

CHAPTER 2

THE INTRODUCTION OF PRE-EMPTION TO NEW ZEALAND

2.1 Introduction

The Colonial Office dallied with the idea of entering into some arrangement with the New Zealand Company, or its precursors, for some years prior to 1839. At one stage it proposed a charter, but no actual agreement resulted. Finally, in March 1839, the Company caught wind of the fact that the then Colonial Secretary, Lord Normanby, was not interested in supporting colonisation by a company. It immediately set in motion plans to travel to New Zealand, fearing that it may otherwise have to purchase land through the Crown. The Company barque, the *Tory*, set sail on 12 May 1839. On board were Company officials specifically sent to buy land before it could be ‘pre-empted’ by the Crown.¹

The Company was taking a calculated risk. The ship set sail despite the British Government’s refusal to give any direct or indirect sanction of the Company’s actions. The British Parliamentary Under-Secretary, Henry Labouchere, had warned it that no guarantee could be given of titles to land bought – land which he thought would ‘probably’ be liable to repurchase by the Crown.²

The Company’s attempt to pre-empt the Crown provoked a pre-emptive response. Normanby’s final instructions to the proposed new Governor, Captain William Hobson, issued following the *Tory*’s departure, differed in important aspects from those of the first draft.

In the first draft, written by the Permanent Under-Secretary, Sir James Stephen, in January 1839, Normanby had required Hobson to choose a ‘few districts’, where British settlement had already been established, and see if the chiefs would cede their sovereignty over these. British institutions would then be established in those districts ‘for the good government of the existing settlers, for the promotion of Trade and for the protection of the Natives’.³ Colonisation was not the focus.

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1. Patricia Burns, *Fatal Success: A History of the New Zealand Company*, Auckland, Heinemann Reed, 1989, pp 72–92
 2. *Ibid*, p 92
 3. *Ibid*, pp 81–82. The Colonial Office had looked at other forms of indirect rule, such as a Protectorate, but at this stage the British Government had, as Belich puts it, ‘decided to try to acquire sovereignty over existing Pakeha settlement and to attempt a benign indirect influence over the rest’ (James Belich, *Making Peoples: A History of New Zealanders From Polynesian Settlement to the End of the Nineteenth Century*, Auckland, Allen Lane and The Penguin Press, 1996, pp 180–182, 196, 200).

Had the content of Stephen's draft instructions remained intact, the purpose of British intervention may have been limited, as Peter Adams argues, to 'the provision of impartial protection for both races' – in as much as the inherent paternalism and aims of the policy makers would allow.⁴ Without the focus on colonisation, the imposition of pre-emption may have weighed more towards effecting this 'protection'. But the purpose of British intervention soon shifted.

The *Tory* sailed to New Zealand. And Normanby's final instructions, of 14 August 1839, incorporated plans for state-controlled colonisation, aided by the Crown's right of pre-emption. Both were justified, he felt, by their 'beneficial' or 'protective' advantages for Maori.⁵ Hobson was to announce pre-emption by proclamation immediately on his arrival in New Zealand.

2.2 Lord Normanby's Instructions to Hobson

The need for a detailed examination of Normanby's instructions has been emphasized by the Tribunal on many occasions. The Muriwhenua Tribunal has recently elaborated on the value of Normanby's instructions in explaining the intentions of the British officials. Normanby's instructions, the Tribunal has stated, ' flesh out and give meaning to the Treaty's bland promise of protection. They so illuminate the Treaty's goals that, in our view, the Treaty and the instructions should be read together'.⁶ The relevant parts of Normanby's instructions are set out here.

Normanby initially outlined the official rationale for Britain's decision to intervene. The considerable body of British subjects resident in New Zealand, the extent of land already purchased, the existence and intentions of the New Zealand Company, and the importance of New Zealand's resources and geographical position to British interests, were all reasons cited for British intervention. Furthermore, there were the fears that 'unless protected and restrained by necessary laws and institutions', settlers would repeat 'the same process of war and spoliation under which uncivilized tribes have almost invariably disappeared' when 'brought into the immediate vicinity of emigrations from the nations of Christendom'. Unless the Queen was acknowledged as New Zealand's sovereign 'or at least of those districts within or adjacent to which Her Majesty's subjects may acquire lands or habitations', Normanby claimed, protection of Maori would be an 'impossibility'.⁷

Hobson was charged, therefore, with obtaining the 'free and intelligent consent' of the Maori people for the recognition of the Queen's authority over the whole, or any parts, of New Zealand which Maori were willing to place under the Crown's dominion.⁸

4. Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830–1847*, Auckland, Auckland University Press and Oxford University Press, 1977, p 175

5. Burns notes, p 81, that in early 1839, 'most politicians and officials' assumed that any intervention would gradually evolve into colonisation, although 'the immediate needs were control of lawless British subjects and justice for the Maori people'. The first draft aimed to cater to these more immediate needs.

6. Waitangi Tribunal, *Muriwhenua Land Report 1997*, Wellington, GP Publications, 1997, p 117

7. Normanby to Hobson, 14 August 1839, BPP, vol 3, pp 85–86

But attaining Maori agreement to British sovereignty was not to be Hobson's sole task. Normanby had recognized that Maori 'title to the soil and to the sovereignty of New Zealand' was indisputable, and that this had 'been solemnly recognized by the British Government'.⁹ He instructed Hobson:

It is further necessary that 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. Contemplating the future growth and extension of a British colony in New Zealand, it is an object of the first importance that the alienation of the unsettled lands within its limits should be conducted, from its commencement, upon that system of sale of which experience has proved the wisdom, and the disregard of which has been so fatal to the prosperity of other British settlements.¹⁰

Normanby sought to 'guard' New Zealand specifically against land speculators; arguing that the speculators may have based their purchases on inequitable transactions, or that the transactions may be 'on a scale prejudicial to community interests'. He thought that grants derivative from the Crown, alternatively, would provide 'at least some kind of system, with some degree of responsibility, subject to some conditions and recorded for general information'.¹¹ Such a system could not operate where purchases had been made directly from Maori. Where this had occurred 'securities against abuse' would not be available and 'none [no securities] could be substituted for them'.

Instead, Normanby instructed Hobson that:

- It would be the new Governor's duty to 'obtain, by fair and equal contracts with the natives, the cession to the Crown of such waste lands as may be progressively required for the occupation of settlers resorting to NZ'.
- All such contracts were to be made by himself 'through the intervention of an officer expressly appointed to watch over the interests of the aborigines as their protector'.¹²

It was envisaged that:

- The resales of the first purchases would provide the funds necessary for future acquisitions, so that 'beyond the original investment of a comparatively small sum of money', no further resources would be necessary for this purpose.
- The price to be paid to Maori was to 'bear an exceedingly small proportion to the price for which the same lands will be re-sold by the Government to the

8. Ibid

9. This was later qualified by an acknowledgement that New Zealand was a sovereign and independent state only in 'so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed, and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert'. Normanby described Maori rights as being 'precarious and little more than nominal'. The benefits of British protection, and of laws administered by British judges would 'far more than compensate for the sacrifice of a national independence, which they are no longer able to maintain'.

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

11. Ibid

12. Ibid, p 87

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settlers'. Normanby saw no real injustice in this, claiming that to Maori 'much of the land of the country is of no actual use, and, in their hands, it possesses scarcely any exchangeable value'.

- The land's 'value in exchange will be first created, and then progressively increased, by the introduction of capital and of settlers from this country'. Maori themselves were to 'gradually participate' in the benefits of that increase.¹³

The nature of the proposed Crown dealings with Maori for their lands was further elaborated:

- They were to be conducted with 'sincerity, justice, and good faith'.
- Maori 'must not be permitted to enter into any contracts in which they might be the ignorant and unintentional authors of injuries to themselves'. Hobson was not, for example, to 'purchase from them any territory, the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence'.
- Acquisitions by the Crown of land for future British settlement were to be 'confinèd to such districts as the natives can alienate, without distress or serious inconvenience to themselves'.
- To ensure the observance of this was to be 'one of the first duties of their official protector'.
- In all future dealings with Maori, the Crown (in this case, the Governor) would provide for and protect Maori interests.¹⁴

Hobson was to issue a proclamation, immediately on arrival, claiming that any title to land not derived from or confirmed by a Crown grant, would be invalid.¹⁵ If existing settlers' property was 'acquired on equitable conditions' and 'not upon a scale which must be prejudicial to the latent interests of the community' they would not be dispossessed. Purchases made prior to the proclamation would be investigated by a commission appointed by the Governor of New South Wales. The commission was to determine 'how far such grants were lawfully acquired, and ought to be respected, and what may have been the price or other valuable considerations given for them'. It would be up to the Governor to decide how far the claimants may be entitled to confirmatory grants.¹⁶

By the time Hobson arrived in Sydney, in early January 1840, many settlers and speculators were wary of an imminent prohibition on private land purchase in New Zealand. Purchasing of New Zealand land was showing no sign of decreasing. Gipps, the Governor of New South Wales, effectively stopped a Sydney auction of Bay of Islands land early in January, by issuing a warning that any such purchasers were acting at their own risk.¹⁷ Hobson had then met with Sydney-based land claimants, on 10 January, and told them that Maori were as unat 'to treat with Europeans for the sale of their lands' as 'minors'.¹⁸ He implied that pre-emption

13. Ibid. This, of course, was in line with current New Zealand Company concepts.

14. Ibid, p 87

15. Ibid, pp 86–87

16. Ibid, p 87

was necessary for the Crown to act as a dutiful guardian. On 14 January, in Sydney, Gipps proclaimed the Crown's right of pre-emption in New Zealand. The proclamation held that 'for the information and guidance' of all interested parties:

all purchases of land in any part of New Zealand which may be made by any of Her Majesty's subjects from any of the native chiefs or tribes of these islands, after the date hereof, will be considered as absolutely null and void, and neither confirmed nor in any way recognised by Her Majesty.¹⁹

Hobson's repeat of this proclamation at Kororareka, on 30 January 1840, the day after his arrival in New Zealand, included an additional reference to the proclamation being for 'the present as well as the future interests of Her said subjects, and also the interests and rights of the chiefs and native tribes'.²⁰ Both proclamations stated that all title to land must derive from or be confirmed by a Crown grant. All former purchases were to be investigated by commissioners, and only those found to be equitable, and not excessive, would be confirmed.²¹ The settlers' 'free for all' was over. According to Russell Stone, who wrote a biography on Auckland settler John Logan Campbell, the proclamation 'spread gloom among speculators on either side of the Tasman'.²² Some 'land-jobbers' had already left, others waited only until they could arrange return passages to Sydney. Some stayed to risk their future.²³ The Crown had indeed stopped the main tide of land speculation.

2.3 Article 2 of the Treaty

Hobson's Secretary, J S Freeman, initially drafted the Treaty of Waitangi. Freeman's second article was skeletal. It contained the pre-emption clause alone – the second major concession Normanby had instructed Hobson to seek from Maori. It provided 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'.²⁴

As is well known, the ex-British Resident, James Busby, was then asked to revise Freeman's draft. Aware that Maori would not accept a treaty which did not secure

17. Gipps to Russell, 9 February 1840, BPP, vol 3, p 123. Explanations of the British Government's intentions, sought from Hobson following this incident were then reported in Sydney papers (Donald Loveridge, 'The New Zealand Land Claims Act of 1840', report commissioned by the Crown, 18 June 1993 (Wai 45 rod, doc i2), pp 24–27).

18. Hobson to Gipps, 16 January 1840, g36/1, NA Wellington

19. Proclamation, 14 January 1840, encl 1 in Gipps to Russell, 9 February 1840, BPP, vol 3, pp 124–125

20. Proclamation, 30 January 1840, in encl 2 in Gipps to Russell, 19 February 1840, BPP, vol 3, pp 44–45

21. Proclamation, 14 January 1840, in encl 1 in Gipps to Russell, 9 February 1840, BPP, vol 3, pp 38–39; Proclamation, 30 January 1840, in encl 2 in Gipps to Russell, 19 February 1840, BPP, vol 3, pp 44–45

22. R C J Stone, *Young Logan Campbell*, Auckland, Auckland University Press, 1982, p 48

23. *Ibid*, p 48

24. Ruth Ross, 'Te Tiriti o Waitangi: Texts and Translations', NZJH, vol 6, no 2, 1972, p 144; Claudia Orange, *The Treaty of Waitangi*, Wellington, Allen & Unwin and Port Nicholson Press, 1987, pp 36–37

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for them their authority, Busby included at the beginning of the article a 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 was shifted behind this guarantee. The position and wording of the clause now indicated that pre-emption was a mere limit upon that essential guarantee. It was not directly linked to the cession of sovereignty in article 1. Had it been so, perhaps it may have indicated more clearly its value to the Crown, as a Crown 'right' and an expression of its sovereignty.

Hobson accepted Busby's article 2 for the final English form of the Treaty. The pre-emption clause appeared then, in the article 2 of the English version of the Treaty, as follows:

Her Majesty the Queen of England confirms and guarantees to the Chiefs and tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession: *but 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 treat with them in that behalf.* [Emphasis added.]

This was translated overnight by Henry Williams and his son Edward Williams as:

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu – ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. *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.* [Emphasis added.]²⁵

Williams had translated 'the exclusive right of pre-emption' as 'te hokonga'. Recent analysis of the meaning that the word 'hokonga' may have had to Maori in 1840, by Anne Salmond, Margaret Mutu, and Lyndsay Head, has indicated that 'hoko' involved both buying and selling or barter exchange. But they do not indicate whether 'te hokonga' was an adequate translation of 'the exclusive right of pre-emption'.²⁶

25. Hugh Carleton, *The Life of Henry Williams, Archdeacon of Waimate*, Auckland, Wilsons & Horton, 1877, vol 2, p 12

26. See Anne Salmond, 'Likely Maori Understanding of Tuku and Hoko', report commissioned by the Waitangi Tribunal, July 1991 (Wai 45 rod, doc d17); Margaret Mutu, 'Tuku Whenua or Land Sale?', report commissioned by the claimants, 24 April 1992 (Wai 45 rod, doc f12); and L F Head, 'Maori Understanding of Land Transactions in the Mangonui–Muritoki Area During 1861–1865', report commissioned by the Waitangi Tribunal, nd (Wai 45 rod, doc f21)

However, there have been a number of attempts over the years to reconstruct an English translation of the Maori Treaty text, which may enlighten us further on the meaning portrayed to Maori in the Maori text:

- A ‘literal translation’, attributed by Claudia Orange to the Reverend Richard Davis, included this version of article 2:

The Queen of England acknowledges and guarantees to the Chiefs, the Tribes, and all the people of New Zealand, the entire supremacy of their lands, of their settlements, and of all their personal property. *But the Chiefs of the Assembly, and all other Chiefs, make over to the Queen the purchasing of such lands, which the man who possesses the land is willing to sell, according to prices agreed upon by him, and the purchaser appointed by the Queen to purchase for her.* [Emphasis added.]²⁷

- An 1869 translation by T E Young, translator of the Native Department held:

The Queen of England arranges and agrees to give to the Chiefs, the Hapus, and all the People of New Zealand, the full chieftainship of their lands, their settlements, and all their property. *But the Chiefs of the Assembly, and all the other Chiefs, give to the Queen the purchase of those pieces of land which the proprietors of the land may wish, for such payment as may be agreed upon by them and the purchaser who is now appointed by the Queen to be her purchaser.* [Emphasis added.]²⁸

- A more recent literal translation by Professor Sir Hugh Kawharu reads:

The Queen of England arranges [and] agrees to the Chiefs to the subtribes to people all of New Zealand the unqualified exercise of their chieftainship over their lands over their villages and over their treasures all. *But on the other hand the Chiefs of the Confederation and the Chiefs all will give to the Queen the sale and purchase of those parts land is willing [to sell] the person owning the land for the amount of the price agreed between them [viz the vendor and] the purchaser appointed by the Queen as an agent purchase for her.* [Emphasis added.]²⁹

All three translations indicate that the vendor must not only agree to sell, but also agree to the price with the Crown’s agent. This may imply an equal footing envisaged between Maori and the Crown – or that the Crown was ready and willing to participate as impartially as possible, with its fiduciary obligations in mind. But it was probably more related to Normanby’s prerequisite that Crown purchases of Maori land be conducted with the free consent of those Maori involved. Of course, the Crown monopoly as a buyer made a mockery of Maori consent over price. Pre-emption meant that they had little bargaining power over the Crown’s offer.

None of the above translations specifically refer to the Crown as the sole or exclusive purchaser or dealer, although they may imply it. Only Professor

27. J Noble Coleman, *A Memoir of the Reverend Richard Davis*, London, James Nisbet, 1865, pp 455–456; copy in Orange, app 4, pp 261–262

28. T E Young, translation ‘from the original Maori’, AJLC, 1869, p 70; copy in Orange, app 5, p 265. See also Ross, p 145.

29. *NZ Maori Council v Attorney-General* [1987] 1 NZLR 641, 662–663

Kawharu's much later translation clearly indicates the Crown was to be both the purchaser and the vendor of land.

Interestingly, the word 'exclusive' is used in relation to the rangatiratanga of the chiefs, as well as the Crown's right of pre-emption in the English text. But the diäering context in each case does not result in its appearance in the latter (pre-emption) clause, in either the Maori translation, or the English re-translations of the Maori text. An interpretation of either the Crown as sole purchaser or as having the ärst right to purchase could equally apply.

Perhaps the expression of pre-emption in this manner had been informed by the lack of success of Gipps's treaty, which he had asked Tuhawaiki and other Ngai Tahu chiefs to sign in Sydney. Gipps's treaty had stipulated that the chiefs agreed:

not to sell or otherwise alienate any land occupied by or belonging to them, to any person whatsoever except to Her said Majesty upon such consideration as may be hereafter äxed.

Ruth Ross believed, based on the failure of Gipps's treaty, that the chiefs in New Zealand would have refused to sign the Treaty of Waitangi had they understood they were being asked to agree not to sell lands occupied by or belonging to them to anyone but the Crown. Claudia Orange too thought it 'surprising' that Maori would have been prepared to restrict land dealings in this way and questioned whether they fully understood its meaning and implications.³⁰

Orange has noted that the Maori Treaty text did not stress the absolute and exclusive right granted to the Crown. Yet, she pointed out, Williams must have known of Hobson's proclamation, which gave 'clear warning of Crown intention to handle all land transactions'.³¹ It might be added that while Williams as translator was key, he was not the only one who would have been aware of this. Hobson had read the proclamation aloud, less than a week earlier, to a meeting of Pakeha residents at Kororareka, and then published it.³² Any one of these people could have enlightened Maori further. Perhaps they, as well as the missionaries, chose not to warn Maori about this eäect, and derogation of chieëy authority implied.

The proclamation would have alerted settlers to the exclusivity of Crown pre-emption (although Ross doubted all Pakeha were aware of its exclusive nature). But to Maori, the concept of the Government being the sole purchaser was completely new. The chiefs would therefore have been largely dependent on explanations and discussion of the meaning of Crown pre-emption at the Treaty debates.

30. See E Sweetman, *The Unsigned New Zealand Treaty*, Melbourne, Arrow Printery, 1939, pp 61–65, copy in Orange, pp 260–261; Ross, p 145; Orange, p 100

31. Orange, p 42. Belich (p 194) goes even further and suggests the use of rangatiratanga for 'ownership' was probably a deliberate or semi-deliberate act of deceit. But in response to this statement by Belich, Alan Ward has pointed out that the Muriwhenua Tribunal considers the versions to be complementary rather than contradictory. Ward notes that both versions must be consulted, but that even so, stress must be placed on underlying principles (see Alan Ward, *National Overview*, Waitangi Tribunal Rangahaua Whanui Series, 1997, vol 2, p 25; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1988, pp 212–213).

32. Hobson to Gipps, 4 February 1840, in encl 2 in Gipps to Russell, 19 February 1840, BPP, vol 3, p 43

2.4 The Treaty Debates

While Normanby's instructions 'ēesh out' Crown intentions for the British officials, the Treaty debates would have been the place for ēeshing out the Treaty for Maori. The appearance of the Crown's 'exclusive right of pre-emption' in the English version of the Treaty, and its translation as 'hokonga' in the Maori version, was not the sole record upon which Maori relied. The verbal explanation of this document, given at Treaty debates, and Maori understanding of those oral interpretations, is of equal, if not greater, importance.³³ But accounts of these, too, must be treated cautiously. As the Tribunal advises: 'the debate in Maori has not survived but only English interpretations of it'.³⁴

Hobson reported that, at Waitangi, he 'dwelt on each article, and oāered a few remarks explanatory of such passages as they [Maori] might be supposed not to understand'. Williams then 'repeated [this] in the native tongue, sentence by sentence'.³⁵ At Mangungu, Hobson 'read the treaty, expounded its provisions, invited discussion, and oāered elucidation'.³⁶ These accounts indicate pre-emption may well have been explained beyond the mere use of the term 'hokonga'. Yet these possible explanations of the meaning of the term are not recorded. Williams, questioned later on the explanation he had given, unhelpfully wrote: 'The chiefs wishing to sell any portion of their lands, shall give to the Queen the right of pre-emption'.³⁷ This possibly indicates that he chose not to explain pre-emption.

At Waitangi, the recorded discussions on the topic of pre-emption, to follow these explanations, were very speciāc. Moka, a Kororareka chief, alleged that local British settlers were still privately purchasing Maori land, despite the 30 January 1840 proclamation. Moka had evidently been the only chief present when the land proclamation had been made public. He expressed doubt at Hobson's ability to enforce Crown control.³⁸ Hobson's response was to assure Moka that 'all claims to lands, however purchased, after the date of the Proclamation would not be held to be lawful'.³⁹ This aspect of pre-emption – preventing settlers from buying Maori land – was spelt out to Maori, at least to those present at this debate.

At other Treaty debates, places where presumably the proclamation had not been read aloud, the discussion took a diāerent, and less speciāc, turn. The instructions given by Hobson to the other, largely missionary, negotiators do not appear to have included any speciāc explanation of pre-emption. This begs the question whether those appointed to negotiate on the Crown's behalf themselves clearly understood

33. This is especially so when one considers that, as Belich, p 195, has noted, of the Maori signatures on the Treaty, under 15 percent are signed names as opposed to moko or a mark. Belich suggests that this probably reēects nominacy rather than literacy, indicating most signatories (not Maori generally) could not read either Treaty version.

34. *Muriwhenua Land Report*, p 110

35. Hobson to Gipps, 5 February 1840, in encl 3 in Gipps to Russell, 19 February 1840, BPP, vol 3, p 45

36. Hobson to Gipps, 17 February 1840, encl in Hobson to Normanby, 16 February 1840, BPP, vol 3, pp 132–134

37. Orange pp 100–101; Ross p 149; Carleton, p 157

38. Orange, p 47

39. Colenso, *The Authenic and Genuine History of the Signing of the Treaty of Waitangi*, Wellington, Government Printer, 1890, p 19

pre-emption enough to explain it. They were told to explain the Treaty's 'principle and object', which Maori were to 'clearly understand' before they would be permitted to sign.⁴⁰ Presumably the 'principle and object' meant here was understood to be those sentiments expressed largely in the Treaty's preamble – involving Crown protection and the maintenance of peace, order and lawfulness.⁴¹ George Clarke, who was appointed the Protector of Aborigines in April 1840 and later became the Chief Protector of Aborigines (see below), was to reëct years later, that the Treaty 'never would have been signed' but for the assurances that the Queen's object was solely to protect Maori rights, suppress disorder and to increase commerce and prosperity.⁴² It is this context, in which the Treaty was delivered and discussions held, which gives an important indication of the meaning pre-emption was likely to have had for Maori, apart from, or in addition to, the few recorded discussions of its purpose.

There were broader, more fundamental, points than the speciãc meaning of the term pre-emption, for Maori present at the Treaty-signing hui to grasp, or to ensure they attained, in an agreement with the British Crown.⁴³ The Muriwhenua Tribunal has put it in these terms: 'in forming contracts, Maori looked not to the heart of the terms but to the heart of the person making them'.⁴⁴ This appears to have been the case here. The apprehensions raised concerning the Treaty diãered depending on the particular experiences of those present. But a common theme centred around the need for general clariãcation of the respective powers the Treaty would give the Crown and Maori. Many of those who had not had much contact with Pakeha settlers simply could not see the point in the Treaty. Those who had been involved in land transactions indicated their desire to have Pakeha actions stopped or regulated. Many chiefs appeared to feel that land sales were out of control, more speciãcally out of their control (at least for those who had adopted Christianity). They recognized that something must be done. Their anxiety centred around a recognition that, as Makoare Taonui eloquently put it at Mangungu, 'the land is our father; the land is our chieftainship'. He added: 'we will not give it up'.⁴⁵

Elsewhere, rumours had been circulating regarding the eãect of accepting the Treaty. It had been said by disaëcted Pakeha settlers, and apparently feared by Maori who had visited, or heard tales of, other British colonies, that Maori would be 'reduced to the condition of slaves', that their land would be taken from them and their dignity as chiefs destroyed.⁴⁶ Again the Tribunal's recent comments

40. Orange, p 69

41. Symonds directed Whiteley to explain 'perfectly' the 'nature of the cession of rights' and the missionary later believed that he had done this to the best of his ability (Orange, p 70; Symonds to Whiteley, 8 April 1840, in encl 5 in Hobson to Secretary of State for Colonies, 15 October 1840, BPP, vol 3, p 224).

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

43. Some Pakeha involved also overlooked this speciãc point in light of the more urgent considerations of general issues to hand. For example, Hobbs's diary entry summarising the Treaty omitted any mention of pre-emption (John Hobbs's diary, 28 March 1840, ms 144, vol 5, AIM Auckland).

44. *Muriwhenua Land Report*, pp 111–112

45. Account of the speeches of chiefs at the Hokianga Treaty signing, encl 2 in Shortland to Stanley, 18 January 1845, BPP, vol 4, p 512; Richard Taylor journal, ms 302, vol 2, pp 361–366, AIM Auckland

perhaps add to our understanding of what may have been going on. It explained its view that:

impassioned declamation is also a standard oratorical tool. It solicits a clear position on a point in issue. Thus Europeans opposed to the Treaty (for annexation would restrict their ability to trade and buy land) had advised Maori that the Governor would enslave them and leave them landless. The Maori way is to clear the air by so averring, in order to compel a forthright denial.⁴⁷

In light of this, the Tribunal doubted whether Maori anxieties ‘were in fact as large as the reports of their alarm that they would be made slaves or would lose their land’.⁴⁸

The impassioned declamations made in the Treaty debates, regarding land and pre-emption, received the necessary clarification on the point at issue. At Mangungu, Hobson’s response was to give:

repeated assurances . . . that the Queen did not want the land, but merely the sovereignty, that she, by her officers, might be able more effectually to govern her subjects who had already settled here, or might hereafter arrive, and punish those of them who might be guilty of crime.⁴⁹

Hobson told those present that land would ‘never be forcibly taken’ from the Maori; if the Queen wanted land she would purchase it.⁵⁰

In Kaikohe, Taiamai, and Waimate, Hobson assured chiefs that:

he was commanded by the Queen to prevent them from selling all their lands to white men, instead that the Queen would buy only such lands from them as they did not require. Which they felt relieved at.⁵¹

Similar assurances were given by Shortland at Kaitaia. Shortland told those present that the Queen would:

appoint gentlemen to protect them and prevent them from being cheated in the sale of their lands – that Her Majesty was ready to purchase such as they did not require for their own use, to dispose of again to his [sic] subjects who [she] would take care were responsible men who would not injure them.⁵²

At the Thames meeting, Captain Bunbury recorded that Williams ‘explained the treaty; its object in consequence of the increasing influx of strangers’ and:

46. Hobson to Gipps, 5 February 1840, in encl 3 in Gipps to Russell, 19 February 1840, BPP, vol 3, p 130

47. *Muriwhenua Land Report*, p 111

48. *Ibid*, p 113

49. Hobbs to Martin, 22 October 1847, in W Martin, *England and the New Zealanders*, Auckland, College Press, 1847, pp 73–74

50. *Ibid*

51. John Johnson journal, 7 April 1840, nzms 27, APL Auckland

52. John Johnson journal, 28 April 1840, nzms 27, APL Auckland

2.4 Right of Pre-emption and Fitzroy's Waiver

that the claim of pre-emption on the part of Her Majesty was intended to check their imprudently selling their lands without sufficiently benefiting [sic] themselves, or obtaining a fair equivalent.⁵³

At Tauranga, Bunbury recorded that he told the Otumoetai chiefs that the Queen sought their authority to govern them, 'for their own good, and to avert the evils which she foresaw were accumulating around them, by the increasing influx of white men', who would otherwise be subject to no law or control. He continued:

On my speaking of the sale of lands, and of the right of pre-emption claimed by the Queen as intended equally for their benefit, and to encourage industrious white men to settle amongst them, to teach them arts, and how to manufacture those articles which were so much sought after and admired by them, rather than by leaving the sale of large tracts of lands to themselves, they might pass into the hands of white men, who would never come amongst them, but to hamper by their speculations the industrious. The Queen, therefore, knew the object of these men, many of whom, I had no doubt, had counselled them not to sign the treaty; but she would, nevertheless, unceasingly exert herself, to mitigate the evils they sought to inflict on this country, by purchasing their lands herself at a juster valuation. He said it was useless now to speak of this, as the white men had purchased all their lands; but they appeared quite satisfied, saying it was very just.⁵⁴

The promise of the Queen purchasing Maori land at 'a juster valuation' is interesting in light of the Crown's aim to purchase Maori land cheaply.

South of Cook Strait and up the coast to Wanganui, Henry Williams reported, chiefs 'appeared much gratified that a check was put to the importunities of the Europeans to the purchase of their lands'. The British negotiators had repeated, in essence, the protective intent expressed in Normanby's instructions.

All these recorded instances of discussion of pre-emption suggest that the negotiators (including Hobson) were less concerned with explaining the practical meaning, and full effect, of pre-emption as the Crown's sole right to purchase, than with expanding upon the purpose it was being held out to fulfil.⁵⁵ This was consistent with Hobson's instructions to the other negotiators. Explanation of the practical meaning and effect of pre-emption was subsumed by the explanation of its 'principle and object'. This may also have been the main concern of the Maori present (as the Tribunal's comments, discussed above, also suggest). It is not surprising then, that as Orange has commented: '[i]t does not seem to have occurred

53. Bunbury to Hobson, 6 May 1840, encl 3 in Hobson to Secretary of State for Colonies, 15 October 1840, BPP, vol 3, p 222

54. Bunbury to Hobson, 15 May 1840, encl 6 in Hobson to Secretary of State for Colonies, 15 October 1840, BPP, vol 3, p 225. The reference to pre-emption being intended 'equally for their [Maori] benefit' is interesting. Grey later noted that the right of pre-emption was 'to be exercised for the benefit of [H]er Majesty's subjects of both races', that the power given to the Queen through pre-emption was 'evidently conferred for public purposes, and for the general good of Her Majesty's subjects' and 'evidently intended to be so exercised that no partiality or preference could be shewn to any individual' (see Grey, memo dated 20 April 1847, encl 3 in Grey to Earl Grey, 19 April 1847, BPP, vol 6, [892], pp 33-34).

55. The practical effect, that the settlers were to be prevented from purchasing land directly from Maori, was discussed at Waitangi, as noted above.

to Maori to question whether the Government had sole right of purchase or only *ārst oāer*?⁵⁶

But questions on the speciācs arose later. Tirarau, who went to the Bay of Islands from Wairoa to sign the Treaty in early May 1840, asked Hobson two weeks later for clariācation of pre-emption. Hara, from the Bay of Islands, who had oāered land to a private purchaser immediately after signing the Treaty, was surprised to ānd that this was not permissible, and indignantly replied he would do what he liked with his own.⁵⁷ If the Treaty secured Maori rangatiratanga, and the pre-emption clause was intended to be solely for their protection, why should his oāer be problematic? And Kanini (a Ngati Tamatera chief) claimed to have sold Motukorea (in the Hauraki Gulf) to Logan Campbell and William Brown, when in September 1840 Pakeha oīcials tried to erect a āgpole on the island, in preparation for taking possession of it for the Crown.⁵⁸ The ‘purchase’ had taken place on 22 May 1840.⁵⁹

William Colenso, after the Waitangi Treaty meeting, wrote that he did not ‘for a moment’ suppose that the chiefs were ‘aware that by signing the Treaty they had restrained themselves from selling their land to whomsoever they will’.⁶⁰ Colenso’s impression was shared by William Brodie, another onlooker at Waitangi. But Whiteley, on the other hand, was adamant that Maori signatories at Kawhia had fully understood that they were to sell to the Crown alone.⁶¹

Tamati Wiremu of Paihia complained in March 1840 that settlers wanted to induce him to sell part of his land and asked the Governor to interfere and stop the practice which he considered wrong.⁶² While this could show an understanding of the exclusive nature of Crown pre-emption, it does not clearly do so. What it does indicate is that the chief clearly understood that the Crown administration would provide a protective cloak around land dealings. This was, it appears, the Maori understanding of the Crown’s ‘heart’ in the matter. Moka’s queries (above) similarly indicated this. Orange noted that his comments showed he had ‘grasped the import of Crown control over all land transactions’ (she reserved judgment on whether this was fully understood by other chiefs at the Waitangi meeting).⁶³ Otumoetai chiefs likewise appear to have understood, and were not averse to, the idea of a (protective) British administration. They were recorded as having thought

56. Orange, p 102

57. Colenso to Church Missionary Society, 24 January 1840, quoted in A G Bagnall and G C Petersen, *William Colenso, Missionary, Botanist, Explorer, Politician; His Life and Journeys*, Wellington, A H & A W Reed, 1948, pp 93–94, in Ross, pp 145–146. See also Orange, pp 100–101.

58. Stone, p 84

59. H H Turton, *Maori Deeds of Land Purchases in the North Island of New Zealand (Turton’s Deeds)*, Wellington, Government Printer, 1877, p 441

60. Ross, pp 145–146. Adams, p 198, refers to an anonymous letter (possibly written by Henry Williams in 1861) where the writer explained that pre-emption was described at Waitangi as follows: ‘The Queen is to have the *ārst oāer* of the land you may wish to sell, and in the event of its being refused by the Crown, the land is yours to sell it to whom you please’. But he doubts the reliability of this evidence, and notes that Colenso queried Maori understanding of the meaning of the term, not the accuracy of the explanation given.

61. Orange, p 101

62. Ross, pp 145–146

63. Orange, p 47

pre-emption, as explained to them, was just.⁶⁴ Again, this is consistent with the 'heart' of the Crown with respect to pre-emption being its intent only to protect. The concept of British administration of land matters, at least in as far as they related to halting Pakeha actions and protecting Maori interests, was acceptable to many Maori.

There had been precedents for such a system in British-Maori relations, without any lessening of Maori authority. James Busby, the ex-Resident, had acted as 'a kind of race relations conciliator in affairs between Maori and Pakeha', as had the missionaries before and during his residency.⁶⁵ Land dealings with Pakeha had been an especial source of requests for such input. Northern Maori had sought Busby's services to ensure that transactions were conducted with the correct parties, and to control Pakeha actions. Orange described some Maori concerns expressed to Busby:

Hau was concerned that tribal land had been sold by an individual Maori; Tupe and others requested that land between Matauri and Whangaroa would be left untouched; and in the Mahurangi area, where Ngapuhi and Hauraki Gulf Maori interests overlapped, Herua expressed his fears that Pomare might use his powerful position in the Bay of Islands to effect a sale.⁶⁶

This clearly would have involved some control of both Maori and Pakeha actions, and mediation between tribes, as well as between tribes and Pakeha.⁶⁷ As Orange noted, Wakena Rukaruka pointed out to Busby that 'chieffy rank was not always an advantage in negotiations, since in certain situations, a chief would be lowering his prestige if he initiated discussions with another tribe'. Wakena believed such circumstances to be 'ideally suited to the intermediary role of the Resident'.⁶⁸

An intermediary or mediator, or even an arbitrator instilling a new Christian moral-legal code – as the missionary example had set for Busby – was, in some circumstances, an acceptable addition to Maori life.

To Orange, this indicated that Maori had seemed 'increasingly aware that the Crown alone possessed the kind of authority capable of controlling new and essentially temporal difficulties'. In her view, the above-mentioned concerns about land 'seemed to indicate a predisposition to accept a greater regulation of Maori-European affairs'. But it may rather have been that Maori assumed the Crown alone to be capable of controlling Pakeha more effectively, thereby setting up more effective communication in cases of difficulty between Maori tribes and the Pakeha.

64. Bunbury to Hobson, 15 May 1840, encl 6 in Hobson to Secretary of State for Colonies, 15 October 1840, BPP, vol 3, p 225

65. Orange, p 14; see also G E O Ramsden, *Busby of Waitangi*, Wellington, A H & A W Reed, 1942, pp 39–46, 60–61, 85

66. Orange, p 17, cites William Marshall Hau to Busby, December 1839, Hemi Kepa Tupe to Busby, nd [1839?], Herua to Busby, nd [1839?] and Fairburn to Busby, 20 December 1839, br 1/2. Paradoxically, the accusation made by Hau is the very one other Te Whiu people levelled at Wiremu Hau during the Myers Mokau Commission in 1947. Hall Skelton, counsel for Te Whiu, blamed Hau and H T Kemp for the 1859 Mokau (or Puketi) Crown purchase.

67. Orange, p 16 (no assessment is made here of how well Busby carried out the task).

68. Orange, p 17

A number of subsequent statements made by Maori appear to support this view (see below). As Belich has noted, Maori may well have seen the new Governor's authority as 'substantial and significant, but restricted to Pakeha', freeing the chiefs from 'the burden of ruling the large and new Pakeha communities' and assisting them in 'policing' Maori-Pakeha interaction.⁶⁹

Maori may have been seeking, in agreeing to the Treaty's pre-emption clause as it was explained to them, to gain more controlled interaction with Pakeha – not seeing it as a submission to British authority, but rather as a means of regulating relations with Pakeha. They may have been seeking a representative person, a chief in effect, who could speak for, and be responsible for, all Pakeha actions, perhaps modified by a recognition of the British experience in Pakeha land transactions, their importance on a global scale, and the desirability of maintaining a good trading relationship with them. Maori had also been led to believe by the (largely Church Missionary Society missionary) Treaty negotiators that the Crown's motives were purely for their benefit, and this was particularly so in their arguments for pre-emption. Maori agreement had hinged on this, and the implication with it, that the Crown position lacked self-interest. A benevolent Christian Crown as mediator or arbitrator may well have seemed attractive in this light.

The Muriwhenua Tribunal recently interpreted the chief Nopera Panakareao's statement that 'The shadow of the land goes to the Queen, but the substance remains with us' as meaning that the Queen:

would serve as kaitiaki, as guardian and protector. Maori in turn would protect the Queen, the two standing in alliance. The Governor would serve as kai-whakarite, as broker or mediator between Maori and European, but the authority of the land would remain with the rangatira, with whom it had always been.⁷⁰

In light of this, the Tribunal stated its belief that:

We think the Treaty rhetoric was, rather, a warning that Maori would entertain no diminution of their authority and expected, at the very least, that power would be shared in arrangements made with the missionaries and the Governor.⁷¹

But the Crown's right of pre-emption, along with the theories behind it, which tangibly illustrated the link between land, power and authority, soon appeared to some Maori to diminish their authority.

69. Belich, pp 180–182, 196, 200

70. *Muriwhenua Land Report*, pp 109, 113

71. *Ibid*, p 113

