'Bay of Islands Maori and the Crown, 1793-1853': a summary

G. Phillipson, 4 September 2016

1. INTRODUCTION

Tēnā koutou katoa.

My name is Grant Phillipson. I have been a member of the Waitangi Tribunal since 2011, before which I was the Tribunal's chief historian (1997-2010). In 2000, I took a break from the Tribunal to prepare the report 'Bay of Islands Maori and the Crown, 1793-1853' for the Crown Forestry Rental Trust. A draft was released for consultation in 2001, after which the report was later revised and completed in 2005. Drafts were commented on by representatives of the Te Waimate-Taiamai Alliance and the Ngāti Hine collective. I want to acknowledge in particular the late John Alexander and the late Erima Henare for their support.

Much of the content of my report is more relevant to Stage 1 of this inquiry, and is therefore not the subject of my evidence in Stage 2. Chapters 4 and 7, relating to the pre-Treaty transactions and the northern war, are directly relevant to Stage 2. Other chapters provide important context, of course, but have not been summarised for the purposes of this evidence.

2. PRE-TREATY TRANSACTIONS/OLD LAND CLAIMS[1]

2.1 Key questions

The key questions addressed in my report are:

1. Were the pre-Treaty transactions conditional, customary transactions or English-style absolute sales?

2. If the pre-Treaty transactions were not absolute alienations on the English model, was the Crown aware of that?

[1] Section 2 of this summary addresses Part 2 of the statement of issues. The SOI focuses in particular on the Land Claims commissions' inquiries and the commissioners' 'titling decisions'. My evidence does not directly address most of the SOI questions.

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3. If so, what actions did the Crown take as a result of that knowledge?

I summarise my answers to each of these questions in section 2.6.

2.2 Historiography and the focus of my research

The issue of sale versus customary transaction was debated in respect of the Bay of Islands Old Land Claims in the Muriwhenua inquiry (Wyatt (1991) and Sinclair (1993)). Otherwise, evidence in that inquiry focused on Muriwhenua and also on linguistic analysis of 'tuku whenua' in Māori-language documents.[2]

In 1997, Barry Rigby wrote a substantial piece on Bay of Islands Old Land Claims, which covered issues such as (a) whether settlers transacted with all (or any) of the correct right-holders, (b) whether prices were fair, (c) whether appropriate reserves were made and oral agreements honoured, and (d) whether boundaries were correctly defined. But Dr Rigby did not address what I saw as the still-unresolved and underlying question: had absolute alienations taken place at all, justifying freehold titles for settlers?[3] This issue was a crucial one for the Bay of Islands claims.[4] I therefore made that issue the focus of my research, leaving the other matters which had been covered by Dr Rigby (and for future research).[5] In particular, I focused in chapter 4 on what knowledge was held by the Crown in the critical period before responsible government was granted, especially during the governorships of Robert FitzRoy and George Grey. There was a relatively narrow window of opportunity for Māori to obtain a fair resolution of the pre-Treaty transactions, before settlers took political control of the colony. Professor Oliver argued that the colonial Parliament's Bell commission was an instrument of settler interests.[6]

2.3 Limited and conditional vs absolute alienations: transactions on the 'middle ground'

In assessing the question of whether the transactions were limited and conditional or absolute in nature, I relied on English-languaged documentary evidence (having no expertise in te reo or the linguistic debate about 'tuku whenua'). Even with that limitation, there is significant evidence in missionary records, British parliamentary papers, Busby's records, OLC files, and other documentary sources that pre-1840 alienations were limited, personal, and conditional, not absolute.

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[2] Chapter 4, pp 105-110
[3] Chapter 4, p 100
[4] Chapter 4, pp 103-105
[5] Chapter 4, p 100
[6] Chapter 4, pp 113-114, 178, 203

For this part of my evidence, I went past 1853 to examine whether Ngāpuhi continued to assert and exercise rights over transacted land in later decades. Of particular interest was Captain FitzRoy's evidence to a British select committee in 1838, after he had visited the Bay of Islands in the *Beagle* (see below).[7] I concluded that there is strong the evidence the transactions were:

- conditional, in the sense of particular to individual settlers and their families;

- conditional, in the sense of contingent on continuing benefits to the host community, sometimes in the form of gifts but not always;

- shared, in terms of continued Maori occupation from time to time for various forms of resource-use, or even just for purposes of transit;

- under the authority of the protecting chief and the host community, although the settler had long-term occupation and use-rights; and

- recoverable by the protecting chief and host community if the agreement was violated, or if the settler left, failed to occupy, or attempted to introduce a third party without consent.[8]

As Governor Grey put it, 'even in the best cases for the purchaser, the title could not ... be regarded as more than simply an adoption into the tribe, and a right of holding the land upon the same terms as the Natives themselves hold lands'.[9] Customary title had not been extinguished.

Nonetheless, some British settlers and commentators believed that the paper deeds signed by Ngāpuhi rangatira constituted absolute sales. They maintained this belief despite evidence that Ngāpuhi hapū continued to exercise acts of occupation or significant authority over transacted land (and over settlers) after a 'sale'. How is this to be explained?

There was a certain amount of self-interest involved. Captain Bolger, for example, argued in 1856 that Ngāpuhi originally only granted a 'right of occupancy' but had started making permanent sales by the time of his own transaction in 1835.[10] The more compelling explanation for the honest and

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[7] Chapter 4, pp 114-178
[8] Chapter 8, p 366
[9] Governor Grey to Earl Grey, 17 October 1848; chapter 4, p 197
[10] Chapter 4, pp 133, 169-170

sustained divergence of views between Māori and (some) Pākehā is in what historian Richard White called the 'middle ground':

> The middle ground is the place in between: in between cultures, peoples, and in between empires and the nonstate world of villages….On the middle ground diverse peoples adjust their differences through what amounts to a process of creative, and often expedient, misunderstandings. People try to persuade others who are different from themselves by appealing to what they perceive to be the values and practices of those others. They often misinterpret and distort both the values and the practices of those they deal with, but from these misunderstandings arise new meanings and through them new practices – the shared meanings and practices of the middle ground. This accommodation took place because for long periods of time in large parts of the colonial world whites could neither dictate to Indians nor ignore them.[11]

In this instance, the 'creative and ... expedient' misunderstandings revolved around the continued Ngāpuhi occupation or use of 'sold' land and exercise of authority over that land (and over 'their' settlers). For a case study of how this process worked at Kerikeri, see 'Religion and Land' (2007).[12]

The crucial issue for transactions and shared land use on the 'middle ground' was the balance of power and the question of who was authorising whom.[13] Busby's letters show that Māori continued to occupy whare on 'his' land for fishing, and to plant new cultivations. The Resident tried to resist when he believed that Māori were trespassing on his rights, but he could not do so without controversy or turning a blind eye to acts of occupation which he could not stop.[14] In respect of the missionaries' claims, James Kemp confirmed that 'No Natives have ever been compelled to leave their cultivations on the land but on the contrary have been encouraged to reside and cultivate and cut timber as they might require, a system universally adopted in all purchases of the Missionaries.'[15] Nor were such arrangements restricted to the Resident and the missionaries. The OLC files show, for example, that Ngāi Tawake continued to occupy land transacted first with JR Clendon and then with Montefiore.[16] In 1842 the Land Claims commissioners reported that 'in instances innumerable, the natives have been

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[11] Richard White, *The Middle Ground: Indians, empires, and republics in the Great Lakes Region, 1650-1815*, Cambride, 1991, p x

[12] Grant Phillipson, 'Religion and Land: the Church Missionary Society at Kerikeri, 1819-1850', in Judith Binney (ed), *Te Kerikeri 1770-1850: the Meeting Pool*, Bridget Williams Books, Wellington, 2007), pp 60-71

[13] Chapter 4, pp 133-136

[14] Chapter 4, pp 123-127

[15] James Kemp to Colonial Secretary, 26 January 1848, OLC 1, 595; chapter 4, p 204

[16] Chapter 4, pp 130, 152, 155-156; chapter 8, p 367

allowed, and frequently encouraged, to remain upon the lands; with an assured promise, or understanding, of never being molested'.[17]

But did these arrangements truly represent acts of grace on the part of early settlers or were they making a virtue out of necessity? The commissioners' stated that Māori had been 'allowed' or 'encouraged' to stay on the land, which encapsulated the Pākehā explanation of the middle ground.[18] Māori occupation was explained (or explained away) as 'reserves', or as by the new owners' permission, whereas Ngāpuhi clearly understood matters differently. This was evident when Busby and some early settlers resisted aspects of Ngāpuhi occupation and control, resulting in conflict.[19] Importantly, the balance of power between settlers and chiefs was perceived as shifting in the late 1830s. Richard Davis and Colenso predicted that Ngāpuhi would have to move off thousands of acres of transacted land as soon settlers got the upper hand; but it had not happened *yet*, and what this evidence shows is that 'sold' land continued to be occupied by Māori.[20] The more secure of the early settlers were contesting some acts of authority or occupation on the part of their protecting chiefs and host communities by the late 1830s, hence the several appeals to Hobson in February 1840 that land must be 'returned'. By then, each side was coming to perceive the other's view of what the transactions meant but believed that their own understanding would prevail.[21]

Hobson promised on 5 February 1840 that pre-1840 transactions would be investigated, and that 'all lands unjustly held would be returned' (translator Henry Williams said that he welcomed a chance to prove his title).[22] I have not made a detailed assessment of the Land Claims Commission which carried out the investigations, because it seemed to me that the crucial Crown actions were those of FitzRoy and Grey after the commissioners had made their recommendations. In brief, Governor Gipps instructed the commissioners to obtain 'proof of conveyance according to the custom of the country and in a manner deemed valid by the inhabitants'.[23] Commissioners Godfrey and Richmond found that absolute alienations had taken place at the Bay of Islands. They appear to me to have missed the significance of evidence before them which suggested that alienations had been conditional and customary in nature, including:

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[17] Godfrey and Richmond to Colonial Secretary, Auckland, 2 May 1842, IA1, 1842/721; chapter 4, p 150
[18] Chapter 4, pp 150-151
[19] Chapter 4, pp 123-152
[20] Chapter 4, pp 131-132, 139-142
[21] Chapter 4, pp 128-133
[22] William Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi*, pp 20-21; chapter 4, p 129; chapter 6, p 288
[23] Quoted in David Armstrong, 'The Land Claims Commission, Practice, and Procedure, 1840-1845', p 23; chapter 4, p 142

- additional payments by 'purchasers' (to the original 'vendors') after a sale was supposedly completed;

- consecutive 'sales' of the same land to different settlers as if it had not been 'sold' already;

- settlers were not necessarily free to on-sell 'their' land without agreement; and

- the fact that land at Kororāreka had to be re-transacted with new chiefs after 1830 despite the supposed acquisition of absolute titles before that date.[24]

The commissioners did, however, see the extent to which Māori continued to occupy and use land that had supposedly been sold. From my analysis (which is not exhaustive), the commissioners only formalised such arrangements where reserves were specified in writing or chiefs denied a sale.[25] Otherwise, they made a general recommendation in 1842 that 'innumerable' oral arrangements for continued occupation and use be formalised by the reservation of all kainga, cultivations, fishing grounds, and wāhi tapu before settlers received their titles. This should be done, the commissioners recommended, unless, in the meantime, these places had 'to a certainty, been voluntarily and totally abandoned'.[26]

The commissioners thus appeared to endorse the early settlers' view of the transactions as absolute sales, but nonetheless insisted that the transactions could not be considered complete until Māori interests had been accommodated (to some extent) and joint Māori-settler occupation had been severed.

It is difficult to interpret the role of Māori rangatira in the commission's inquiry. FitzRoy later stated that Ngāpuhi resentment of it as Government 'interference' between them and their Pākehā was a factor in the northern war.[27] My view is that – at the least – rangatira who appeared before the commission confirmed that they had transacted with certain Pākehā whose relationship they valued and to whose continued occupation they agreed. But I acknowledge that (in English translation) many rangatira testified that absolute sales had taken place. This may reflect the taking of brief, formulaic minutes in English.[28] Some future difficulties

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[24] Chapter 4, pp 142-158; SOI 2a, 2c, 2d
[25] Chapter 4, pp 150-153, 178-179; SOI 2a, 2c, 2f
[26] Godfrey and Richmond to Colonial Secretary, Auckland, 2 May 1842, IA1, 1842/721; chapter 4, pp 150-151, 178-179
[27] Chapter 7, p 316; SOI 3g
[28] Chapter 4, pp 153-158; SOI 2a, 2c, 2d

could perhaps have been avoided if the northern commissioners had taken the same detailed evidence as Commissioner Spain.[29]

In any case, there is subsequent evidence that Ngāpuhi – without necessarily repudiating the transactions – continued to assert their rights over transacted lands through to at least the 1870s.[30] This suggests to me that they had not affirmed absolute sales to the commission in the early 1840s, or had not intended to do so. Such evidence included asserting their rights to:

- control whether (and to whom) land could be on-sold by settlers;
- dig gum on transacted land;
- access and control use of the foreshore and shellfisheries adjoining or included in transacted land; and,
- in some cases, continue in occupation and/or claim ownership in the Native Land Court.[31]

I accept that in some instances these actions could be explained as those of right-holders excluded from the original transactions, but not in all cases.

2.4 The governorship of Robert FitzRoy

In brief, Acting Governor Shortland[32] accepted the commissioners' reports but he did not otherwise action them. This task was carried out by FitzRoy, who issued unsurveyed Crown grants on the basis of the commissioners' awards, and also made grants to some claimants for areas far larger than the original statutory limit. The Crown thus awarded freehold title to settlers,[33] a process which Grey later described as the Crown taking land which belonged to one class of its subjects to give to another.[34]

FitzRoy balanced this *partial* confiscation by a policy decision to return the remainder of the transacted land – the so-called 'surplus' – to its 'original owners'. The Colonial Office had granted him some discretion to 'return' land where Māori were in occupation or had made a request for its return which

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[29] Chapter 4, p 156; SOI 2d
[30] Chapter 4, pp 158-178; SOI 2a, 2c, 2d
[31] Chapter 4, pp 158-178, 186-189; SOI 2a, 2c, 2d
[32] His official title was 'officer administering the government'
[33] Chapter 4, pp 178-181, 185-186
[34] Chapter 4, pp 196, 199

should, in all fairness, be 'humoured'. But the British Government hoped that selling the surplus land to settlers would help fund government and provide land for colonisation, so the Colonial Office by no means approved a blanket return of the surplus. Nonetheless, FitzRoy announced his intentions upon his arrival in 1843, and specifically promised to return the 'surplus' land at a crucial hui with Ngāpuhi in 1844. I could not find any evidence, however, that FitzRoy reported this promise to the Colonial Office or took any concrete steps to carry out his promise.[35] Although the surplus could not, of course, have been defined until surveys took place, Fitzroy could have amended the Land Claims Ordinance to specify that surplus land would revert to Māori.

Two questions arise from FitzRoy's actions.

1. Given the creative and convenient misunderstandings which allowed Māori and settlers to co-exist on the 'middle ground', was it impossible for outside observers (including the Crown's representatives) to identify that pre-Treaty transactions were limited and conditional, not absolute and permanent, alienations?

In brief, the evidence of witnesses to the 1838 and 1840 select committees, Dieffenbach's 1843 publication, and the documentary evidence of FitzRoy and Grey themselves in the 1840s, shows awareness that the pre-Treaty transactions were not or might not have been absolute sales.[36]

2. Did the issuing of freehold titles to settlers mean that FitzRoy had changed his mind since giving evidence to the select committee in 1838?

The points which I derived from FitzRoy's evidence to the House of Lords committee in 1838 were:

- Sovereignty and authority over land and the people who lived on it were indistinguishable to Māori.

- Māori did not cede their rights over land in perpetuity, although settlers *could* acquire permanent shared use rights of their own.

- Settlers were seen as increasing Māori resources, and welcomed by them on that basis.

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[35] Chapter 7, pp 316-318, 339-341; SOI 2i
[36] Chapter 4, pp 113-123, 146-147, 182-183, 193-200

- Māori retained political authority not only over the land but also the settlers; they were the veritable 'masters', but settlers had use rights.

- Māori provided protection to the settlers, who were taken into the tribe.

- Settlers made ongoing gifts to the protecting chief.

- The CMS had made large 'purchases' but Māori had continued to live on the missionary land and use its resources; FitzRoy partly equated this to the English rights of 'common'.

- The missionaries knew that they lived on the land in 'sufferance', that it could be taken away from them.

- 'It is a Sort of conditional Sale, such as "We sell them to you to hold as long as we shall permit you."'

- The 'right of common' Māori had retained included the right to live temporarily on the land, feed livestock on it, traverse it, and use the foreshore for fishing – 'the Country was as useful to them in every point of view as if there had been no Settlers'.

- English concepts of property saw this as 'trespass' – on one of the Bay islands, the purchasers wanted to keep Māori out, complaining of damage to their crops, but had not the power to do so.[37]

It seemed from his actions in issuing freehold titles that FitzRoy must have changed his mind since 1838.[38] In considering this issue, I relied on his own explanation of his actions, given in 1847 in response to his successor's criticisms.[39]

Astonishingly, despite granting freehold titles, FitzRoy's view was that British ideas of landed property were 'prejudicial' to understanding the situation of the grantees. Of course, he argued, all pā, cultivations, and burial grounds had been 'excepted' by Māori from sales of land granted to settlers (excepted by deed or more often by oral agreement). Where the commissioners' awards had mentioned reserves, these still held good for the meantime. But FitzRoy believed that his Crown grants were perfectible. The grantees could continue to rely on the 'good faith and traditional usages' of Māori until the latter gradually become convinced

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[37] Chapter 4, pp 118-122
[38] Chapter 4, p 181
[39] Robert FitzRoy, memorandum, March 1847, GBPP vol 5, pp 621-626

to accept the European view of a sale. Eventually, the Governor hoped, Māori would make a 'willing and permanent cession' of those areas inside the Crown Grants which admittedly still belonged to them. All that was needed, he said, was an unspecified period of time for Māori to become 'civilised' and heavily reduced in numbers.[40]

FitzRoy also argued that his grants only held good against the Crown, not against Māori:

> the wording of all these deeds of grant for unsurveyed lands was most studiously guarded. As I could not indefinitely delay the settlement of these land-claims, and had neither men nor money enough to survey them, even in a few years (setting aside the doubt as to involving the Government in private questions); moreover, as I believe, from the best information, that land purchases, properly made, never had been nor were likely to be seriously disputed; and as the claimants themselves generally sought titles, as against the Crown, rather than the aborigines, on whose good faith and traditional usages they could then depend, I resolved to extricate all parties from their perplexing dilemma by undertaking the responsibility of issuing such grants as would avoid compromising the Government, and yet answer the object of the several claimants for, at least, a term of years, during which interval accurate data might be obtained, and the civilization, as well as the diminution of the number of natives would continue. I allude to this diminution with regret; but the fact is undoubted...
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> These grants were intended to effect exactly what I now observe Governor Grey to do with respect to certain purchases of land, of which the boundaries may be uncertain and the title doubtful for a time, namely, to give (in the deeds of grant) "no guarantee or warranty of the title to the lands, save only so far as to engage that the grant shall be considered as barring the title of the Crown to such lands, and as transferring to the grantee any right to the lands which at or previously to the date of the grant may have been vested in the Queen."[41]

This was a mystifying view. Crown grants conferred English freehold tenure upon the grantee. But what it shows is that FitzRoy had not entirely changed his mind about the nature of the pre-1840 transactions. He knew that land had not been alienated absolutely, that Bay of Islands Māori continued to live on it and exercise authority over it, but that early settlers had acquired some kind of 'general right'. One option available to him was to insert in the grants a general exception for all areas of Māori occupation, as he did in the New Zealand Company's Nelson and Wellington grants. Alternatively, he could have carried out the commissioners' 1842 recommendation and consulted Māori, created reserves, and perhaps negotiated payments for agreed parcels of land to be vested in Pākehā. Leases, life interests, or shared titles as tenants in common might more fairly have reflected reality on the middle ground, not just at the time of the

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[40] Chapter 4, pp 182-183

[41] FitzRoy, memorandum, March 1847, GBPP vol 5, p 625; chapter 4, p 183

original transaction but as it continued to be throughout the 1840s. Instead, each settler was given a Crown grant and left to 'make his way by degrees' and 'gradually obtain a free and willing cession' some time in the future. By then, presumably, surveyors would be more readily available.[42]

While FitzRoy was honest and well-intentioned, and believed that he had come up with a pragmatic solution to the circumstances in which the old land claimants found themselves, this was nonetheless a cynical approach to Māori and their rights. Rather than preserving the positions of both parties to adjust privately between themselves, as he claimed, FitzRoy's Crown grants conferred sole legal title on one of the parties to what had originally been limited, conditional transactions.[43] Waiting for Māori to give in or die out was not necessarily a sound solution for the old land claimants either, especially since the balance of power did not – as they had hoped – shift in their favour in the 1840s.[44]

It remained to be seen whether FitzRoy's successor, George Grey, would recognise his error and redeem the situation. There was still time. As the new Governor reported to the Colonial Office in 1846-47:

> the natives were yet left in ignorance that these large tracts of land had been granted to Europeans, and that the paucity of the European population had prevented any actual possession being taken, or, at least, of any actual use being made of these tracts of country; but that I feared, that so soon as the population spread out over the country, and new settlers went upon these lands, sanguinary contests would take place.[45]

2.5 The governorship of George Grey

Governor Grey soon came to understand that Ngāpuhi of the Bay of Islands had not intended the pre-Treaty transactions to be absolute sales. He informed the British Government several times that the old land claims were personal, conditional alienations to particular individuals and their families, and that Māori were still in occupation of much of the transacted land.[46] George Clarke, for instance, had 'only purchased a life interest from the Natives and not the fee simple'.[47] Grey set out his views most fully in a despatch of 1848, in which he argued that the Crown had a duty to support Māori rights and correct FitzRoy's Crown grants, otherwise a very large amount of land had been taken from them

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[42] Chapter 4, pp 182-185, 189-191
[43] Chapter 4, pp 189-191
[44] Chapter 4, p 167; chapter 7, p 361
[45] Grey to Earl Grey, 17 April 1847, GBPP vol 6 [892], p 27; chapter 4, p 194
[46] Chapter 4, pp 193-199
[47] F Merriman to G Clarke, Auckland, 10 July 1848, G Clarke, Letters & Journals, vol 2, qMS-0464; chapter 4, pp 195-196

by the Crown and vested in settlers. He set out what he understood to be key features of the pre-Treaty transactions:

- They were 'pretended purchases' with deeds which only conveyed land to the original purchaser, his children, and family.
- The majority of these pretended purchases were speculations, and none of them were recognisable by British law.
- In the 'best cases', the title acquired was in fact an adoption into the tribe, and a right of holding land upon the same terms as Māori held land.
- Māori could have had no understanding of a land tenure other than their own and, in any case, Māori would have recognised no land tenure other than that of their own country.
- The contracting parties were imperfectly acquainted with each other's languages.[48]

Thus, the pre-Treaty transactions were governed by Māori land tenure, and were conditional in the sense of conveying something only to a particular person and family. They had the effect of incorporating the settler into the tribe, to hold land on the same basis and law as the rest of the tribe. This was a more sophisticated and deeper understanding than that of FitzRoy, although both Governors came to the same conclusion: Māori had not intended to make absolute alienations, and had not in fact done so. FitzRoy's solution – unsurveyed, perfectible grants – was unjust to Māori and had left Grey with a serious problem.

Grey argued that the Governor, in strict justice, should have issued some kind of title that would debar the Crown from claiming the land, but which did not actually guarantee settlers a title. That would have enabled what Grey called the 'real owners' – Māori – to preserve intact any rights with which they had not parted. (FitzRoy's rejoinder, of course, was that this was what he had actually done, but for the purpose of letting settlers continue to extinguish Māori interests privately.) Grey also noted that that there were many Māori with rights who were not consulted or paid. Their interests also had to be protected. The Land Claims Commission, in Grey's view, had done nothing more than determine that the grantees had not been dishonest or fraudulent in their transactions, not that there had actually been valid alienations.[49] In any case, with land unsurveyed, boundaries unknown to the Commissioners, and large tracts of land at issue, how

[48] Chapter 4, pp 196-199
[49] Chapter 4, pp 196-199; SOI 2a, 2c, 2d, 2f

could the Commissioners possibly have known 'whether or not a valid purchase had been made'? According to Grey, the papers of the commission showed 'that they did not pretend to have done so'.[50]

In all, it was a damning indictment of the Crown's handling of the pre-Treaty transactions, and a recognition that something must be done to avert injustice to Māori. Otherwise, as Grey put it, the Crown would simply have taken land unfairly from Māori and given it to settlers. Further, Governor Grey predicted that bloody contests would occur when lightly-occupied old land claims became more heavily settled by Europeans, and Ngāpuhi understood that the law had dispossessed them.[51]

Grey's **first attempt** at a concrete remedy was to ally with Bishop Selwyn and try to get CMS missionaries to surrender their extended grants voluntarily. The surrendered land would be returned to Ngāpuhi.[52]

When this failed, his **second attempt** at a remedy was to challenge the validity of the grants in the Supreme Court, starting with that of George Clarke. Further suits were planned against missionaries Kemp and Shepherd. (These attacks on FitzRoy's missionary allies and the former protectorate had a political dimension, but that did not change the correctness of Grey's position on pre-Treaty transactions.[53]) Kemp responded to the Governor's criticisms by pointing out that Māori had *not* been dispossessed since they had been allowed and encouraged to reside and cultivate on transacted land. His defence articluated the arrangements of the 'middle ground' as if they were set to continue and was thus tragically ironic; the Crown grants turned those middle ground arrangements into exclusive, freehold titles for settlers.[54]

The Crown lost *The Queen v Clarke* in the Supreme Court in 1848, in a case which hinged on the legality of the extended grants, not of the transactions. In advocating an appeal to the Privy Council, Grey recommended challenging the validity of the transactions underlying the grants. Although the Crown did appeal to the Privy Council, Grey's arguments about the pre-Treaty transactions do not appear to have been tested in the Privy Council. In the meantime, contests arose which convinced the Governor that more direct action was required to achieve a 'general settlement' of the problem:

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[50] Grey to Earl Grey, 17 October 1838, G30/14; chapter 4, pp 198-199; SOI 2a, 2c, 2d, 2f
[51] Chapter 4, p 194
[52] Chapter 4, p 194
[53] Chapter 4, pp 191-200, esp pp 191-193
[54] Chapter 4, pp 194-200, 204

- Tāmati Waka Nene's complaints to the Governor about contested occupation of granted land at the Bay of Islands;

- A significant dispute about Busby's on-sale of land to Irving (via Mair) when Irving tried to occupy; and

- A dispute about a wāhi tapu on land granted to Richard Davis.[55]

Grey's **third attempt** at a remedy was the 1849 Crown Titles Ordinance.[56] The aim of the ordinance was to validate FitzRoy's grants and get them surveyed (s 1). The proviso to this was the key remedy for Ngāpuhi. If it could be proven to a Supreme Court judge that native title to land granted by the Crown had not been 'fully extinguished', any Māori who could prove their title would be paid compensation set by the judge (s 2). In cases where Māori offered 'serious obstruction' to the survey or selection of land, the Governor had discretion to grant the settler Crown land elsewhere (s 9). But this did not mean that Māori would retain the disputed land: neither in this clause nor in any other did the ordinance provide for disputed or 'surplus' land to return to Māori. Grey made no attempt to carry out FitzRoy's promise about the surplus land, either in this ordinance or otherwise. The ordinance did provide for any reserves and wāhi tapu *specified in the grants* to be set aside (s 12), but did not carry out the general recommendation of the commissioners to reserve all land in occupation.[57]

The Governor explained that his ordinance was designed to provide a 'speedy and conclusive general settlement' in a way that 'inflict[ed] the least possible amount of injustice on the natives, at the same time that it affirmed the validity of the Crown Grants which had been issued to Europeans'.[58] That bias was very evident in its provisions. The remedies for Ngāpuhi were quite limited. It still confiscated the land but provided a route for Māori to obtain compensation.

The new law, however, proved to be a dead letter. This was for two main reasons.

First, Grey had advised the Colonial Secretary only the year before that litigation in the ordinary courts could not be an effective remedy for Māori for a number of reasons, including:

> Firstly, that the natives are too poor to contest their rights in a Court of Law.

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[55] Chapter 4, pp 159-166, 196-202
[56] Full title: An Ordinance for Quieting Titles to Land in the Province of New Ulster
[57] Crown Titles Ordinance 1849; chapter 4, pp 200-201
[58] Chapter 4, pp 200-201

> Secondly, that they have no knowledge that they possess such rights, against the Crown, nor of the steps by which they would enforce them.
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> Thirdly, that they cannot have much confidence in the decision of our Courts on such a subject, nor do I think many of them would now resort to them, after having come in the first instance at their own cost before the Commissioners whose decisions have been set aside, without any notice whatever, having been given of the reopening of cases long previously decided.
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> Fourthly, that such questions would be submitted only to an European Jury.[59]

To get over the serious barriers, what was necessary was Crown assistance in the form of advice and information (about the ordinance and how to prosecute a claim) and assistance with costs. Otherwise, the ordinance's remedies, such as they were, would not practically be available to Ngāpuhi. As far as I am aware, no Crown assistance was provided to Bay of Islands Māori to use the ordinance, and the OLC files show no compensation provided via the Supreme Court for unextinguished native title.[60]

Secondly, there was too little incentive for settlers to use the ordinance and no penalties if they did not.

As a result of both factors, Grey's third attempted remedy was ineffective. In the years 1850-1854, the Governor took no action to improve or give effect to the remedy that his ordinance supposedly provided. No additional or alternative remedy was attempted for the remainder of his governorship.[61]

After responsible government was granted to settlers, the ordinance was repealed and no further opportunity was provided for Ngāpuhi to prove that native title had not been extinguished. The Bell commission operated on two cardinal premises: that the commissioners' decisions (as to validity of sales) could not be reopened; and that Māori could not claim the surplus land, which they had been 'repeatedly told' was the property of the Crown. I did not otherwise make a detailed study of the Bell commission.[62]

2.6 Answers to key issue questions

My answers to the three key questions posed in section 2.1 are:

1. There is strong documentary evidence that pre-Treaty transactions at the Bay of Islands were personal, limited, and conditional, not absolute sales.

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[59] Grey to Earl Grey, 17 October 1838, G30/14; chapter 4, p 198
[60] Chapter 4, pp 202-203
[61] Chapter 4, pp 201-205
[62] Chapter 4, pp 172-173, 186-187; SOI 2a, 2c, 2d, 2f, 2i

2. Governor FitzRoy and Governor Grey were both aware of that fact – FitzRoy since the late 1830s and Grey from at least 1846. The Land Claims commission, on the other hand, accepted early settlers' 'middle ground' understandings, including their explanations for continued Māori occupation of transacted land.

3. FitzRoy issued unsurveyed, perfectible grants. He expected grantees to 'make their way by degrees' and eventually obtain 'free and willing cessions' of land inside their grants, once 'civilisation' and a decline in numerical strength compelled Māori to accept the Pākehā understanding of the transactions. This was balanced by his promise to return all the 'surplus' land to Māori. Grey, on the other hand, tried to provide three remedies: voluntary relinquishment of extended grants; challenging the grants in the courts; and the Crown Titles Ordinance 1849. For the reasons explained above, none of Grey's remedies were effective. The Crown failed to take any action to improve or give proper effect to the 1849 ordinance. Nor did it honour FitzRoy's promise to return the surplus land.

3. THE NORTHERN WAR

The origins of the Northern War are discussed in chapter 7 of my report. I did not address the events of the war itself, nor (in any detail) the peace-making, which I identified as in need of further research (now covered by Ralph Johnson).[63]

In my view, the essential context for the events of 1844-1845 is the evolution of the relationship between Ngāpuhi and the British Crown from 1820 to 1840. After the meeting of Hongi and George IV in 1820, the relationship intensified as the result of a series of crucial decisions which were made in concert by the Ngāpuhi chiefs of the Bay of Islands and Hokianga: Ngāpuhi's letter to William IV in 1831, followed by their reception of the British Resident as the King's representative in 1833, their selection of a flag for independent New Zealand (1834), and their Declaration of Independence in 1835. The alliance was further strengthened and renegotiated at Waitangi in 1840, culminating in the signing of Te Tiriti.[64]

My argument in chapter 7 is that this process did not stop suddenly in 1840. Ngāpuhi continued to adjust and renegotiate the details of their now treaty-based relationship with the Crown. A crucial question facing leaders such as Hōne Heke

[63] Chapter 1, p 4; Ralph Johnson, 'The Northern War 1844-1846', 2006 (Wai 1040, doc A5)

[64] These matters are covered in chapters 5 and 6 of my report, and have been reported on by the Tribunal in its stage one report, hence they have not been addressed in any detail in my stage two evidence.

was whether Te Tiriti meant to the British what they, the rangatira, understood it to mean. Following from that was the question of whether the Governor should perhaps be sent back, and the Māori-settler interface managed with the assistance of Busby and the missionaries, as it had been in the days of King William. The "war aims" of Heke, Kawiti, and their supporters veered between achieving that end, and getting the Governor to confirm that matters between them would be managed by agreement from a position of equality.[65] The latter was what Tāmati Waka Nene and other Ngāpuhi leaders believed they had achieved at the Waimate hui of 2-3 September 1844 (discussed below).

There is little doubt that Ngāpuhi discontent with the new arrangements of 1840 had turned into a political crisis by 1844. This discontent was fuelled by several factors. First, they had understood that the Governor would live close to them and under their protection, facilitating the relationship and bringing expanded economic opportunities. Instead, Hobson removed to Ngāti Whatua territory and his new town was established there. Secondly, the 1840s saw a serious economic decline in the north, for which the Government's customs establishment (and pre-emption) were blamed. Thirdly, FitzRoy identified the Government's 'interference' between early settlers and their protecting chiefs (the Land Claims commission) and its surplus land policy as a serious grievance.[66] Fourthly, and exacerbated by the other three, a war of words took place from 1840-1845 as to (i) the true meaning of Te Tiriti, (ii) the respective authority of Governor and rangatira, and (iii) the intentions of the British Crown in respect of Māori and their lands.[67] This war had three sides: protectors, missionaries, and officials; early settlers and non-missionary Pākehā advisors to rangatira; and the rangatira themselves.

This war of words became a shooting war in 1845. How did that happen?

In sum, the political crisis in the north was turned into a war by a failure of diplomacy, not because of irreconcilable positions. Heke's challenge to the Governor in repeatedly felling the flagstaff was for the Governor to show by his actions the respective authority of Governor and rangatira, and the relationship between the two. Heke always wanted some kind of symbolic resolution in how the flagstaff was to be re-erected. As Bishop Selwyn pointed out, it was entirely feasible for the Governor to have consulted the chiefs and reached an agreement *before* the flagstaff was re-erected. This, the Governor failed to do each time. FitzRoy's significant assurances and undertakings at Waimate in September 1844

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[65] Chapter 5, pp 215-216; Chapter 7, pp 326-328; Chapter 8, pp 371-372; SOI 3a and 3c

[66] Chapter 7, pp 306-319; SOI 3d, 3g

[67] Chapter 7, pp 305, 320-354, ; see also quote from George Clarke to FitzRoy, 1 July 1845, on p 276; SOI 3a, 3c, 3d, 3g

showed that he *could have* satisfactorily answered Heke's challenge about their respective authority, at least in the circumstances of 1844. Longer term, the House of Commons committee's report indicated how dangerous the situation really was for Māori. In addition, the Governor rejected Heke's overtures in October 1844 and missed a crucial three-month opportunity in which a settlement could have been reached. From January 1845, when the flagstaff came down twice more, the Governor was determined to employ military sanctions. Heke and Kawiti did not reach the same point, I believe, until late February/early March, after the publication of the Commons' select committee report.

We turn next to a more detailed explanation and summary.

Instances of attempted Government interference with the authority of chiefs led to a split within the Ngāpuhi leadership as to the correct way forward. My argument is that, regardless of internal squabbles, skirmishes and even small wars, Ngāpuhi leaders had always come together to debate and decide in concert any adjustments to their relationship with the British Crown.[68] This continued in 1841 when Ngāpuhi leaders resolved how to deal with Maketu. Heke and others were unhappy with the decision reached to let the Governor punish Maketu, but the consensus prevailed; talk of reprisals against settlers or the Governor came to nothing.[69] Otherwise instances of actual Government 'interference' had been relatively few: attempts by protectors to mediate inter- or intra-iwi disputes as well as Māori-settler disputes; the odd attempt by the police magistrate to deal with Māori-settler disputes; the imposition of customs duties on the shipping at the Bay of Islands; and the Land Claims Commission and the surplus land policy.[70] Enough had occurred for the war of words to fuel doubts about the authority of the Governor vis-a-vis rangatira, and whether they would – as specified at Waitangi – be exactly equal.

The result of these doubts was a determination to test the Governor, exhibited in a very similar way by:

- Tāmata Waka Nene's declaration that he would cut down a kauri in front of the Governor to see what he would do (the Governor having prohibited the felling of kauri):[71] and

- Heke's determination to cut down the flagstaff and see what the Governor would do. What Heke wanted in response to his challenge was a

[68] Chapters 5-6, SOI 3b
[69] Chapter 7, pp 323-324
[70] Chapter 7, pp 321-325
[71] Chapter 7, p 325

> demonstration of the equal or joint authority of Governor and chiefs.[72] This took a variety of forms: (i) that Heke would raise the staff again while the Governor stayed away and took no action; (ii) that Heke and the Governor would put up new flagstaffs side by side, flying the Māori flag and the Queen's flag; and (iii) that the Governor and chiefs would share a new flagstaff – rangatira to have the bottom half planted in the whenua, symbolising their 'Mana (chieftainship) of the country', and the Governor to have the top half and the flag.[73]

Heke's test of the Governor did not result in war in 1844. The Ngāpuhi rangatira came together at a crucial hui at Waimate in July 1844 to resolve a path forward in response to the actions of Heke and his supporters. After significant debate, they reached consensus. As a result, Heke wrote to the Governor that soldiers must not be sent to the Bay of Islands (the rangatira did not want the Governor to have a military force in their district). He also stated that he (Heke) would re-erect the flagstaff, noting that he had erected the original staff for the 1834 Māori flag. At the July hui, as reported by William Cotton, the 'substitution of the English flag' for the Māori flag had been 'made a great grievance': Heke had felled the flagstaff because it was 'erected he said for the NZ flag & not the Queen's flag'.[74] Heke's letter was followed by a letter from Nene, Te Hira Pure and other chiefs, asking the Governor to 'agree to a flag for us, the Maori rangatira', reminding FitzRoy of 'te korero a Kingi Wiremu i mua' and the 1834 flag.[75] My presumption is that they – with Heke – wanted *this* flag to fly from the re-erected flagstaff.[76]

Bishop Selwyn later suggested that the overtures from the July 1844 hui 'would I believe have secured the peace of the country, if the Flag Staff had not been erected, *without further communication between the Government and the Ngapuhi Chiefs*' (emphasis added).[77] Selwyn appreciated the need for such consultation, and he conveyed the chiefs' letter to FitzRoy. But the Governor had already, without waiting or consulting, ordered the re-erection of the flagstaff. He had also sent 30 troops to Kororāreka (in a strictly defensive capacity), and asked the New South Wales Government for more. He was contemplating a demonstration of power once he had enough troops, but he also wanted the protectorate to negotiate for Heke to pay compensation (the amount to be set by

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[72] Chapter 7, pp 326, 328, 332, 343, 345; SOI 3a

[73] Chapter 7, pp 332, 343; John Hobbs, Journal, 15 January 1845, quoted in Johnson, 'Northern War' (Wai 1040, doc A5), pp 158-159 (I had not consulted this source when I wrote my report); SOI 3a, 3g

[74] Chapter 7, pp 330-332; SOI 3a, 3b

[75] Ralph Johnson, 'Northern War' (Wai 1040, doc A5), pp 106-108; SOI 3a, 3b

[76] I was not aware of this letter when I wrote my report.

[77] Selwyn to FitzRoy, November 1845, CO209/49; Chapter 7, p 331

the Crown). FitzRoy was thus considering two possible routes forward for the Government: a show of force and/or a demand for compensation.[78]

FitzRoy arrived at the Bay of Islands in August 1844 apparently determined on a show of force: he brought 250[79] newly-arrived troops with the intention of marching inland to capture Heke. Nonetheless, he was still willing to entertain an alternative: he met with Ngāpuhi chiefs at Kororāreka on 26 August 1844 and agreed that Heke could instead pay compensation and make a promise of future good conduct.[80]

This arrival of the Governor with troops, intent on taking a chief, fractured the concert of Ngāpuhi. On 27 August 1844, Heke refused to pay compensation on the Governor's terms.[81] A military confrontation – which would likely have been fatal to both FitzRoy's forces and the Crown-Ngāpuhi alliance – was averted on 28 August by rangatira whom Burrows described as 'the most influential chiefs of the Waimate and Hokianga districts'.[82] These chiefs asked FitzRoy not to march inland but to leave his troops behind and meet with them at Waimate. The Governor agreed. This hui took place on 2-3 September 1844.[83] The Governor had decided, as William Cotton put it, to 'try the effect of a quiet talk with the principal chiefs'.[84]

Having made a show of force without actually firing a shot, the Governor thus ultimately chose to act peacefully and in concert with the rangatira to, in my view, renegotiate or reaffirm some of the specifics of the Crown-Ngāpuhi alliance.[85] With a virtually empty treasury, trouble brewing in other parts of the country, and no permanent military force at his disposal, FitzRoy had strong incentives to reach a peaceful settlement in the north and to leave it to govern itself. Mutual assurances and undertakings were given at the September 1844 hui, including that:

- the settlers should be encouraged to stay, under the protection of their chiefs;

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[78] Chapter 7, p 330; SOI 3e, 3f
[79] Sources vary as to the exact number.
[80] Chapter 7, p 332
[81] Chapter 7, p 332; SOI 3b, 3d, and 3e
[82] Burrows to CMS, 4 September 1844; chapter 7, p 332
[83] Chapter 7, pp 332-342; SOI 3a, 3e
[84] W Cotton, journal, 30 August 1844; Chapter 7, p 333
[85] Chapter 7, pp 332-342, SOI 3e

- the Governor would do his best to ensure Ngāpuhi's prosperity, and as part of that, he would abolish the customs and restore trade at the Bay of Islands;

- the missionaries should remain among Ngāpuhi, with their schools and other work funded by the people of England;

- the Governor would not land his soldiers but send them back to Auckland, in return for the agreement of Ngāpuhi to remain at peace and to restrain trouble-makers (specifically Heke);

- the Governor himself would return to Auckland and leave Ngāpuhi to manage the situation;

- the Government would not interfere in the operation of Māori law insofar as it applied to themselves alone;

- the Governor wanted to act in concert with the principal chiefs, and would consult them on all important matters;

- pre-emption was intended for the protection of Māori from land loss, and their lands were secure;

- the Governor would give the Ngāpuhi chiefs flags with the motto 'Allied Guardians of New Zealand'; and

- the surplus lands would be returned to Ngāuhi.[86]

Compensation was made for Heke's actions by the Ngāpuhi leaders, in atonement for what seems to have been recognised as his offence against the Queen.[87]

The 2-3 September 1844 hui was a crucial turning point in the crisis. It reaffirmed the alliance and Ngāpuhi support for the Governor, but Heke and his supporters were not present. According to one source, Wharerahi (a leading rangatira) may have persuaded Heke to supply the muskets that were paid as compensation.[88] Also, Heke had stayed away from the hui, he later explained to the Governor, lest it result in an open breach and fighting among Ngāpuhi.[89] While the hui was in progress, Heke held a great hākari at Kaikohe for his supporters. At the hākari, so

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[86] Chapter 7, pp 333-342; SOI 3a, 3c, 3e
[87] Chapter 7, pp 334-336, 341-342, SOI 3b
[88] Chapter 7, p 338; SOI 3b. The source for this was St John's College clergyman William Bambridge.
[89] Chapter 7, p 345; SOI 3b

it was reported, a noose was placed around the neck of a carved figure called Te Kawana.[90] While this was going on, Heke wrote to FitzRoy, asking him to stay at the Bay of Islands two or three days longer so that they could meet, Heke being unable to leave his guests. The Governor did not choose to wait, having already reached agreement with the Ngāpuhi leaders that *they* should resolve matters with Heke internally.[91]

On 7 September 1844, Heke came to Waimate with about 250 supporters, and a second crucial hui took place. It is not known exactly which rangatira attended this hui. Heke's proposal at the hui was for 'the Governor to come with him & take down the present flagstaff, and then erect two, side by side, one for the English, and one for the Maori flag.'[92] Heke and Te Hira Pure both wrote to the Governor after the hui. It is clear from their letters that some within Ngāpuhi were not satisfied by the Governor's pledges at Waimate, and that doubts still existed as to the true meaning of Te Tiriti (doubts which the missionaries and protectors spent the next six months trying to combat[93]). FitzRoy was asked to return to the north, take down the flagstaff, and meet with Heke and the chiefs face to face, after which they would all proceed to Kororāreka together to resolve matters. (This presumably referred to the proposed erection of flagstaffs side by side for the Māori flag and the Queen's flag.) The alternative, FitzRoy was told, would be war between Ngāpuhi chiefs.[94]

Te Hira Pure's letter advised the Governor that he should have held his Waimate meeting *before* re-erecting the flagstaff and sending for soldiers. Now, peace had to be restored by a meeting between the Governor and Heke, with the shaking of hands and discussion of the issues. FitzRoy should return to the Bay, take down the flagstaff, and then meet with Ngāpuhi. The flag was 'equal to the taking of our country from us'. If the Governor disagreed that that was true, then he must come and prove the contrary. All could yet be resolved through this means, but Te Hira Pure ended his letter with a warning that there would be dire consequences if the Governor did not come.[95]

It was unlikely that this particular Governor would ever take down the flagstaff in the way proposed (a contrast is often drawn with George Grey, who did not insist on re-erecting the flagstaff). Promises were kept: the customs were abolished, and some recognition had been given to Māori law in the Native Exemption

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[90] Chapter 7, p 338
[91] Chapter 7, p 338
[92] Chapter 7, pp 342-343; SOI 3a, 3b
[93] Chapter 7, pp 344, 349-354; SOI 3a, 3d
[94] Chapter 7, pp 345-346
[95] Te Hira Pure to FitzRoy, undated (September 1844), GBPP vol 4, p 418; chapter 7, p 346

Ordinance. But FitzRoy's response to Heke's September 1844 overtures was twofold: (i) he asked the Colonial Office for warships and troops so that he could use force if necessary, in any part of New Zealand; and (ii) he replied to Heke on 5 October 1844 that it would be a 'few months' before he could come back to the Bay of Islands. He would meet with Heke and other chiefs at Waimate in the summer.[96]

FitzRoy also assured Heke that the Queen's promises of protection and justice, and the 'kind intentions of the British Government', could be trusted. He referred to his revised surplus land policy as an example. The flag, he stated, was sacred, and Heke's attack on it a grave insult. The Queen's flag also symbolised Māori inclusion in the great British nation, 'united as brothers and friends'. Many nations, he said, with their own customs and languages, lived in security under that flag. Māori could have their own flags but these had no force against other powers: 'Your safety, your freedom, your preservation as a nation, depend upon your union, not only together, but with a powerful European nation, not only able to protect you, but willing to acknowledge and defend your rights.'[97]

By rejecting the requests of Heke and Te Hira Pure to come and meet with them and reach an agreement, FitzRoy made a crucial decision that would lead to war in March 1845. His Waimate hui ensured that he had committed allies in the Bay of Islands but it had not succeeded in resolving matters with Heke. There were three months following the September/October exchange of letters, in which FitzRoy could have returned to the Bay and met with Heke and those who supported him (as well as Nene and his allies). Whether they could have reached a mutually satisfactory agreement is unknown, but it was at least possible. It was even *likely*, in my view, given the kinds of assurances and undertakings which FitzRoy had been able to give at Waimate on 2-3 September.[98]

During those same three months, Ngāpuhi chiefs were not able to resolve the situation internally. Hitherto, dissent from some chiefs at the Treaty-signing, for example, or at the 1841 hui which resolved Maketu's fate, had not prevented Ngāpuhi from following their chosen course in respect of the Crown. But the dissent of Heke and his supporters, later joined by Kawiti and Ngāti Hine, was of a different order. Neither Ngāpuhi rangatira nor missionaries and protectors could convince Heke; as Te Hira Pure put it, only the Governor could provide the answer to Heke's challenge, *and* only if the Governor stopped unilaterally re-erecting the flagstaff.

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[96] Chapter 7, pp 346-347

[97] FitzRoy to Heke, 5 October 1844, GBPP vol 4, p 417; chapter 7, p 346

[98] Chapter 7, p 347; SOI 3a, 3d, 3e, 3f

FitzRoy's rejection of Heke's overtures in October 1844 meant that Heke's doubts and the threat of Ngāpuhi civil war remained unresolved, and the flagstaff remained a live issue. The inevitable result, it seems to me, was a repeat of the challenge. On 10 January 1845, Heke brought the flagstaff down a second time, without any violence or bloodshed.[99] This time, according to missionary John Hobbs, Heke wanted a new flagstaff in which the lower part would be placed in the earth by rangatira (representing 'a right to the Mana (chieftainship) of the Country'), while the upper part and flag would belong to the Governor.[100] It seems to me that Heke was not yet bent on war in January 1845 but on getting a definite answer to his challenge about the respective authority of Governor and rangatira, and the relationship between the two.

Against Henry Williams' advice, the Governor immediately ordered the flagstaff put back up again and police magistrate Beckham did so. He also sent his small force of 30 troops back to Kororāreka, instructing the police magistrate to arm and drill the townspeople and to arrest Heke if possible. A reward of £100 was offered for his capture. Heke's action was thus treated not as a political act but as a crime. Rewa's people occupied the town to defend their settlers, and a force of Tāmati Waka Nene's men joined FitzRoy's soldiers to guard the flagstaff on alternate nights. On 17 January 1845, Rewa's force deterred Heke from pulling down the jail in answer to the insult that he, a rangatira, might be imprisoned in it. But on 19 January 1845, the flagstaff came down a third time, with Nene's men offering no or only token resistance.[101] This could not have happened, wrote Richard Davis, had the doubts not been widespread among Ngāpuhi:

> Heke's party is strong – in fact, I do not know, but it consists of nearly the whole of Nga Puhi. Heke has done much mischief by instilling into the minds of the natives that the *mana* of the Island is invested in the Queen of England, and that they are thereby made thoroughly poor men and slaves. This, from the manner in which he has introduced it, has seriously affected the native mind, and many have been brought over to his way of thinking, although they do not stand so prominently forward in the cause. Had it not been for this feeling, or some of a similar nature, the last flagstaff would not have been cut down without bloodshed. The quiet removal of that flagstaff in the face of those who had engaged to protect it is, or ought to be to us, a sufficient indication as to what the mind of the natives is, and of the little reliance which can be placed on them. They (the hostile party) declare that they have no anger to the Queen of England – to the Governor; but seeing that they are a lost people – they and their children – for ever, they now wish to have undone what they ignorantly did [on 6 February 1840], or to make an effort to save themselves and their children from ruin, or perish in the attempt. They say: 'It is for the Governor to save or destroy us. If the flagstaff be again raised it will be a sufficient

[99] Chapter 7, pp 347-348; SOI 3a
[100] Johnson, 'The Northern War' (Wai 1040, doc A5), pp 158-159
[101] Chapter 7, pp 348-350; SOI 3a, 3b

> indication to us as to what the Governor's intention is – namely, our destruction. Should he permit the flagstaff to remain down we are friends again.'[102]

A week later, on 28 January 1845, Ngāpuhi leaders met in a large hui at Pāroa to determine a way forward. Te Tiriti was debated strenuously: had they been deceived or not? According to Henry Williams, by reading out and explaining the text of Te Tiriti, he was able to reassure the assembled chiefs and people that it was not 'an instrument for seizing the country for the Queen'.[103] Pledges of support for the Crown were renewed, although the majority declared that they would stay neutral.[104]

In February-March 1845, there was a marked change in the intensity of the crisis and the likelihood of a three-way war (British troops, Nene's 'allied guardians of New Zealand', and the growing supporters of Heke and Kawiti). A crucial trigger was outside of FitzRoy's control: the 1844 House of Commons select committee report was published at the Bay of Islands. That report famously referred to the Treaty as a mistake and a 'legal fiction', and argued that all land which Māori were not directly cultivating belonged to the Crown. The effect at the Bay of Islands cannot be exaggerated. I am quite certain that it convinced Heke he now knew for certain how the Crown understood Te Tiriti and what its intentions were towards Māori and their lands. The report also brought Kawiti and Ngāti Hine to join forces with Heke, and there were taua muru against settlers. Henry Williams urged the Governor to come to the Bay of Islands and meet with the Crown's allies to reassure them, and Richard Davis urged him to come and negotiate with Heke.[105]

The Governor rejected the option of negotiation in early 1845.[106] After the flagstaff came down in January, he sent for more troops and also ordered a blockhouse[107] put up to protect the flagstaff. As Ralph Johnson explains, the Governor had decided in January 1845 on a military response but he lacked the capacity for one, and there was a long delay before the extra troops he requested were sent to New Zealand.[108] In the meantime, while he waited for the force necessary for military action, FitzRoy imposed economic sanctions on the Bay of Islands in March 1845. On 6 March, he ordered that only 'friendly' chiefs with

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[102] Richard Davis to George Clarke, quote in TL Buick, *New Zealand's First War: The Rebellion of Hone Heke*, Wellington, 1926, p 51; chapter 7, p 349; SOI 3a, 3b, 3c

[103] Henry Williams, *Plain Facts Relative to the Late War in New Zealand*, 1847, p xxvi; chapter 7, p 351

[104] Chapter 7, pp 350-351; SOI 3b, 3c

[105] Chapter 7, pp 318, 351-353; SOI 3a, 3c, 3d

[106] SOI 3e

[107] I mistakenly referred to this as a 'bunkhouse', chapter 7, p 354

[108] Johnson, 'Northern War' (Wai 1040 doc A5), pp 164-166

Government-issued passports would be allowed to trade with ships and settlers at the Bay of Islands.[109]

Heke was already on his way to Kororāreka, professing peaceful intentions but publicly and avowedly after the re-erected flagstaff:

> He was very civil for some time, and said he had no wish to injure either sailor, soldier, or any of the settlers; but the third flagstaff had been erected without any reference to him; moreover that £100 had been offered by the Governor for his apprehension (he presumed, dead or alive). He did not attempt to hide from us that if he had a chance he would attempt the destruction of the third flagstaff. Heke did not allow this opportunity to pass without alluding to the Treaty of Waitangi, and of having been deceived by the Archdeacon [Henry Williams] and others in inducing *so many* chiefs to sign it, when they must have known that they (the chiefs) were signing away their lands, etc. Heke, however, had his match here; for with that peculiar look which the Archdeacon knew how to give over his spectacles, accompanied by a stern sort of half-smile, he replied, 'Your salvation is in that treaty'.[110]

Kawiti was reported to have said to Bishop Pompallier:

> What we have said and what we intend are well known. Let the flagstaff come down and all will be at peace. We have no intention of giving up our authority and our lands to any nation whatsoever.[111]

In March 1845, Heke and Kawiti were planning an attack on the more heavily defended flagstaff. I think it must have been very clear to Heke and Kawiti that they could not take the flagstaff this time without fighting the Queen's forces. This meant that *both* sides were now definitely intent on some form of military engagement with each other. One key difference between them was that FitzRoy was not yet ready or able to attack. The 'allied' side in this three-way conflict was less certain to be involved; police magistrate Beckham had rejected offers from Rewa and his people to come and defend Kororāreka, and – thus far – fighting within Ngāpuhi had been avoided despite provocation (including the potentially disastrous encounter on Maiki Hill on 19 January 1845). Nonetheless, on the way to Kororāreka in March, Heke was warned of what the consequence would ultimately be – including, according to Burrows, Tāmati Waka Nene warning Heke that he would fulfil his pledges made to the Governor at the September 1844 Waimate hui.[112] Heke was undeterred. He proceeded with Kawiti and their forces in the attack on the flagstaff that resulted in the destruction of Kororāreka and the beginning of the northern war.

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[109] Chapter 7, p 353; SOI, 3e

[110] Robert Burrows, 'The War in the North 1845', c 1860; chapter 7, p 353; SOI 3a

[111] Quoted in Paul Moon, *Hone Heke, Nga Puhi Warrior,* Auckland, 2001, p 95

[112] Chapter 7, p 353; SOI 3b, 3c