Pre-emption, the Treaty of Waitangi and the Politics of Crown Purchase

THE TREATY OF WAITANGI was once seen as something unique to the late 1830s, hurriedly devised and reflecting the specific humanitarian, political or international pressures of the moment.[1] After the work of Claudia Orange and the new legal studies of the Treaty and international law, this idea of uniqueness is no longer sustainable.[2] The Treaty expressed a series of views about sovereignty and property extending back at least to the early colonization of North America.[3] But, while not unique, the Treaty of Waitangi was certainly an unusual example of treaties with indigenous peoples, especially in its time. Most North American treaties followed warfare against Native American nations, and ceded large areas of territory to the Crown or the United States. The uncompromising protection of Maori rights to land and other property in the Treaty of Waitangi was unusual, especially when its drafters anticipated large-scale colonization to follow almost immediately. Most of the historical debate has been on the diverse political influences on the evolution of Colonial Office policy between 1835 and 1840,[4] but more recently, attention has turned to the Maori side of the Treaty, exploring the nature and limitations of Maori understandings of and agreement to the

1 K. Sinclair, *A History of New Zealand*, Harmondsworth, 1969, p.71; I. Wards, *The Shadow of the Land, A Study of British Policy and Racial Conflict in New Zealand, 1832-1852*, Wellington, 1968, p.49.

2 C. Orange, *The Treaty of Waitangi*, Wellington, 1987; P. Adams, *Fatal Necessity. British Intervention in New Zealand 1830-1847*, Auckland, 1977, also made the international connection, but was unaware of the legal principles involved.

3 P. McHugh, *The Maori Magna Carta. New Zealand Law and the Treaty of Waitangi*, Auckland, 1991 and Benedict Kingsbury, 'The Treaty of Waitangi: Some international law aspects', in I.H. Kawharu, ed., *Waitangi, Maori and Pakeha Perspectives on the Treaty of Waitangi*, Auckland, 1989, pp.121-57; D.V. Williams, 'The Constitutional Status of the Treaty of Waitangi: An Historical Perspective', *New Zealand Universities Law Review*, XIV, 1 (1990), pp.9-36. In contrast, P. Spiller, J. Finn and R. Boast are surprisingly silent on the Treaty's international context, *A New Zealand Legal History*, Wellington, 1985, ch. iv.

4 A.H. McLintock, *Crown Colony Government in New Zealand*, Wellington, 1958; T. Williams, 'The Treaty of Waitangi', *History*, New Series, XXV, 99 (1940), pp.237-51, and 'James Stephen and British Intervention in New Zealand', *Journal of Modern History*, XIII, 1 (1941), pp.19-35; Adams.

transfer of sovereignty.[5] The narrower but related question of the recognition of Maori property rights has been overshadowed by these broad issues.

The recognition of aboriginal title, Maori rights to land, was central to the debates over the Treaty in the 1840s. This issue illustrates a very fluid relationship between a body of legal and political theory of aboriginal rights and the political forces which mould its interpretation. Paul McHugh, the most prominent of new legal historians writing today, sees the Treaty as doing little more than confirming a series of common and customary law principles, most of which would have applied anyway. [6] McHugh's work parallels that of a number of writers on North America, for whom the decisions of Chief Justice John Marshall in the 1830s provide the basis for the recognition of aboriginal tenure and the only possible model for legal recognition in the New Zealand of the 1840s.[7] Marshall's views were applied in *R. v. Symonds*, the 1847 test of Governor Robert FitzRoy's grants under the waiver of pre-emption proclamations. In this decision, aboriginal sovereignty and aboriginal title were recognized and could only be extinguished by the Crown.[8] Extinguishing sovereignty did not compromise existing rights to property. In a peculiar legal heresy, from the 1870s the New Zealand courts turned their backs on these internationally held principles until their rediscovery a century later. With a slightly earlier time frame, this pattern of establishment, denial and renewed recognition mirrors that of the United States. McHugh's thesis has its legal critics, however, who emphasize the Treaty's specifically Maori context and see customary understandings of the Treaty guarantees as the only issue needing consideration.[9]

Appealing to the long tradition of recognition of aboriginal sovereignty and aboriginal title strengthens the case for contemporary acknowledgement of these tribally held interests. It is debatable whether these views were so dominant as to appear self-evident in mid-nineteenth century thinking. References to Marshall in the legal literature rarely mention that his decisions were ignored and defied by President Andrew Jackson, the champion of state over federal and Indian rights. Power does matter. The principles used to recognize aboriginal title and their interpretation relied not on established legal precedent but on the working-out of a series of political relationships between Maori and the state, and within

5 Orange; R. Walker, *Ka Whawhai Tonu Matou. Struggle Without End*, Auckland, 1990; J. Binney, 'The Maori and the Signing of the Treaty of Waitangi', in *Towards 1990*, Wellington, 1989, pp.20-31.

6 *The Maori Magna Carta*, ch. v.

7 C. Wilkinson, *American Indians, Time, and the Law. Native Societies in a Modern Constitutional Democracy*, New Haven, 1987; S.L. Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century*, New York, 1994.

8 *Johnson and Graham's Lessee* v. *M'Intosh*, 8 Wheat. 543 (1823); *Worcester* v. *The State of Georgia*, 315 U.S. 515 (1832); *The Cherokee Nation* v. *The State of Georgia*, 30 U.S. 1 (1831); *R.* v. *Symonds*, *Great Britain Parliamentary Papers* (GBPP), 1847, (892), pp.64-71.

9 D.V. Williams, 'Te Tiriti o Waitangi — Unique Relationship Between the Crown and Tangata Whenua?', in Kawharu, pp.64-91; Richard Boast, 'Treaty Rights or Aboriginal Rights', *New Zealand Law Journal*, (1990), pp.32-6; Waitangi Tribunal, *Muriwhenua Fisheries Report*, Wellington, 1988, p.209; C. Wickliffe, 'Issues for Indigenous Claims Settlement Policies Arising in other Jurisdictions', *Victoria University of Wellington Law Review*, XXV, 2 (1995), p.207.

the European world itself. Policy makers, administrators and lobbyists had a wide range of authorities to draw on. John Marshall's decisions were known and accepted by some at different times in the period, but contrary views abounded. Chief among these were the views of Emmerich de Vattel, the eighteenth-century Swiss jurist, and a source more readily appealed to than Marshall. Vattel argued that 'civilised' nations had an obligation to displace peoples who did not use their lands for agriculture and provide food for a growing population.[10]

Marshall and Vattel provided contrary positions for a continuing debate among Europeans about the nature of Maori title, and the Crown's obligations in recognizing it. Maori themselves were active participants by force of numbers, arms and persuasion. Europeans took positions which suited their economic and political interests, and they adjusted and rejected these positions as these interests changed. Only in the late 1840s was Governor George Grey able to turn the theoretical argument into effective policy by ensuring that title to land could be recognized, while promising its easy extinguishment. In the process, the nature of aboriginal title was established on the ground and, in being defined in practice, produced a compromise between the Marshall and Vattel positions.

The problem remains, how after so comprehensive a guarantee of Maori rights to land in the Treaty of Waitangi, was it possible for the Crown to claim the extinguishment of aboriginal title over half of the country's territory in less than a decade between 1843 and 1853? In answering this question it is necessary to re-examine the existing historiography of the 1840s in the light of the new legal history, while escaping some of its limitations. The new history of the Treaty has often been driven by the need of the Waitangi Tribunal and the courts to understand the place of the Treaty and of customary law in current legal debates. The Treaty has also become the touchstone of state policy for Maori alongside a public demand to explain the relevance of a nineteenth-century agreement to contemporary New Zealand society. Much of this explanation has been provided by non-historians. This has created a conundrum. Finding the 'meaning and effect' of the Treaty has the courts locating principles in an 1840 document, taking them out of time and giving them a utilitarian currency. Yet to understand the enduring political and cultural impact of the events of the early colonial period, we need to explore contexts, decisions and processes which are peculiarly located in the 1840s. In the few short years between the signing of the Treaty and Grey's departure for South Africa in late 1853, the political and economic landscape of New Zealand was transformed. Many tribes lost the bulk of their lands and were marginalized in the face of the growing power of the European state during this period.[11] When political fortunes change so rapidly, then so do the agendas and rationale for participating in different events, both for Maori and for colonial administrators. As events unfolded in this 13-year period different individuals and groups rose and fell on their changing ability to influence events.

10 English translations were readily available, although like most authorities, it is difficult to know if those using him had ever read them, E. Vattel, *The Law of Nations; Principles of the Law of Nature: Applied to the Conduct and Affairs of Nations and Sovereigns*, 3 vols, London, 1760.

11 Waitangi Tribunal, *The Ngai Tahu Report 1991*, Wellington, 1991.

Far from being a simple declaration of legal principles, the Treaty's property guarantees can be seen as malleable and highly contested, reflecting the changing relationships between Maori and the major European interests in New Zealand. William Hobson's mission had two primary goals for the Colonial Office: a basis for a proclamation of sovereignty under international law, and the immediate control of the market in land. Only by the imposition of pre-emption could the latter be achieved. Historians have had only a weak understanding of the legal role of pre-emption in the Treaty, regarding it as a policy of convenience, understood by Maori as no more than a right of first refusal. Without the doctrine of pre-emption, however, any effective control of the colony would have been impossible. The notion of pre-emption was central to Marshall's interpretation of international law.[12] According to Marshall, European powers had long refused to recognize any titles European citizens could claim from the purchase of land from aboriginal peoples. If indigenous people sold land to European aliens then the title went not to the purchaser, but to the European state whose adventurers had first 'discovered' the aboriginal people. This right of discovery did not limit the rights of aboriginal people to sell property, only the rights of Europeans to claim a title.

Given that Abel Tasman and not James Cook was the first to 'discover' New Zealand, and that his visit was not followed up, just how the principle could be applied in this case was open to debate. The Crown's position was unequivocal. Any land in New Zealand where aboriginal title had already been extinguished became Crown land on the transfer of sovereignty, if not before. Only by this doctrine did the Crown have the power to return to Maori land that may have been unjustly acquired before the transfer of sovereignty. Whether intervention was based on concern to protect Maori or for controlled colonization is largely irrelevant, because pre-emption provided the promise of both. Normanby's vain hope that the colony would be immediately self-financing was a secondary issue in 1839.[13] Much more important was halting runaway speculation in land and providing for an orderly and retrospective investigation of European claims to land.

The imposition of a Crown monopoly after 1840 and the retrospective review of European claims to land acquired prior to 1840 were inextricably linked. One could only proceed with the other. Without the power to refuse to acknowledge titles not derived from the Crown and to investigate these pre-1840 claims, the Crown's intervention in New Zealand would have been meaningless. The urgency was such that Governor George Gipps in New South Wales and Hobson in New Zealand issued proclamations imposing pre-emption before the Treaty. The Colonial Office had every reason to believe that the speculative market for land in New Zealand was out of control, with dire consequences for Maori and the threat that Britain could be drawn into costly military intervention if that market could not be contained.

12 *Worcester* v. *The State of Georgia.*

13 Normanby to Hobson, 14, 15 August 1839, CO 209/4, pp.251-82, 157-63, microfilm, National Archives (NA); Orange, p.29.

Without a military presence, or even a state infrastructure, Hobson was able to halt the runaway speculation in Maori land.[14] It was an effective and immediate display of the Queen's power, and one that needs to be placed alongside arguments that the governor's initial authority was all but nominal. The early imposition of pre-emption demonstrated the governor's ability to control access to European resources, by then essential to the political economy of many tribes. Only those in the central North Island with no history of trading in land were unaffected. It matters little that the policy was implemented indirectly. The chiefs were not prohibited from selling land. The European purchasers simply disappeared, their hopes of quick profit gone.

As McHugh has argued, there was no need to include these issues in the Treaty; the doctrine would have applied anyway. The strength of Maori determination to assert rights ensured their inclusion in the Treaty's guarantees. It was also a victory for the humanitarians and a deliberate attempt on the part of James Busby and Henry Williams to contain the New Zealand Company. This conflict between Edward Gibbon Wakefield and the humanitarians has disguised the extent that there was, in 1840, a broad, if transitory, consensus that Maori had significant rights to land. The New Zealand Company; the missionary societies; the missionaries themselves; the Aboriginal Protection Society: the Colonial Office and those Europeans in New Zealand and Australia claiming titles: all had very different and often conflicting positions on most things relating to New Zealand. But for a brief period in 1840 all adhered to the principle of aboriginal tenure.

The Church Missionary Society (CMS) recognized tenure as a means of protecting its own interests and those of Maori. The local missionaries envisaged a tribally based theocracy in New Zealand. Missionary government based on chiefly authority would remain a bulwark against the introduction of the vices of the colonial frontier.[15] Henry Williams's strengthening of Article II, using the term 'te tino rangatiratanga', can be explained more readily as boosting the authority of his Christian chiefs in the new colony, than as underplaying the transfer of sovereignty.[16] The power of the Protestant missionaries rested on these chiefs and both depended on the ability to resist claims that there was vacant un-owned land in New Zealand. On a more venal level, and one that would eventually cost them dearly, the CMS missionaries relied on Maori title to assert their own claims to land.

The New Zealand Company became one of the most vociferous opponents of the recognition of Maori tenure, but in 1840 it took a different view. Wakefield's theory of colonization allowed for buying land cheaply from Maori, but still assumed that rights would be gained by purchase. The commitment was vague, based on an untried theory, as unrealistic as any other image of New Zealand

14 The files of the Old Land Claims' Commission show some attempts to claim from purchases after 14 January 1840, but these are few, OLC series, NA, Wellington.

15 See evidence of Dandeson Coates, Secretary of the CMS, to the House Committee on New Zealand, May 1838, GBPP, 1837-40, (660), pp.180-242.

16 Orange, p.41.

developed by Wakefield and his fellow promoters. Enthusiasm for Maori title was largely a piece of window dressing, designed to appease influential public opinion moulded by the CMS and the Aboriginal Protection Society. As such it was an aspect of Wakefield's thinking easily jettisoned when the difficulties of purchasing rights become apparent. But in 1839 the New Zealand Company had sent an expedition to New Zealand to purchase land, an expedition it believed successful and its claims to up to 20 million acres of land were, until November 1840, based on conveyances from the chiefs.[17] William Wakefield's account of the supposed purchase of Wellington indicates the extent that the New Zealand Company recognized an all-encompassing title in its negotiating with Taranaki Maori for the land. Wakefield described the tribe as able to muster 'upon the slightest call three hundred armed men, and quite capable, as they have repeatedly proved themselves to be, of retaining their possessions, and never having parted with a single acre of land in their district, by sale or otherwise, now for the first time disposed to make over their country to me'.[18] Along with Europeans resident in New Zealand and the large number of Sydney speculators, who had obtained deeds of cession from Maori between 1836 and 1840, the future success of their pretensions to land ownership depended on gaining Crown recognition of their titles.

A common dependence on aboriginal tenure allowed James Stephen, the influential Permanent Under-secretary of the Colonial Office, to recognize rights as he saw them in international law, without political opposition. This consensus was not based on humanitarian concern but on the real self-interest of obtaining a claim to land once the country became a British colony. Political recognition of customary rights was made possible by the belief that customary title had already been extensively extinguished. Except for a very limited number of missionaries and settlers in New Zealand, who understood the complexity of Maori rights and the difficulties of obtaining cessions of land, the overwhelming view in Britain and Sydney was that Maori were willing, even anxious, to dispose of their lands for nominal sums.[19] The image of Maori as willing sellers made confirmation of title and the promise to purchase land fairly appear no handicap to colonization. As architects of the Treaty's guarantees, Busby and Williams were themselves compromised by their own claims to land.[20]

Economic interest correlated substantially with attitude to native tenure, not just in 1840, but in the years which followed. Arguments presented by European claimants, particularly those not resident in New Zealand, were rarely governed by regard for Maori property or constitutional rights. The Maori right of ownership only had value if it could be obtained by a European. The non-Company speculators, under the leadership of William Charles Wentworth, the

17 P. Burns, *Fatal Success, A History of the New Zealand Company,* Auckland, 1989.

18 Journal, 24 September 1839, GBPP, 1835-1842, (311), p.144.

19 Rosemarie Tonk, '"A Difficult and Complicated Question", The New Zealand Company's Wellington, Port Nicholson Claim', in D. Hamer and Roberta Nichols, eds, *The Making of Wellington*, Wellington, 1990, pp.35-60.

20 Barry Rigby, 'Empire on the Cheap. Crown Policies and Purchases in Muriwhenua, 1840-1850', Wellington, [1991], Wai-45, F8.

leading Sydney speculator with claims of his own to much of the South Island, argued that Maori sovereignty was absolute and not qualified by the 'savage' state of Maori society.[21] The object was to deny the Crown right of discovery. If full Maori sovereignty was recognized, pre-Treaty sales would have to be respected by the Crown, whereas under the right of discovery all land not in Maori ownership belonged to the Crown. Gipps, in introducing legislation to allow for the investigation of these titles, could not accept Wentworth's argument. Maori, as New Zealand's 'uncivilized inhabitants', had only a 'qualified dominion' over the country and as a result the right to extinguish aboriginal title rested exclusively in the colonizing power. It was a curious forum for the defence of both Maori sovereignty and property rights depending entirely on the assumption that both had been extinguished for the lands under claim.

The New Zealand Company felt its interests threatened by the very purchases Wentworth was defending. It launched its initial attack on the Treaty not for its recognition of Maori property rights but for its acknowledgement of Maori sovereignty. The Company argued that the right to discovery did apply, and Wakefield, like Gipps, used *Johnson and Graham's Lessee v. M'Intosh* as his authority.[22] Wakefield claimed that the Company's purchases had extinguished aboriginal title in favour of the Crown, and that the Crown should allow the Company to apply pre-emption on its behalf. The argument was designed to undermine that of the Sydney speculators. Had the Sydney and New Zealand claims been upheld, the Company's hopes for a monopoly of the sale of land would have been destroyed and with it any possibility of keeping the price of land to Europeans high in the new colony.

With Hobson installed as Lieutenant-governor in the Bay of Islands and the Company's settlers struggling to assert their grip on the Wellington foreshore, it was imperative for the Company to come to an accommodation with the Crown. This was finally achieved by an agreement with Lord John Russell in November 1840.[23] The British government agreed to provide a grant of four acres for every pound expended by the Company on its New Zealand venture. The agreement was based on an understanding not that the Company had an actual title, but that it had extinguished aboriginal title to an area of land well in excess of that to be granted.[24]

21 Speech of His Excellency Sir George Gipps, in the New South Wales Legislative Council, 9 July 1840, GBPP, 1835-1842, (311), pp.63-64. For the most detailed coverage of the New South Wales debates see D.M. Loveridge's evidence in the Muriwhenua Claim, 'The New Zealand Land Claims Act of 1840', Wai-45, I2. D.A. Armstrong and B. Stirling, 'Surplus Lands. Policy and Practice: 1840-1950', Wai-45, J2.

22 'Report of the [House] Select Committee on New Zealand', Minutes of Evidence, GBPP, 1837-1840, (582), p.53.

23 'Agreement between H.M. Government and the New Zealand Company', November 1840, Twelfth Report of the Directors of the New Zealand Company, 4, London, pp.5c-10c; Waitangi Tribunal, *Ngai Tahu Report 1991*, pp.286-8.

24 Adams misunderstands Stephen's comments that the Company was not claiming actual title. The Company, accepting the orthodox view of Crown pre-emption by right of discovery, could not claim to have title as such, but it was claiming to have extinguished aboriginal title on behalf of the Crown, Adams, appendix 4, pp.256-8.

Despite this success, the Company's problems over title were far from over. Commissioner William Spain began a much more thorough investigation of the purchase deeds than the Company had anticipated.[25] The evidence for most of the deeds demonstrated that only a small proportion of those with rights to these large areas had participated in the purchases. Indeed, the rights of whole tribes had been ignored. Those tribes who had given the Company their agreement had only a limited understanding of the details of the purchase agreements. In all, the Company was shown to have dealt with Maori in far from an exemplary fashion. When Spain finally reported he found that the Company had extinguished title to only very limited areas of land.[26]

The settlers were landed, but Maori denied their Company titles and were able by force of arms to keep the intruders off. Once Spain had rejected most of their claims, the Company was then involved in a protracted negotiation to purchase land properly at its own cost. Its London advocates brushed up their Vattel and lobbied against the recognition of Maori title as well as against respect for Maori tribal sovereignty. The Company had considerable political success in attacking the Treaty's guarantee of comprehensive property rights. In 1840 Edward Gibbon Wakefield lectured a parliamentary committee stacked with his own directors on the evils of recognizing Maori sovereignty. Another sympathetic committee listened favourably to the arguments against Maori tenure in 1844. The committee, at a safe distance from the reality of Maori claims to the soil, had no difficulty in seeing Maori title as limited. 'The unoccupied land, previously to European settlement, was of no value to them, they were neither a pastoral people, nor one living, like the North American Indians, by the chase, and therefore requiring a great extent of country for their support: they derived their chief subsistence from the produce of the soil and agriculture, rude as it was, and ... hardly a thousandth part of the available land was thus made use of by them'.[27]

Lord Stanley, the Colonial Secretary, remained unconvinced. He resisted the report's recommendations, and argued that the exact nature of Maori title would have to be determined on the ground and with reference not to abstract rules but to custom. While Stanley still expected there to be un-owned land in New Zealand, which by definition would rest in the Crown, he insisted on the recognition of Maori land tenure based on Maori practice rather than on abstract principles.[28]

In 1846 the chairman of the 1844 committee was himself Colonial Secretary and he set about implementing his committee's recommendations in instructions, which also provided for a settler-based constitution. The governor was lectured on the principles of aboriginal tenure in phrases drawn directly from the 1844 report: 'To contend that ... civilised men had not a right to step in and to take possession of the vacant territory, but were bound to respect the supposed proprietary title of the savage tribes who dwelt in but were utterly unable to

25 Burns, p.214.
26 ibid., p.238.
27 'Report from the Select Committee on New Zealand', GBPP, 1844, p.7.
28 Stanley to Grey, 13 June 1845, GBPP, 1846-1847, (337), p.70. Adams, p.86.

occupy the land, is to mistake the grounds upon which the right of property in land is founded'.[29]

While the Colonial Secretary was fulfilling the recommendations of the 1844 committee in outlining the principles of aboriginal tenure as he understood them, he still acknowledged that turning these principles into reality would not be easy. Grey was instructed not to repudiate any recognition of tenure which had already been forced upon him, but to 'avoid as much as possible any further surrender of the property of the Crown'.[30] Pre-emption was to be strictly adhered to. He was to begin the process, first outlined by Lord John Russell in 1841, of investigating Maori title and registering Maori claims to land.

The instructions placed the governor in an impossible situation. Like his predecessors he well understood that any attempt to seize so-called waste land was militarily and politically impossible. Some months earlier he had reported on the Wairau purchase of three million acres from Ngati Toa in the northern South Island and outlined his own policy on recognition of Maori land tenure.[31] All of which varied extensively from what Earl Grey, the Colonial Secretary, had in mind. The governor in his Wairau report argued that it was essential to recognize Maori title to large tracts of land. This need not prejudice the government since, he suggested, the tribes were more than prepared to convey all their rights in the block, in return for adequate reserves. Although the Wairau purchase was presented as voluntary, it had only been possible after substantial military pressure and the forced exile of Te Rauparaha, Ngati Toa's leading rangatira.

George Grey did not reply to the 1846 instructions until almost a year later. The delay gave him time to provide a tactful and effective response, and also allowed a ground-swell of opposition to the instructions to emerge, all carefully orchestrated by himself. The Chief Justice, the Anglican Bishop of New Zealand, and many of the country's major rangatira protested against what they saw as a repudiation of the Treaty of Waitangi and a unscrupulous attempt to confiscate Maori land.[32]

In 1847 the dilemma for the government was still what it had been in 1840, to reconcile colonization with respect for aboriginal rights. The balance had clearly shifted in favour of European settlement. The chiefs were still major forces, but the humanitarian lobby in New Zealand had been weakened, forced to ally with the governor against the Colonial Secretary and the Company. Whereas in 1840 there was no political demand to deny Maori tenure, this was no longer the case. The political influence of those claiming titles on the basis of Maori rights had

29 Earl Grey to Governor Grey, 23 December 1846, GBPP, 1847, (763), p.68.

30 ibid., p.69.

31 The instructions were received 30 June 1847, although the governor had seen drafts sometime earlier. Grey to Earl Grey, 26 March, 7 April 1847, GBPP, 1847-1850, (892), pp.7-9, 14-17; Rigby, p.78.

32 Orange, pp.129-30; J. Rutherford, *Sir George Grey K.C.M.G. 1812-1898: A Study in Colonial Government*, London, 1961, pp.167-71; W. Martin, *England and the New Zealanders*, Wellington, 1847. Petitions were also sent by rangatira to Britain through Grey, see Te Wherowhero and others to Governor Grey, 8 November 1847, GBPP, 1847-1850, (1002), pp.15-16.

been heavily undermined, sometimes through determined campaigns waged by Grey himself. The pretensions of the Sydney speculators had been largely abandoned, or reduced to comparatively minor grants. The New Zealand Company had turned about face, and Grey had effectively chipped away the credibility of the CMS missionaries and the holders of waiver certificates, which had allowed limited private purchases.[33]

The first six years of Crown colony government had dissipated the confidence of 1840 that Maori title could be quickly and inexpensively extinguished. Conflicts over land had led to violence at Wairau in 1843 and in the Hutt Valley. The process of extinguishing title to lands being demanded by the New Zealand Company was proving long, drawn out and still uncertain. At the end of 1846 any hope that pre-emption would provide a mechanism for a self-sustaining fund for land purchase appeared no more than an illusion. As a result the Crown was unable to purchase land in any quantity at all. The attempt to claim waste land as the demesne land of the Crown was based largely on the apparent failure to acquire title by any other means.

When Grey did respond to Earl Grey's instructions in April 1848, the genius of his scheme was that it allowed for a recognition of Maori rights, apparently compatible with the Treaty, and yet promised to restore confidence that these rights could be easily extinguished.[34] Grey reiterated the arguments he had used a year earlier, but this time he was careful not to contradict Earl Grey unnecessarily while arguing that recognition of broad rights to land was crucial to getting any waste lands for Crown disposal. It was an argument that Earl Grey, in the face of considerable opposition to his original plans, was only too willing to accept.

The bitter irony for many Maori tribes was that having won the battle to have their comprehensive rights to all of their territory recognized, they then almost immediately lost the vast bulk of their land through a series of Crown purchases. Between 1847 and 1853 Grey presided over a purchasing campaign which gave the Crown effective control of all of the South Island and substantial portions of the North Island.[35] Ngai Tahu, the South Island tribe whose rights covered the vast majority of the island, found themselves confined to reserves which fell short of even those allowed for by Earl Grey. Only 37,000 acres from the roughly 30 million acres of Ngai Tahu territory which passed to the Crown between 1844 and 1864 was left in Maori ownership.[36]

For over 100 years these sales have remained largely unquestioned beyond the marae. Historians like A.H. McLintock, James Rutherford and Keith Sinclair have seen these sales as absolute, despite a recognition that in many cases inadequate reserves had been provided and other conditions of sale had not been complied with.[37] Only in the 1980s have some historians and lawyers questioned

33 *R.* v. *Symonds*, pp.64-71.

34 Grey to Earl Grey, 15 May 1848, GBPP, 1847-1850, (1120), pp.22-26.

35 See A. McKay, *A Compendium of Official Documents Relative to Native Affairs in the South Island,* 2 vols, Wellington, 1872. Waitangi Tribunal, *Ngai Tahu Report 1991.*

36 *Ngai Tahu Report 1991,* Vol.3, p.821.

37 Rutherford, pp.172-6,181-2,184-6; McLintock, p.213; Sinclair, *History,* pp.80-84.

Grey's confident assertions to the Colonial Office that Maori had freely sold all their lands.[38]

Some historians have emphasized Grey's persuasive skill as a governor, but in the most sophisticated explanation so far, Peter Adams saw the success of the land purchase policy after 1847 in the imposition of pre-emption.[39] A Crown monopoly was designed to control the market for Maori lands and to ensure that land could be purchased cheaply for settlement. Edward Gibbon Wakefield's scheme for the systematic colonization of New Zealand was based on the argument that colonization could only proceed effectively if profits made from the sale of land were sufficiently high to fund an infrastructure and immigration. This would increase the speculative value of land so fuelling further investment. These ideas were incorporated into Lord Normanby's instructions to Hobson. Adams argued therefore that the tension in the Treaty between the protection of Maori interests and the promotion of colonization was inevitably resolved in favour of settlement and at the expense of Maori. FitzRoy's temporary waiver of pre-emption between 1844 and 1845 offered an opportunity for Maori and settler to negotiate an equitable price for land. This was unacceptable to George Grey and the Colonial Office, both of whom insisted that the profits from land purchase should go to the Company or the Crown and that Maori must receive no more than nominal sums for their land. Grey's success was in his realization that the Treaty could be used against itself and that if the 'pre-emption monopoly was used extensively and rigorously, it would effectively neutralize the wide recognition of Maori land rights'.[40]

This is but part of the story. Pre-emption was more fundamental to the whole period and there is a danger of too readily accepting Grey's own rhetoric over the difficulties flowing from FitzRoy's 1844 waiver. Grey persistently libelled his predecessor over his policy towards Maori. It was a view popular with the Company and its settlers. The hapless FitzRoy was branded as having risked the peace of the colony by awarding extensive areas of lands to missionaries and by allowing reckless speculation by the waiver of pre-emption. Grey warned colonial secretaries on numerous occasions that he could not make good the pre-emptive purchases or the missionaries' land grants without risking British lives: '... on my arrival in this country I found that the Crown's right of pre-emption over the lands belonging to the natives had been waived; that a reckless spirit of bargaining for lands between the natives and European speculators was in progress: that rebellion prevailed in several portions of the country: that it was asserted that the natives would never submit to the Crown's resuming its right of pre-emption and would never permit it to exercise such rights'.[41]

All this was nonsense. While FitzRoy did waive pre-emption for around

38 Much of this argument was developed before the Waitangi Tribunal, see A. Ward, et al., 'A Report on the Historical Evidence. The Ngai Tahu Claim', Wai-27, T1; *Ngai Tahu Report 1991*, ch.viii.

39 Adams, pp.193-206.

40 ibid., p.209.

41 Grey to Earl Grey, 15 May 1848, GBPP, 1847-1850, (1120), p.23.

90,000 acres, there were considerable safeguards.[42] Most of the land was purchased in small parcels around Auckland.[43] Far from having difficulty in re-imposing pre-emption, Grey never once issued a waiver certificate himself and in 1846 easily imposed a land purchase ordinance which made private sales of land illegal. Equally important for Adams's argument, there is no evidence that the waiver of pre-emption improved the price Maori received for their land. The blocks sold under the waiver proclamation went for about the same sum as paid by the Crown and in some cases they were sold for a pittance.[44] The evil of FitzRoy's waiver of pre-emption was little more than an elaborate ploy in Grey's malicious campaign to discredit his predecessor.[45]

Grey's success lay in completing purchases — not just persuading tribes to enter into agreements but in enforcing these agreements when difficulties arose, as they inevitably did. In the early 1840s Maori were able to assert the strength and subtlety of their attitudes to land ownership and land sales. The failing confidence that extinguishment of Maori title could be achieved was the result of their success, as was the New Zealand Company and Colonial Office's flirtation with the doctrine of limited aboriginal tenure. The Crown's power to enforce contracts was negligible, and the policy of acquisition still wedded to that of protection. The office of Protector of Aborigines was filled by George Clarke, a former CMS missionary, whose role was to ensure that Maori were not seriously disadvantaged by sales to the Crown. Clarke would always be uncomfortable with these dual responsibilities, but while he ran the Protectorate Department, Maori claims to full ownership of lands were recognized and the few Crown purchases that did take place were negotiated on this assumption.

The difficulties went beyond just the provision of funds. The intricacies of establishing who had rights to land were substantial, and purchasing these interests in a way that was clearly understood and generally accepted by Maori was a slow, tortuous process. It was possible to purchase small areas, but the difficulties compounded as the size of the block increased.[46] There were some notable failures, such as in Mangonui in 1840-41.[47] Nonetheless effective procedures for purchase did develop, based on those used by the CMS before 1840. They included extended and open public discussion among the tribes claiming interests, a recognition of the varied nature of rights, walking over the

42 Each purchase had to be approved by the governor, a tenth of the land was to be reserved for public (especially Maori) purposes and no land could be purchased if this was detrimental to the Maori owners. Promises to chiefs and proclamations and minutes to the Executive Council are in GBPP, 1843-1845, (133), pp.43-48.

43 Alan Ward, 'Supplementary Historical Report on Central Auckland', A Report to the Crown Congress Joint Working Party, Wellington, 1992, pp.43-48.

44 ibid., pp.31-34.

45 In the two largest purchases, Wairau and Kemp, Earl Grey was aiming to protect the Company's monopoly over land rather than the Crown's.

46 In November 1841 Clarke was arguing that land could only be bought in small parcels. Clarke to Colonial Secretary, 1 November 1843, CO 209/33, p.365, microfilm, NA. Edward Shortland, also well informed on customary rights, had a similar view, *The Southern Districts of New Zealand, A Journal with Passing Notes on the Customs of the Aborigines*, London, 1843, ch. v, pp.85-91.

47 Rigby, pp.36-41.

land, and the creation of Maori language deeds, which tried accurately to convey the nature of the transaction.[48] Sinclair assumed that these methods were devised by Grey: this was not the case.[49]

The Chief Protector and his department became the focus of the Company settlers' discontent, and Clarke was vilified for his inability to push Maori aside and secure the settlers their titles. Grey realized the political advantages of denigrating Clarke and other missionaries, and subverting their authority with the chiefs. There was little he was not prepared to do to achieve this. The Protector's office was abolished. The missionaries, blamed for Hone Heke's war in the north, were charged with aiding him, and of the most outrageous land-grabbing. Missionary activity was seen as a major cause of Maori disaffection with the government. Grey claimed that the special treatment the missionaries had received in obtaining land grants was so offensive to Maori that military action would be required to enforce them. Maori were told that the land they occupied on the missionary estates would be returned to them. The Chief Protector was accused of achieving nothing for the amelioration of the Maori. Clarke and his son, also a protector, were censured for bureaucratic incompetence and monopolizing the protectors' budget to their own ends. Most of these charges were complete fabrications; all were unfair. In 1849 Grey made Clarke's own land title a test case of FitzRoy's powers to issue Crown grants.[50] Although it was FitzRoy's actions under review, attention was deliberately drawn to the size of Clarke's holdings. The missionary was powerless to respond as the Attorney-general misrepresented the factual situation in the Crown's favour. Grey's campaign persuaded the CMS and Bishop Selwyn, whose high-church attitudes conflicted with the evangelicalism of the CMS missionaries, that there was substance to the charges of land-grabbing.

These attacks left policy over land issues entirely in Grey's control and neutralized a powerful opposition to unfettered colonization. While other opponents of Earl Grey's instructions were unsure of the governor's willingness to resist the 1846 instructions, his success in persuading Earl Grey to acknowledge a comprehensive Maori title disarmed both Selwyn and Chief Justice Martin. In dividing the missionary forces against themselves and in presenting his land policy as an affirmation of the Treaty in the face of the New Zealand Company's political campaign against it, Grey was given a much freer hand. Clarke's isolation and disgrace were particularly important, since they prevented Grey's land purchase techniques being examined too closely. In this way, the Pakeha lobby which had assisted Maori in the early 1840s to assert their aboriginal title against the claims of land purchasers was unable to come to the aid of Maori adversely affected by Crown purchases after 1847. Missionaries were far less established in the South Island, and the CMS not at all.

48 See the discussion of the 1844 Otakou purchase, Ngai Tahu Claim, Wai-27, 'Evidence of Ann Parsonson on the Otakou Tenths', C1, 'Evidence of Donald M. Loveridge on the Otakou Tenths', O1, A. Ward, et al., 'A Report on the Historical Evidence. The Ngai Tahu Claim', T1, ch.iii.

49 Sinclair, *History*, p.83, 'George Grey 1812-1898', p.161.

50 J. Rutherford, 'A Note on *Queen* v. *Clarke* 1848/1851', unpublished mss, n.d., in possession of M.P.K. Sorrenson.

The careful negotiation for Maori rights established by the Protectorate was still generally maintained in most of the North Island, where Maori were strong and more numerous. But in areas where Maori were dispersed the actual standards of purchasing declined substantially. The contrast between the government's handling of the Otakou purchase in 1844 and the Kemp purchase in 1848 is dramatic.[51] In 1844 Ngai Tahu, through FitzRoy's specific waiver of pre-emption, sold 500,000 acres of land at Otakou to the New Zealand Company for £2400. Great care was taken to ensure that all owners gave consent to the purchase and understood the terms. The boundaries were carefully discussed and agreed on and there was a Protector of Aborigines present to oversee the transaction and ensure that the sale did not compromise Maori interests.[52] In 1848, through a muddled negotiation, Ngai Tahu were induced to sign an ambiguous deed, which conveyed 20 million acres to the Crown for only £2000. No reserves were laid out at the time of the purchase and the substantial reserves they were promised were never provided. Maori sellers were left with only ten acres per head and there was confusion about the location of the northern boundary of the block.[53] All of this was under Grey's direction.

Grey's move to large scale land acquisition was fraught with the same dangers which had beset the Company purchases. Purchases were conducted with too limited a range of customary groups, excluding others who were given no opportunity to present their own claims. In order to gain acceptance of sale agreements, threats were made not to recognize title at all, and to bring in settlers regardless. Grey had stumbled on the secret to the extinguishment of aboriginal title, but this differed substantially from that he tendered to the Colonial Office. Earl Grey was told that, in purchasing large blocks ahead of settlement, he was providing only a nominal recognition of title and that Maori would soon forget their traditional claims to distant mountains and forests in their haste to develop the reserves that were left to them. In fact it was the recognition of extensive ownership rights, inherent in these transactions, which forced other tribes and other chiefs to the negotiation table for the sale of their lands. Ann Parsonson has shown how competition between rangatira and their communities for mana could complicate land sale agendas.[54] Entering into land sales was not, however, just a futile means to assert tribal rights. Reserves and residual rights to natural resources could only be located within the overall territory identified in these

51 Waitangi Tribunal, *Ngai Tahu Report 1991*, ch. vi.

52 A later claim that 10% of the land was promised to the sellers at the time has been found to have been without historical validity, ibid., chs ii, vi. H. Evison rejects the Tribunal's findings, *Te Wai Pounamu. The Greenstone Island. A History of the Southern Maori during the European Colonization of New Zealand,* Wellington, 1993, pp.206-7.

53 Waitangi Tribunal, *Ngai Tahu Report 1991*, ch. viii. The discovery of Ngai Tahu and Crown confusion over the boundary of the purchase and the key role this played in later complaints by Ngai Tahu was made by D. Loveridge, 'Evidence of D.M. Loveridge on Kemp's Purchase', Wai-27, L8.

54 A. Parsonson, 'The Pursuit of Mana', in W.H. Oliver and B.R. Williams, eds, *The Oxford History of New Zealand,* Oxford, 1981, pp.140-67 and 'The Expansion of a Competitive Society: A Study in Nineteenth-Century Maori History', *New Zealand Journal of History,* XIV, 1 (1980), pp.45-60.

transactions. By recognizing extensive and competing titles, well beyond simple villages and cultivations, the Crown was able to exploit the contending claims of Maori for recognition of their customary rights, and to use these to bolster the case for extinguishment.

A more fundamental questioning of the nature of the early land sale agreements is now taking place. Did Maori willingly sell all the land claimed to have been purchased by the Crown between 1847 and 1853? In contrast to the European historical and legal traditions, Maori historians and claimants to the Waitangi Tribunal are arguing almost as a matter of first principle that Maori would never have willingly agreed to sell their land in such quantity. Many argue that Maori would never freely sell any land at all.[55] A variety of reasons are being put forward to explain how sales were no more than confiscations. These histories stress the lack of understanding of the nature of sale in traditional Maori society and assert a belief that only rights to use were being conveyed. Threats of force, a lack of understanding of the terms of the agreement, deliberate deception and purchase from non-owners are all put forward as arguments. It is this new history, based on Maori perceptions of the continuity of Maori rights, that is forcing us to re-examine the nature of early dealings over land from a broader perspective and one that better acknowledges Maori customary practices. It is difficult to generalize about Maori understanding of early transactions with the Crown. Tribal variation was significant and local factors greatly influenced the kinds of understandings reached between traders in land rights. The important overall change was not so much in Maori understanding of agreements over rights, but in the government's increasing ability to enforce its own interpretation.

With Maori opposition suppressed and their European allies compromised and powerless, tribes were less able to articulate their interpretations of land transactions. As purchases and settlers swept over small Maori tribes, it was the Crown's ability to insist that these purchases were absolute, even when the evidence suggested otherwise, that made the difference between the early days of the 1840s. Having promised that Maori rights could be easily extinguished through full recognition, Grey was able to turn the appearance of success into its substance. Whatever the legal principles which laid the framework for relationships between Maori and the colonial state, they were at best principles to be determined on the ground, reflecting not moulding the political realities of a dramatically changing expansion of colonial power. In this process the customary nature of Maori rights to property remained a secondary consideration.

MICHAEL BELGRAVE

Massey University/Albany

55 Much of this discussion is in evidence before the Waitangi Tribunal and especially in the Muriwhenua Claim, Wai-45. See the evidence in support of Maori understandings of Crown purchase agreements which fall far short of sales, Margaret Mutu, F12, Joan Metge, 'Cross Cultural Communication and Land Transfer in Western Muriwhenua 1832-1840', F13, and the contrary evidence of F.R.J. Sinclair, 'Issues Arising From Pre-Treaty Land Transactions', I3.