sentiments: '[t]his agreement at Waitangi said: The land was to be sold to the Queen; now, we supposed that the land was first to be offered to Her, and if Her Governor was not willing to buy, we might sell to whom we pleased; but no, it is for the Queen alone to buy; now, this is displeasing to us, for our waste lands will not be bought up by Her only, because She wants only large tracts; but the common Europeans are content with small places to sit down upon'.[13] Pakeha settlers were also vocal in criticising pre-emption. They were restricted to purchasing land only from the Crown and at the prices the Crown prescribed.

Within two months of arriving in the colony FitzRoy was to introduce the first of three pre-emption waivers. In justifying his action to the Secretary of State for the Colonies, FitzRoy described the situation:

> the natives have been clamorous to sell their lands. They called on the Government to buy, or let others buy; and great discontent has been caused among them by the inability of the Government to do either. But while they called on the Government to buy from them, it was at a nice price wholly out of the question. They said: 'Let the

10. FitzRoy to Stanley, 16 May 1843, BPP, vol 2, pp 387–388
11. Stanley to FitzRoy, 26 June 1843, BPP, vol 2, p 390
12. *Southern Cross*, 30 December 1843, cited in Ross, p 146
13. Ibid

> Government give us as much as it receives from others, or let them buy from us. By the treaty of Waitangi, we agreed to let the Queen have first choice (the refusal) of our lands, but we never thought we should be prevented from selling to others if the Queen would not buy. Is it just to us that you will neither buy at a fair price, nor let others buy, who will give us as large a price as they give to you, after you have bought from us for a trifle?'.

FitzRoy gave two reasons why he was unable to buy land: firstly, the high prices Maori were asking for their land, and secondly, he did not have sufficient capital. The situation, FitzRoy continued, was critical and he believed that had he deferred the decision:

> the character of the Government would have been so irretrievably injured in the native estimation, and such open opposition to authority would have been the consequence, that our moral influence, by which we alone stand firmly in New Zealand, would have been lost.[14]

4.5 Fitzroy's Pre-emption Waivers for the New Zealand Company

In January 1844 FitzRoy travelled to Wellington to try to settle the continuing difficulties arising out of the New Zealand Company claims there and the Wairau incident. Encountering the fact that more company settlers were preparing to embark for New Zealand and that the Government did not have the time nor the funds to purchase land, FitzRoy adopted the only solution he thought 'practicable'. On 27 February 1844 he waived the Crown's right of pre-emption over 150,000 acres of land for the proposed settlement in 'New Munster' (the South Island and the southern part of the North Island), to be selected and purchased by the company's agent 'under the superintendence and with the assistance of the most efficient Government officer of whose services' FitzRoy could provide: J J Symonds, former Sub-Protector of Aborigines and now police magistrate. This waiver led to the Otakou purchase of July 1844.

FitzRoy instructed Symonds 'not to countenance any, even the smallest encroachment on, or infringement of existing rights or claims, whether native or other, unless clearly sanctioned by their legitimate successor [sic]'. The new settlers in New Munster were to be informed that their cases would be dealt with 'most carefully and kindly' while Maori were to be told that the Government would 'not authorize, nor in any way sanction any proceedings which are not honest, equitable and in every way irreproachable'.[15]

FitzRoy was also authorised to waive pre-emption in favour of the New Zealand Company for 150,000 acres in or near the Wairarapa, and another 250,000 acres 'in other places within the limits claimed by the New Zealand Company under Mr

14. FitzRoy to Stanley, 15 April 1844, BPP, vol 4, pp 178–179
15. FitzRoy to Symonds, 27 February 1844, BPP, vol 4, p 437

Pennington's award'.[16] (In the event these purchases were not made during FitzRoy's governorship.)

The waivers were dependent on a number of conditions: firstly, that all the other detailed arrangements made by the Government in respect of the company's settlements were to remain unaltered (see chapter 3 above); secondly, that the land purchased under the waivers was in exchange for an equal number of acres claimed by the company elsewhere (namely in Port Nicholson, Taranaki, Whanganui, and Wairau, where Maori were not willing to sell in the quantity the company required), and that the purchase money was to be provided by the company; and thirdly, that all surveys of the land purchased were to be made by company surveyors at company expense.[17] (In the end the Government helped both with the surveys and by advancing funds.)

4.6 General Waivers

4.6.1 The '10 shillings an acre' proclamation

Upon his return to Auckland, FitzRoy issued the '10-shillings-an-acre proclamation', dated 26 March 1844. Pre-emption was to be waived over 'certain limited portions of land' under certain conditions. In addition to the cost of the land, the purchaser was to pay four shillings an acre to the Treasury to secure the waiver permit and six shillings an acre into the Land Fund for 'the general purposes of Government', in order to obtain the Crown grant on completion of the purchase from the Maori owners. Applications for waiver were to be made to the Governor and had to describe the area of land 'as accurately as may be practicable'. Before giving his consent, the Governor would consider the locality, the 'state of the neighbouring and resident natives', 'their abundance or deficiency of land', and 'their disposition towards Europeans, and towards Her Majesty's Government'. He would also consult with the Protector of Aborigines. In giving his consent, the Governor might 'judge best for the public welfare, rather than for the private interest of the applicant'.

No Crown title was to be given for any pa or urupa or land about them, 'however desirous the owners may now be to part with them'. Pre-emption was also not to be waived over any land required by Maori for their present use. Of all land purchased under the waiver, 10 percent was to be conveyed to the Crown by the purchaser 'for public purposes, especially for the future benefit of the aborigines'.[18]

Meeting with Maori chiefs at Government House on the day the proclamation was issued, FitzRoy told them that there was no longer any objection to them selling their land to Europeans, providing his permission was sought and the case was investigated to determine whether Maori could spare the land and to ensure any future difficulties were pre-empted. He also advised those present:

16. FitzRoy to Spain, 27 February 1844, BPP, vol 4, p 437
17. Hamilton to Wakefield, 27 February 1844, BPP, vol 4, p 437
18. Proclamation, 26 March 1844, BPP, vol 4, pp 618–619

> not to part with your land hastily, and only with such portions as you can well spare, and to be cautious to sell to the best advantage, and not to the first person that asks you. See that you get a fair price, and as much as the land will sell for; be very cautious in making your bargains, in order that when they are settled, you may abide by them honestly; in order that there may be no quarrelling, or even misunderstandings afterwards.

FitzRoy went on to say that one-tenth of the land purchased under the waiver would be set aside to be:

> chiefly applied to, your future use, or for the special benefit of yourselves, your children, and your children's children. The produce [agricultural or otherwise is not specified] of that tenth will be applied by the Government to building schools and hospitals.[19]

Before Crown pre-emption was restored under Grey, 57 waiver certificates had been issued under the March 1844 proclamation for areas ranging from nine and a half perches to 200 acres. One-third of the certificates were for areas of 10 acres or less, just over half were for areas of 20 acres or less, and just under a quarter were for areas of between 31 and 50 acres. In aggregate they authorised direct purchase of 2337 acres, by Daamen's calculations, or 1795 acres according to the Myers commission of 1948.[20] A third of the certificates were issued within the first month of the waiver, but demand then steadily dwindled until the more lenient waiver was issued in October. A few of the deeds attached to the waiver certificates predated the waiver proclamation. Almost all of the waiver certificates were issued for Auckland land: only three were recorded for land north of Auckland (two in the Bay of Islands and one along the Mahurangi–Waiwerawera coast); a further two were issued for islands in the Hauraki Gulf.

In terms of investigation into each application, in most instances it appears that Protector Clarke knew of no objection to the purchase, nor of anything to prevent it. The few exceptions to this seem to be based on Clarke's concern as to whether settlers were purchasing land from the correct parties. When Clarke was unsure of this he sought a local person from the area concerned to advise. (For example, when assessing applications from the Bay of Islands he asked Major Bridge to inquire into the matter on his behalf.) There appeared to be no inquiry into the price paid to Maori for their land, or at least no objections by the Protectors are recorded in respect of price. Daamen's research shows that payments to Maori ranged from 3s 5d an acre to £2 10s an acre, averaging 16 shillings an acre for the 32 claims where records of both price and acreage survive. (This was apart from the 10 shillings an acre payable to the Government.)[21]

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19. Copy of Minutes of a Meeting of Native Chiefs, by Appointment, at Government House, Auckland on Tuesday, 26 March 1844, BPP, vol 4, pp 197–198
20. Rose Daamen, 'Pre-emption and FitzRoy's Waiver Purchases', Waitangi Tribunal Rangahaua Whanui Series unpublished draft, 1996, ch 3, p 14; Sir M Myers report, AJHR, 1948, g-8, p 66. The discrepancy relates to the confusion of the records and to the fact that some waiver certificates under the March 1844 proclamation were reissued under the October proclamation.

4.6.2 The 'penny an acre' proclamation

Despite FitzRoy's March pre-emption waiver, dissatisfaction was still being expressed about land purchasing. The March waiver had done little to encourage land transactions outside Auckland. The 10 shilling an acre fee was precluding land sales elsewhere because it would be some time before the value of land would be worth the capital expenditure necessary to acquire it at that cost. In the north Maori were increasingly dissatisfied with the manner in which the Crown exerted its power through pre-emption, customs, and timber duties. These controls, and the shift of the capital to Auckland, diminished the flow of revenue to northern Maori and settlers alike. In July of 1844, Hone Heke expressed his anger at the loss of mana as well as economic opportunity by cutting down the flagstaff flying the Union Jack at Kororareka. In early October, FitzRoy, in an attempt to alleviate disquiet, totally abolished customs duties.

On 10 October 1844 FitzRoy also reduced the fee payable to the Government for a pre-emption waiver to 1d per acre. This fee was payable upon issue of a Crown grant and not before.[22] The remaining provisions for this waiver duplicated those of the earlier March waiver. FitzRoy argued that in order for the colony to prosper '[l]and[23] must be made easy of attainment in small quantities, when sellers and purchaser fully agree to the transfer'. The previous pre-emption period, however, was neither unfair to those who had already bought land at high prices nor to Maori. In the case of the former, unless the colony prospered, the value of their land would fall to nothing, and in the case of the latter, the previous four years of interaction with land commissioners, Protectors, missionaries, and others had 'so completely informed the natives of the value of land, that there is not now any doubt of their ability to manage their own transactions of this nature, as far as relates to their own present interests'.[24]

Under the October pre-emption waiver, 192 certificates were issued over an area totalling around 99,500 acres. The waivers ranged from 13 perches to 3000 acres. Many purchasers overcame the acreage limit (based on the phrase 'a limited portion of land' in the March 1844 proclamation, which was later interpreted by Attorney-General Swainson to mean 'not more than a few hundred acres'[25]) by submitting a series of applications for adjacent areas of land, or by submitting applications for each individual family member, increasing their claim to areas of around 2500 to 4500 acres. Apart from this, almost three-quarters of the waiver certificates issued were for areas between 100 and 1000 acres, a quarter for less than 100 acres and 'a small number' for between 1000 and 3000 acres which suggests that the implied acreage limit was not adhered to.[26]

21. Daamen, chapter 3, pp 14–18
22. Proclamation, 10 October 1844, BPP, vol 4, pp 620–622
23. Minute of 10 June 1852, olc 1240, NA Wellington
24. FitzRoy Memorandum, 14 October 1844, BPP, vol 4, pp 403–404
25. Swainson minute, 31 August 1848, olc 1/1240, NA Wellington
26. Daamen, chapter 3, p 28

Around two-thirds of the certificates were issued from December 1844 to March 1845, with FitzRoy issuing his last pre-emption waiver certificate in November or December 1845. Over three-quarters of the certificates under the October waiver were for land around the Auckland area, while a small number were issued for land in the Bay of Islands, Whangaroa, Ngunguru, Mahurangi, Hokianga, Kaipara, Coromandel–Thames, Bay of Plenty, and one in the Waikato.

According to Daamen's reading of the files, Maori received on average two shillings an acre for the land sold. The Myers commission gives one shilling and three pence per acre average.[27]

Some of the deeds were signed prior to the proclamation, and a large number were signed following the proclamation but before the certificate was granted. Like those under the March proclamation, such transgressions did not result in a refusal for the certificate to be granted, except in a small number of cases which came before the Attorney-General in 1846 to 1847, and, under Earl Grey's instructions of 10 February 1847, had to comply *precisely* with the terms of the waiver proclamations.

In terms of investigating proposed waivers, in Daamen's view, the Protectors only seemed to question an application if a previous purchase had taken place over the same area of land.[28] Part of the explanation was probably that the Protectors already had a very considerable knowledge of the land and the Maori ownership of it in the areas most affected.

4.7 The Colonial Office's Reaction

The Colonial Office sanctioned and approved the 10-shillings-an-acre proclamation. It recognised the pressure that was placed on FitzRoy by Maori and settler discontent. However, the office was of the opinion that the fee paid by settlers could be increased. This of course was impossible; few settlers were prepared to pay even the 10 shillings. On the other hand, FitzRoy's 'penny-an-acre proclamation' seriously undermined the possibility that the Government could derive a significant income from land sales. Consequently the Colonial Office was not pleased with FitzRoy's second waiver, but sanctioned it nonetheless, partly because they recognised that FitzRoy was trying to allay Maori unrest. Later, after Heke and Kawiti had sacked the township of Kororareka (Russell) anyway, the office changed its stance, calling the Proclamation 'a most impolitic arrangement'.[29] Among other factors the penny-an-acre proclamation gave the Colonial Office reason to remove FitzRoy from his post in November 1845.

27. Daamen, chapter 3, p 29; AJHR, 1948, g-8, p 76
28. Daamen, chapter 3, pp 27–30
29. Stanley to George Grey, 13 June 1845, BPP, vol 5, p 232

4.8 Grey's Restoration of Crown Pre-emption

FitzRoy's replacement, George Grey, was instructed to recognise the purchases made under the proclamations, but to re-assess the need for the waiver of Crown pre-emption. Grey saw little that he liked and soon after his arrival refused to sanction any further private purchases. In a series of didactic despatches to the Colonial Office in June 1846 Grey attacked the proclamations. He argued that FitzRoy had issued them under duress from 'agitators' who 'were those who most eagerly availed themselves of . . . [the concessions] when they were obtained' and that such coercion should not be tolerated.[30] Grey also attacked the way that individual waivers were not gazetted, so that more than one buyer could seek to purchase the land. Maori, he suggested (with some justice) would have got better prices had the land been sold at public auction. He complained that Maori would oppose the occupation of lands purchased under the Proclamations (although they had not done so), and talked of the numerous injustices suffered by the settlers (although the settlers had almost universally supported the penny-an-acre proclamation).

On 10 February 1847 Earl Grey replied to Governor Grey s June dispatches.[31] On the whole the Colonial Office appears to have been convinced by Grey's arguments. Earl Grey suggested that FitzRoy had 'plainly exceeded his lawful authority' and agreed that the waiver of pre-emption purchases should be disallowed and annulled. However, Grey was instructed to recognise individual transactions if purchasers could 'prove in the strictest manner that he had completely and literally satisfied the requisitions of the proclamations in every particular they contain'. Earl Grey anticipated that 'very few indeed [of the waiver purchases] will be sustained'. Grey was also instructed to ensure that the land had been purchased from the correct owners:

> the Attorney-General should certify to you 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.[32]

Grey, however, had acted before receiving these instructions. On 15 June 1846 he gazetted a notice announcing his proposal to appoint commissioners to investigate and report on each 'alleged purchase' and calling on all persons who wished to lodge claims to submit their papers, 'whether deeds or surveys', by 15 September 1846. He would decide, in the light of the commissioners' reports, whether to issue grants in satisfaction of the claims.[33]

In November 1846 Grey issued two Ordinances relative to the land question. The first, the Native Land Purchase Ordinance, banned all private purchases and leases of Maori land. The second, the Land Claims Compensation Ordinance, authorised

30. George Grey to Stanley, 9 June 1846, BPP, vol 5, p 555
31. Earl Grey to George Grey, 10 February 1847, BPP, vol 5, pp 578–580
32. Ibid, p 579
33. Grey to Gladstone, 18 June 1846, BPP, vol 5, p 569

the setting up of the commission to investigate the pre-emption waiver purchases. The commissioner(s) would ascertain whether or not individual purchases had followed the terms of FitzRoy's waiver of pre-emption under the October 1844 proclamation. Before Crown grants could be issued for purchases under that proclamation it was necessary to check whether the claimant had 'duly complied with the terms and conditions prescribed by the said recited Proclamation, and by the Notice to Land Claimants published in the Government *Gazette* of the fifteenth day of June, 1846'.[34] If the commissioner appointed to investigate the claims was satisfied that a claim met the requirements of the ordinance, a debenture would be issued that covered the claimant's costs including the price paid to Maori, the expenses of the conveyance, survey costs, and the costs of improvements. By section 11, if the land had been occupied by the claimant (by fencing, cultivating, or erecting buildings), he was authorised to purchase the land from the Crown at an additional fee of £1 per acre, less what money had been spent on the land, other than the cost of improvements (but at most 10 shillings an acre).

The preamble of the Land Claims Compensation Ordinance in part sought to protect the interests of Maori:

> no Crown Grant of any such land can be safely issued until it shall be ascertained that such alleged purchases have been made from the true Native owners of such land, and that the rights of all persons thereto have been extinguished.

However, by section 10, any land not sold to the settler claimant was to revert to the Crown as 'demesne land of the Crown, saving always the rights which may hereafter be substantiated thereto by any person of the Native race'. The onus of proof was thus on the Maori: if they did not substantiate a claim they would be assumed to have surrendered all their rights to the land in the initial sale. In other words the same principle of a radical Crown title as underlay the Crown's handling of pre-1840 purchases, was applied to the pre-emption waiver purchases also.

In other very important respects the Ordinance worked against Maori interests. In a notable departure from FitzRoy's policy, section 14 of the Ordinance allowed successful claimants to purchase the 'tenth of the land that had been reserved 'for public purposes, especially the future benefit of the aborigines'. It was reasoned that 'such reservations cannot in many cases be conveniently made'. But FitzRoy had publicly stated that the Government would look after Maori interests and that the tribes would retain land in the growing settler community. Grey's rationalisation that such reserves were inconvenient is therefore highly unsatisfactory. This was poor treatment indeed for those tribes living in or near Auckland who had sold thousands of acres of land to the settlers.

34. 'An Ordinance to authorize Compensation in Colonial Debentures to be made to certain Claimants to Land in the Colony of New Zealand', 1846 no 22

4.9 *Queen v Symonds*

Like the Land Claims Ordinance 1841, the Land Claims Compensation Ordinance 1846 was highly unpopular among the settlers, and not all potential claims were submitted to the appointed commissioner, Major Matson, by the required date. Grey sought to strengthen his hand by recourse to the Supreme Court. In a test case, *Queen v Symonds*, brought by a Crown official, the court found that the Crown was the sole source of legal title and had the sole right to extinguish Native title. Purchases completed under FitzRoy's waiver of pre-emption thus had no valid or enduring title, unless followed by a Crown grant. Politically, the claimants were placed at the mercy of the Government, which held the power to authenticate the purchases as it saw fit.

4.10 Grey's Three Options

Grey only partly followed the instructions sent by the Colonial Office for the settlement of the pre-emption waiver claims. His overriding concern was to settle the claims quickly and acquire for the Crown a sizeable 'surplus of land that could be sold at a profit to the Crown. On 10 August 1847, in the aftermath of *Regina v Symonds*, Grey issued regulations presenting the settler claimants with three options. Firstly, the purchasers could have their claims assessed under the Colonial Office's narrow and strict instructions. Secondly, they could take the more generous settlement offered by the Land Claims Compensation Ordinance. Thirdly, they could follow a new set of regulations, whereby, if approved by the commissioner, the penny-an-acre claimants could receive a Crown grant for up to a maximum of 500 acres and at the payment of a fee of five shillings an acre, provided the claim was undisputed by Maori and was within 20 miles of Auckland. Ten-shillings-an-acre claimants could receive a grant when they paid the six shillings an acre fee required for the issuance of the Crown grant. Most claimants followed the third option.

4.11 The Matson Inquiry

Meanwhile, from December 1846, the inquiry conducted by Commissioner Matson had heard evidence for the vast majority of the claims, including claims under the 10-shillings-an-acre proclamation as well as the penny-an-acre proclamation The former group were relatively unproblematic. Of 62 claims lodged: 49 (relating to about 1500 acres) were Crown granted by Grey on payment of outstanding fees; nine claims (relating to about 280 acres) were disallowed for non-payment of the four shilling per acre fee at point of application for the waiver certificate (which should therefore never have been issued). According to the Domett committee, in respect of 189 applications under the penny-an-acre proclamation, affecting 97,472

acres, Matson was quick to disallow purchases outright or to authorise compensation instead of a Crown grant: 53 grants were awarded to settlers on payment of an additional five shillings per acre, 21 led to payments of compensation or debentures, 80 were disallowed for non-compliance with the requirements of the notice of 15 June 1846 (that is, plans and surveys were not submitted by Grey's deadline of 15 September 1846), a further 28 were disallowed by the Attorney-General for not meeting the Colonial Office requirement of 10 February 1847 that they conform precisely with the procedures laid down in FitzRoy's proclamations and seven were abandoned or disallowed for no stated reason.[35] This meant that, in the majority of cases, some or all the land went to the Crown, an outcome that was strongly resented by the settlers. It did not necessarily mean, however, that the land itself was identified and available for reallocation. An accurate survey had not been an actual requirement of Grey's 1846 proclamation and ordinance, and many of the claims, especially those distant from Auckland, were not yet surveyed.

Some Maori chiefs were interviewed by Commissioner Matson (Hutton suggests that this was especially the case in the 10-shillings-an-acre purchases), but the records examined thus far suggest that little information was sought from them other than to affirm the transaction, the location of the land and the receipt of payment for it.[36] In this respect Matson's inquiries were very similar to those conducted for old land claims by Richmond and Godfrey. Indeed, the records show no evidence of a thorough investigation of whether or not the land had been purchased from the 'correct group, as required by Earl Grey and by the 1846 ordinance. Either Maori did not come forward to contest the claim or the inquiry proceeded on the basis that the correct owners had been determined by the Protectorate at the time of the purchase. Furthermore, no claim appears to have been disallowed on the basis of Maori receiving insufficient payment, although in some cases the money paid was clearly trifling. For example Puketahi Island was purchased for 'five pounds cash and 12 blankets' and immediately on-sold for £200.[37]

A number of Maori opposed the Crown's acquisition of a 'surplus. As has been explained in chapter 2, the Crown took the position that any purchase by Europeans of land held under 'Native title extinguished the Maori interest but created a title in the Crown, not the private purchaser, and the Crown had the legal right to retain part or all of this title. This was fundamentally different from the common Maori view that the 'sale of land formed part of an ongoing relationship with a particular settler, a relationship in which the Maori vendors retained certain rights over the land. So when the Crown asserted rights over a 'surplus it interfered with the understandings Maori had of some, at least, of the transactions, and the relationship established between Maori and particular settlers.

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35. AJHR, 1948, g-8, p 69
36. John Hutton, 'Land Purchases under FitzRoy's Waiver of Crown Pre-emption: an Analysis', report commissioned by the Waitangi Tribunal in conjunction with the Waitangi Tribunal Rangahaua Whanui series, October 1996, draft report, secs 3.2, 3.3
37. Ibid, sec 3.4

Evidence of this difference of view is that in a number of cases Maori refused to let Crown surveyors onto land they had sold to settlers.[38] Likewise, the Ngati Whatua chief Paora Tuhaere, who sold land to a settler called McConnochie, criticised the Crown when it tried to take possession of the land. As the *Southern Cross* reported, the Magistrate's Court explained to Tuhaere that 'he had nothing to do with it – that he had been paid for the land, and that consequently all his interest in it had ceased'.[39] The chief rejected this argument, and 'maintained that he had an interest in the land, and that he should be compelled to refund the money that he had received if McConnochie were not allowed to retain possession'.[40] He wrote to the *Southern Cross*:

> Friends, White People of Auckland, – Listen all of you. The Governor is unjustly taking the lands of the white people. Now I say this law of the Governor is wrong. Because I have sold the land to the white man. The money has been received by us, our eyes have seen the payment, and we were glad. But the Governor s payment we have not seen, his claims are shallow, therefore I said this principle is wrong, is it not so, friends? . . . let the lands which we sold to the white people rest with them in consideration of the payment received by us. . . . Our doings are right, there is nothing wrong in this our custom. You white people say we are a foolish people, now what is that? we can see clearly the evil of this confused work, therefore I say regarding this law it is wrong.[41]

Despite this opposition the Crown continued to assert a right over 'surplus' lands from the waiver purchases. The Crown also retained control over the 'reserve tenths' (which FitzRoy had publicly promised would be used primarily for Maori purposes). Grey chose to sell most of them to successful settler claimants under section 14 of the 1846 ordinance. There is little indication that the Crown used them for Maori purposes. It is possible that the 'model village' Grey fostered at Mangere for Tainui, may have included disallowed pre-emption waiver purchases, but more research would be required to establish this. Some of the Anglican endowment (including Bishop Selwyn's school) in the Remuera–Meadowbank areas might have included such lands, but again further research would be required.

In summary, the waiver of pre-emption purchases appears to have cut a swathe through Maori land resources in Auckland and south Auckland. Normanby had adumbrated the theory that, even though land was bought by the Crown at low prices, Maori would benefit from the increased value that settlement would give the remainder. But if Maori were to benefit from the increasing value of their land they would need to retain land either to sell at a later date, lease, or use as collateral. Similarly, if Maori communities were to remain healthy and prosperous they also needed to retain sufficient land for their own residence and commercial agriculture.

38. In particular, the purchases by Chisholm, Hart, and Hay in Ihumatao and Papakura: A Ward, 'South Auckland Lands', draft report commissioned by the Crown Congress Joint Working Party, 1992 (cited in Hutton, sec 3.5).
39. *The Southern Cross*, 16 September 1848
40. Ibid
41. Ibid

For example, land at Remuera and Mount St John had been held back by the Ngati Whatua ki Orakei chiefs from previous sales to the Crown. But this was sold in the pre-emption waivers, partly as a result of the division of that land with Tainui right-holders, who were interested in selling. Grey and Matson's inquiries do not appear to have taken into consideration the long-term land needs of Maori vendors, by holding land in trust for Maori purposes or by returning it to Maori.

4.12 The Domett Committee and the Land Claims Settlement Act 1856

The resentment felt by settlers toward Grey's treatment of the pre-emption waiver claims and the result of Matson's inquiry simmered for some years. Many claims that had been disallowed applied to land outside Auckland and had not been surveyed, or taken possession of by either the claimants or the Crown. It is probable that Maori who had transacted them in 1844 to 1846 with private settlers assumed that the sale had lapsed and the land remained theirs. In 1856 a committee of the General Assembly chaired by Alfred Domett argued that Matson s practice of disallowing claims because claimants failed to send in plans of the land claimed by the required date of 15 September 1846, resulted in an injustice to the settler claimants. The committee recommended a second investigation of the 'unresolved waiver of pre-emption purchases and old land claims. These recommendations were adopted in the Land Claims Settlement Act 1856.

While the Land Claims Settlement Act did much to satisfy settlers, it did nothing to protect Maori interests. Surplus land continued to revert to the Crown and generous provisions (in the form of an allowance, in land, for survey costs) were included to encourage settlers to have lands surveyed. The commissioner appointed under the Act, Dillon Bell, commented 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 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.[42]

These comments apply mainly to the pre-1840 old land claims, but would have applied to some of the still unsurveyed pre-emption waiver purchases, especially

42. AJHR, 1862, d-10, p 4

outside Auckland. It is possible that these compensation measures encouraged settlers to place undue pressure on Maori, or to exaggerate the area of land they had allegedly purchased. Section 48 of the Act provided for the satisfaction of any opponent to a claim except if these opponents were 'of the native race, or a half caste'. This exclusion of Maori from compensation implies that the provision was only included to satisfy overlapping claims where settlers had purchased the same land.

4.13 The Bell Inquiry

A number of cases examined by Bell therefore 're-visited claims for land which, in some cases, had in the meantime remained effectively in Maori control. For example, Bell's investigation of Whitaker and Du Moulin's pre-emption waiver claim on Great Barrier Island, originally made for 3500 acres, revealed that a purchase had allegedly been made for some 21,845 acres.[43] Whitaker, who financed the survey, was awarded an additional 4291 acres for his trouble, thus acquiring a total of 5463 acres for an initial payment to Maori of £172 and survey costs of £508. The Crown acquired a surplus of 17,554 acres at no cost to itself. Maori interests were not considered, as they were assumed to have fully alienated their rights over all the land surveyed.[44]

In total, the 250 waiver purchases examined (including the claims which went before Matson), when surveyed, amounted to 97,427 acres, all but about 1500 acres arising from claims under the penny-an-acre proclamation. Bell noted in his 1862 report that the land granted to claimants amounted to 25,300 acres, making the total 'surplus acquired by the Crown 72,127 acres.[45] However, it does not appear that the figure of 25,300 acres referred to *all* the land granted. The appendix to Bell's report (published in 1863) suggests that approximately 49,150 acres were awarded to the claimants, giving a Crown 'surplus' of approximately 48,200 acres.[46] The chairman of the 1948 royal commission on surplus lands, Sir Michael Myers, calculated that a surplus of only 16,427 acre arose from the pre-emption waiver purchases. The other two commissioners, Reedy and Samuel, issued a separate report as to compensation due to Maori, but were in agreement with Myers over this area.[47] Further research is necessary to account for the difference between Bell's 1862 and 1863 estimates of surplus, and between both of these and the calculation of the Myer's commission. It is likely that the pre-emption waiver purchases were intermixed with pre-1840 purchases (old land claims) in cases such as Great Barrier Island, or with Crown purchases after 1847, and were grouped differently in the various reports.

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43. See olc 1130–1131, NA Wellington
44. Hutton, p 71
45. AJHR, 1862, d-10, p 6
46. Appendix to the Report of the Land Claims Commissioner, AJHR,O 1863, d-14
47. AJHR, 1948, g-8, pp 33, 71

The commissioners in the 1948 Surplus Lands Commission used different bases of calculation for reckoning compensation due to Maori. The chairman, Myers, apparently based his award on the difference between the acreage allowed by the certificate issued by FitzRoy, and the area actually surveyed or in excess of the 500-acre maximum allowed to claimants in the 1847 regulations. On the basis that Maori had been paid by private purchasers for the land (whether or not it was eventually granted to the settlers or was retained by the Crown) Myers only 'with great hesitation' added the pre-emption waiver surplus to the Crown surplus from pre-1840 purchases.[48] The principles behind the Myers commission's award, and its calculations, both require further examination.

4.14 Conclusion

Note: This section refers to the general waiver proclamations operating in Auckland and the north, not the waivers in favour of the New Zealand Company.

Fitzroy's waiver of Crown pre-emption was clearly in accord with Maori wishes at the time. Direct sale to private settlers enabled the vendors, at least in theory, to seek the best prices the market could offer. Initially, at an average of 16 shillings an acre, Maori seemed to do reasonably well, although they did not receive the £1 per acre which Fitzroy had thought should be a minimum price when he first proposed the waiver. The average of two shillings (or one shilling and threepence) an acre under the October 1844 proclamation is probably not a lot better than Maori had been getting from the Crown in its more generous moments (although average prices are very hard to determine). The pre-emption waiver purchases raised for the first time, the question of whether the Crown should have required private purchase of Maori land to be by public auction, with an upset price. As it was, the chiefs generally made private deals with individual Europeans who approached them. It is not clear that the rest of the hapu had much to do with the arrangements.

The sales also got out of hand as far as area was concerned. Fitzroy's initial proposal was that each waiver purchase was to be for 'a limited portion of land but many purchases under the October proclamation were for 1000 to 3000 acres, considerable areas, especially since the purchasers were picking the eyes out of prime land, mostly urban. The sale of 21,845 acres of Great Barrier Island, when the original waiver certificate had been for 3500 acres, if in fact carried through, is a travesty of FitzRoy's proclaimed intention.

The checks by the Protectors of Aborigines on whether the correct Maori parties were selling seem to have been fairly perfunctory, but most sales took place in and around Auckland and were by the Ngati Whatua chiefs. A potential problem arose over sales in the Mount St John and Remuera areas of the city. Portions there had been held by Tainui tribes following Tainui's assistance in restoring Ngati Whatua to Tamaki Makaurau after the Ngapuhi incursions. Ngati Whatua had not wanted to

48. AJHR, 1948, g-8, p 76

sell any more of Remuera, and the decision of the Tainui chiefs to sell seems to have contributed to a flow of sales in the area. But all groups cooperated in the boundary – marking and no subsequent protests are recorded.

Most seriously, however, there were almost no reserves for Maori in the waiver purchases. This would have been a reasonable act of trusteeship, in keeping with Russell's instructions to Hobson in 1840 and 1841. FitzRoy did indeed require one-tenth of the land in each purchase to be made over to the Crown as an endowment largely for Maori purposes. But Grey cancelled the 'Crown tenths', allowing settlers to buy them or including them in the general pool of Crown surplus which he took (having reduced or annulled a great many of the purchases following Commissioner Matson's inquiries in 1847). The abandonment of the Crown tenths would seem to be a clear breach of Treaty responsibilities as recognised by FitzRoy.

The Crown's taking of a very substantial surplus (possibly 48,200 acres of the 97,427 acres alienated under the general waivers according to Bell's figures, but only 16,427 according to the Myers commission) raises other Treaty issues. The recorded objections of Ngati Whatua chief, Paora Tuhaere, and the obstruction of surveys in the Ihumatao area, are evidence of some Maori dissatisfaction. Maori notions of sale still held connotations of transacting with 'my Pakeha' and of having some ongoing relationship with them and the land. The Crown was not supposed to be part of the deal. That is what pre-emption waiver means. For the Crown to change the rules under Grey, without consulting Maori, is highly questionable in Treaty terms. On the other hand, unlike the pre-1840 purchases, the waiver purchases were being made after the establishment of British sovereignty and under British law.

The Crown's taking of considerable surpluses remains problematic for other reasons, however. The practical consequences for Maori would have been different if some of the surpluses had been used to assist Maori enterprises in some way, or if the Crown tenths had been retained, principally for Maori purposes. But by the end of the waiver period the Maori people of Auckland, in particular, had lost almost all of the land except the Orakei Reserve block. This was a far cry from Crown and New Zealand Company proposals in 1839 to ensure Maori a share of the economic growth and rising capital value of the towns.