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## LIST OF ABBREVIATIONS

|         |   |
|---------|---|
| AIM     | Auckland Institute and Museum Library   |
| AJHR    | <i>Appendices to the Journals of the House of Representatives</i>   |
| AJLC    | <i>Appendices to the Journals of the Legislative Council</i>  |
| APL     | Auckland Public Library   |
| app     | appendix  |
| ATL     | Alexander Turnbull Library  |
| BPP     | <i>British Parliamentary Papers: Colonies New Zealand</i> (17 vols, Shannon, Irish University Press, 1968–69) |
| cf      | compare with (confer)   |
| ch      | chapter   |
| CCJWP   | Crown Congress Joint Working Party  |
| CMS     | Church Missionary Society   |
| CO      | Colonial Office series, National Archives, Wellington   |
| DNZB    | <i>Dictionary of New Zealand Biography</i>  |
| doc     | document  |
| ed      | edition, editor   |
| encl    | enclosure   |
| fn      | footnote  |
| G       | Governor's series, National Archives, Wellington  |
| IA      | Department of Internal Affairs  |
| MS, MSS | manuscript(s)   |
| NA      | National Archives   |
| no      | number  |
| NZJH    | <i>New Zealand Journal of History</i>   |
| NZPD    | <i>New Zealand Parliamentary Debates</i>  |
| OLC     | old land claim series   |
| p, pp   | page, pages   |
| para    | paragraph   |
| pt      | part  |
| rod     | record of documents   |
| s, ss   | section, sections (of an Act)   |
| sec     | section (of this report, or of an article, book, etc)   |
| sess    | session   |
| vol     | volume  |
| Wai     | Waitangi Tribunal claim   |

## INTRODUCTION

Article 2 of the Treaty of Waitangi vested the right of pre-emption in the British Crown. To the British officials, this meant that Maori gave up the right to sell their land directly to settlers or to private companies dealing in land settlement. Instead, the Crown alone now had a monopoly on the purchase of Maori land.

Maori agreement to Crown pre-emption, as it had been explained to them, was not without reason. The key to this agreement was the assurance by British officials that pre-emption was necessary to protect Maori interests in land dealings. Protecting Maori interests meant obligations for the Crown. In the Muriwhenua land claim, the Tribunal held that the Crown's acquisition of the substantial right of pre-emption required an equally substantial fiduciary duty on the Crown's part 'to stand as a protector of the Maori people and as a guardian of their interests'. In that tribunal's opinion, such was the importance of this role that it 'could not have been overstated'.<sup>1</sup>

My report constitutes the National Theme d report for the Waitangi Tribunal's Rangahaua Whanui Series. It very briefly surveys the reasons for the use of pre-emption in British colonies and looks in more depth at the intentions of the British Crown in implementing pre-emption in New Zealand. It then examines how pre-emption was portrayed to Maori in the Treaty debates and why Maori may have accepted these arguments. My report moves on to look at how the legal theory behind pre-emption was subsequently expressed in the early colonial legislation, and what Maori (and settler) responses to this were. It then documents Governor FitzRoy's subsequent decision to waive pre-emption in New Zealand, focusing specifically on his general waivers of March and October 1844. My report questions whether FitzRoy's pre-emption waiver proclamations kept the Crown's role as active protector to the fore, and it suggests that, in practice, the Crown neglected its protective obligations.

I only briefly touch on pre-emption waivers in favour of the New Zealand Company up to this period. The Crown's actions in dealing with the Company's transactions with Maori are the subject of a separate report by Duncan Moore. In his section in the *Old Land Claims* (National Theme a) Rangahaua Whanui Series report, Moore discusses pre-emption waivers in favour of the Company, and the relationship which subsequently developed between the Crown and the Company around these transactions.<sup>2</sup> The parallel development of the Crown's policies in relation to Company waivers should be considered in conjunction with my report. Crown purchases of Maori land during the pre-emptive period, and their effectiveness in 'protecting' Maori land interests, are also not covered in my report.

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1. Waitangi Tribunal, *The Muriwhenua Land Report 1997*, Wellington, GP Publications, 1997, p 5

2. See D Moore, B Rigby, and M Russell, *Old Land Claims*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release) July 1997

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My report concludes with a brief account of the decision to return to Crown pre-emption in 1846, and the effect subsequent inquiries into the pre-emption waiver purchases (by Henry Matson and Francis Dillon Bell) had on Maori who made use of the waiver provisions. The framework for this chapter (chapter 7) is a summary of a report written by John Hutton to look at the way Grey dealt with the pre-emption waiver purchases made under FitzRoy. I had taken ill and was not able to complete my work on pre-emption waiver purchases for Alan Ward's Rangahaua Whanui Series *National Overview*. John was given an early draft of my report, and my tables detailing the pre-emption waiver purchases, which he used in the early part of his report in particular. This chapter, while initially relying on John's framework, includes some additional information and, in parts, a change in interpretation based on knowledge gained through my research for the earlier chapters of this report.

Pre-emption was one of the earliest practical expressions of British sovereignty. One of the key aspects of the study of pre-emption here is its importance in clarifying the British understanding of sovereignty to Maori who saw the Treaty instead as an alliance of equals. The story of pre-emption could equally be that of the increasing awareness amongst Maori of the British perception of sovereignty, and its overlap with what rangatiratanga meant to Maori. To the Maori people, as the Tribunal has noted, land, power, and authority were inextricably linked.<sup>3</sup> Pre-emption involved all three of these elements. Its implementation expressed Crown power and authority – its sovereignty – over the land. As will be seen below, pre-emption was also a means of enhancing colonial control over Maori. By allowing Maori to sell land only to the Crown, pre-emption facilitated the transfer of that land from indigenous land tenure controlled by customary law, to British land title controlled by British law.

In New Zealand, pre-emption prescribed that Maori land could only be sold to the Crown (and subsequent legislation restricted the leasing of it to the Crown alone) from the inception of the colony to the enactment of the Native Lands Act 1862, with the waivers of pre-emption in the mid-1840s forming a brief – and partial – reprieve.<sup>4</sup> Throughout the pre-emptive period Maori were dependent on the fairness of the Crown in its land purchases, and the integrity of the Crown in its promise to protect Maori interests.

The imbalance of experience of the Crown and of Maori in such transactions, in particular the imbalance of their knowledge of the likely outcome of British settlement at this time, added, in the Muriwhenua Tribunal's view, to the Crown's fiduciary obligations to ensure the protection of Maori lands.<sup>5</sup> I argue that during the brief and partial waivers of Crown pre-emption in favour of private purchasers in the 1840s, the administration of land purchase was not exempt from these

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3. *Muriwhenua Land Report*, pp 21–30

4. An 1858 Bill to waive the Crown's right of pre-emption was disallowed (D V Williams, 'Te Tiriti o Waitangi – Unique Relationship Between Crown and Tangata Whenua', in *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi (Waitangi)*, I H Kawharu (ed), Auckland, Oxford University Press, 1989, p 86).

5. *Muriwhenua Land Report*, p 389

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obligations. The duty of protection owed during the pre-emptive period was equally as relevant during the relaxation of the ‘protective’ pre-emption provision in the mid-1840s (as it also was in the New Zealand Company waivers).

In this light, as a point of reference, it is relevant to summarize the Tribunal’s findings with regard to the duties of the Crown in giving effect to article 2 of the Treaty, which includes the pre-emption clause. The Tribunal stated in its *Orakei Report* that the instructions given by the Colonial Office, and the oral assurances of the British negotiators at the Treaty debates, indicate that article 2, read as a whole, imposed on the Crown two key duties when negotiating the purchase of Maori lands. It imposed a duty to: (a) ensure Maori people in fact wished to sell; and (b) ensure they were left with sufficient land for their maintenance and support or livelihood.<sup>6</sup> Or, as previously put in the *Waiheke Report*, to (b) ensure that each tribe maintained a sufficient endowment for its foreseen needs.<sup>7</sup> More recently, the Tribunal has elaborated on these points. The Muriwhenua Tribunal has stated that the instructions of the British Government indicate it had in mind, protection by: (a) an audit of the Government’s policies and practices through the appointment of an independent Protector of Aborigines; and (b) the assurance of adequate reserves. That tribunal held that the apparent principle behind the reserves was that ‘Maori would retain sufficient resources to be full participants in the projected new economy, and would have sufficient land to provide an economic base for the future’.<sup>8</sup>

A key question addressed here is whether the Crown’s actions in relation to private pre-emptive waiver purchases were consistent with its Treaty obligations in this period. Was there an independent audit of the Government’s policies and practices by the Protector of Aborigines with regard to the pre-emption waiver purchases? Did the waiver proclamations leave Maori (largely of Auckland) in a position to participate fully in the new economy, with sufficient land for the future? Of particular relevance is the ‘tenths’ clause (one tenth of the land purchased was intended to be set aside ‘for public purposes, especially the future benefit of the aborigines’) in FitzRoy’s pre-emption waiver proclamations.<sup>9</sup>

While the abandonment of pre-emption in 1862 (effectively 1865) may suggest it ceased to be of importance following the introduction of the Native Lands Acts, that is not the case. An aspect of its purpose – facilitating the transfer of land from customary to British land title, controlled by the Crown – continued in a modified form through the land Acts. Nor was the restriction of alienability of Maori land, to the Crown alone, wholly abandoned after 1862. The Crown reasserted this aspect of pre-emption by proclamation, whenever it deemed it necessary, to again monopolize the purchase of particular areas of (and for a brief period all) Maori

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

7. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Waiheke Island Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1987, p 38. See also Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, pp 237–238.

8. *Muriwhenua Land Report*, pp 389–390

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

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land, well into the twentieth century. This later period is not covered by my report, although I note the continuing effect this British colonial policy has had for Maori in New Zealand.

At the time of the Treaty, British officials professed that their intentions with regard to pre-emption were clearly linked with the protection of Maori interests in land. But it was also intended as an effective tool of colonisation and of extinguishing native title to introduce cheaply the British systems of land tenure and serve the interests of the colonising power. The waivers of pre-emption (again despite professed intentions being to 'benefit' Maori and ensure the expression of their rights) were also a means of achieving British colonisation. Hence, pre-emption served both as an expression of article 2 of the Treaty – as a 'protective' qualification on rangatiratanga – and an expression of article 1 – as an expression of sovereignty.

