OFFICIAL

IN THE WAITANGI TRIBUNAL **WAI 1040**

IN THE MATTER OF **THE TREATY OF WAITANGI ACT 1975**

AND

IN THE MATTER OF **TE PAPARAHI O TE RAKI (NORTHLAND INQUIRY)**

BRIEF OF EVIDENCE OF PROFESSOR ALAN WARD

Dated 17 December 2009

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MAY IT PLEASE THE TRIBUNAL:

Preface

1. My name is Alan Dudley Ward. I am Emeritus Professor of History at the University of Newcastle, New South Wales. I graduated with an M.A. Hons degree from Victoria University of Wellington in 1958 and a PhD in Pacific History from the Australian National University in 1968. During my career as an academic historian I have published four books and numerous articles on New Zealand and Pacific history, including *A Show of Justice; Racial 'amalgamation' nineteenth century New Zealand* (1974). Between 1988 and 2006 I was employed (including two years fulltime) by the Waitangi Tribunal Division as a contract historian. As a report writer I assisted in the drafting of several Tribunal reports, was a coordinator of the Tribunal's 'Rangahaua Whanui' research programme, and wrote the *National Overview* for that programme (1997). My most recent employment was as report writer for the *Hauraki Report* (completed 2006).

2. This report has been written in fulfilment of a commission from the Crown Law Office dated 1 September 2009. The commission sought my views 'on the following broad issues in the light of historical evidence of interaction between Maori, settlers and the Crown':

    2.1 Crown and Maori understandings of He Whakaputanga;

    2.2 The implications of He Whakaputanga for subsequent conduct of Crown and Maori;

    2.3 Crown and Maori understandings of Te Tiriti;

    2.4 The implications of these understandings for subsequent conduct of Crown and Maori.

3. The commission further asked for analysis of the following specific questions:

    3.1 Did the Crown and did Maori consider He Whakaputanga to be a source of sovereignty?

3.2 What would the Crown and Maori have understood by each of the three Articles of the Treaty?

3.3 Did Te Tiriti represent a meeting of the minds? If so, what were the commonly held understandings and intentions?

3.4 Would there have been any intended limitation to the "Sovereignty" or "Kawanatanga" mentioned in the first Article of Te Tiriti?

3.5 Did Maori intend to cede or retain any sovereignty through Te Tiriti?

3.6 Did Crown officials or missionaries deceive Maori in the drafting and/or signing of Te Tiriti?

4. My responses to the first group of issues are given in Part A of this report and to the second group in Part B. The views expressed are entirely my own and do not necessarily reflect the views of the Crown Law Office or any other institution.

Newcastle
December 2009

PART A: IN RELATION TO THE GENERAL QUESTIONS 2.1 TO 2.4

Synopsis

5. The central argument of this overview is that the meanings and understandings of He Whakaputunga and Te Tiriti are best discerned from the complex interactions between Maori, settlers (including missionaries) and the Crown in the 1830s and early 1840s, rather than from a focus on the texts of the documents themselves, in either language. Both documents were shaped and subsequently interpreted in the light of complex and fast-changing circumstances. At the time of signing neither group of participants fully understood the import of their actions, and certainly did not understand them in precisely the same terms. The rapid increase in unregulated land transactions in the late 1830s provided good reason for the Crown both to *declare* and to *exercise* its authority on the ground, particularly in Cook Strait and in Banks Peninsula, where organised settlement by the New Zealand Company and by the French was already under way. Faced with the prospect of a rush of settlement, both organised and unorganised, the Crown saw an urgent need to establish British authority in New Zealand. Lt. Governor Hobson and his associates sought agreement from a sufficient number of rangatira to support a declaration of British sovereignty which would enable the Crown to protect Maori land rights and establish the rule of law, while leaving aspects of the Crown/Maori relationship yet to be defined. For their part, the Maori leaders in 1840 sought to enter into some kind of relationship with the Crown, to preserve their mana and their land. Maori understandings of what the over-arching authority of the Crown involved were varied and incomplete but it is fairly clear that the rangatira who signed the Treaty expected that the Crown officials would work with them in shaping a form of governance in New Zealand which would better address the problems that had emerged from contact with the wider world.

The context: the industrial revolution and European colonisation of the Pacific

6. It is the argument of this section that a proper analysis of events in New Zealand in 1830-40 needs to take into account the great international forces

in the region, including French ambitions, to avoid a narrow parochial perspective.

7. Interaction between Maori and the British Crown developed during the era of massive European and United States expansion fuelled by the Industrial Revolution and reinforced by military and naval power – the beginning of 'globalisation' as we would say today. This was driven largely by the accumulated wealth and enterprise of private citizens over whom governments often had only limited control. In the seventeenth and eighteenth centuries the establishment of trading ports, and control of the hinterland surrounding them, had been undertaken largely by chartered companies granted monopolies by their respective governments - charters which commonly had involved the right to control extensive territories and the indigenous peoples who occupied them. By the early nineteenth century, however, British governments' enthusiasm for formal colonisation had been dampened by the loss of the American colonies, while the East India Company's dubious record in India had raised scepticism about barely controllable chartered companies. However, the rise of free trade economic theory, epitomised by Adam Smith's *The Wealth of Nations* (1776), underlay the British governments' determination to use the Royal Navy to support their traders and protect their main trade routes. In this situation the aphorism 'trade follows the flag' sometimes became reversed, with investors, traders – and missionaries too – drawing their respective governments into further territorial expansion. New Zealand became a case in point.

8. Nevertheless, European governments still had additional powerful motives for undertaking formal colonisation. Crucially important for the south Pacific was the founding of the British settlement in New South Wales in 1788. Although New South Wales was founded as a penal colony the British government also had major strategic purposes, including the harvesting of timber spars and flax from New Zealand for the Royal Navy and the protection of trade routes to India and China, against rival ambitions of the French and Dutch.[1] Those motives very quickly led to

1 For evidence of French interest see, e.g. Frank Horner, *The French Reconnaissance; Baudin in Australia 1801-1803,* Melbourne, 1987.

expansion into Bass Strait and to northern and western Australia until the whole continent became a series of British colonies.[2] Concurrently, the settlers of New South Wales began to extend their own enterprises into Tahiti, New Zealand, the Torres Straits and Melanesia. In New Zealand and in Tahiti the British began to clash again with the French, who had their own imperial ambitions, not only for economic gain but also for the rebuilding of naval power and national prestige after the loss of empire in Canada and India and the defeats at Trafalgar and Waterloo. By the 1870s Germany and the United States had joined 'the scramble for the Pacific'.

9. If, in the early nineteenth century, the scale of this vast movement could scarcely be foreseen, by the early twentieth century it was virtually complete, as was the European colonisation of all of Africa, and much of Asia. In the process, one Pacific people after another lost their independence. Not even the emergence of viable, functioning Polynesian monarchies with nominal British support could prevent it.

10. Because of its strong influence on events in New Zealand in 1838-40 it is worth spending a little time considering the fate of Tahiti. By 1815 the powerful Pomare dynasty, assisted by missionaries of the London Missionary Society (LMS) and armed with weapons procured through the profits of the pork trade with New South Wales, had achieved a stable and relatively competent governance of the Society Islands, the first of the emerging Polynesian kingdoms. But the small remote Pacific monarchies were vulnerable to the vaunting ambitions of local European consular agents, and of naval captains who were under orders to support the commercial ventures of their nationals, and who could overawe Polynesian monarchies with the firepower of their warships. Interestingly, one of the first of these captains to bully the Tahitians was Captain Robert FitzRoy, the future governor of New Zealand. During the scientific voyage of the *Beagle* in 1835 (with Charles Darwin aboard), FitzRoy extracted from Queen Pomare a promissory note for 2,853 piastres for the plunder of a British trader's vessel in the Tuamotu islands.[3] British and French naval captains were at that time under orders to protect the interests of their investors and

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2 Adams, *Fatal Necessity; British Intervention in New Zealand 1830-1847,* Auckland and Oxford, 1977, p 75.

3 Colin Newbury, *Tahiti Nui; Change and Survival in French Polynesia 1769-1945*, Honolulu, 1980, pp 75-6.

traders on the coasts of Peru and Chile, and their respective whaling fleets in the south Atlantic and south Pacific.

11. These instructions gave exaggerated authority to the consuls in Tahiti: the LMS missionary George Pritchard for Britain, and the Belgian pearl trader and planter Jacques Moerenhout for France. Just as the Protestant missionaries in New Zealand stimulated petitions to the British Crown when a French threat supposedly appeared, so Pritchard stimulated the heavily indebted Queen Pomare and the Tahitian ariki into firing off a succession of petitions to London seeking British protection. They received only vague promises of diplomatic support. Then, as in New Zealand, Catholic missionaries entered the scene. The Sacred Heart Congregation had established headquarters at Valparaiso and in the 1830s began to land missionaries in the Tuamotu Archipelago. But when in 1835 the mission attempted to land priests in Tahiti itself, Queen Pomare and the ariki, under Pritchard's influence, evicted the priests and declined to allow them future residence. In August 1838 the swashbuckling Captain Dupetit-Thouars arrived on the *Venus* and in September Captain Dumont d'Urville with two more warships. The French commanders demanded reparations for the expulsion of the Catholic priests (which were paid) and acceptance of their future residence (about which the Tahitians vacillated but eventually capitulated). Pritchard lost his previous influence and left the islands in February 1841. In 1842 Dupetit-Thouars returned with his warships and enforced a formal French protectorate over Tahiti and the annexation of the Marquesas – a prelude to the deposition of the Tahitian monarchy and full annexation of the Society Islands in the 1880s.[4] French Polynesia remains a French possession to this day.

12. The importance of these events for New Zealand is that they stirred public feeling in England, in Sydney and in the Bay of Islands. The alliance of the French navy and the Catholic missions was particularly upsetting to the Protestant missionary societies which had been trying to evangelise the Tahitians since 1797. The events of 1838-9 in Tahiti were well-known in Sydney and among the CMS missionaries in New Zealand. Indeed Dupetit-

4 Ibid, pp 92-100.

Thouars arrived in the Bay of Islands with the *Venus* in early 1839 soon after his action in Tahiti. He seems to have enjoyed amicable relations with James Busby and of course with Bishop Pompallier (who had arrived in the district in January 1838), but Busby thought there was no doubt that the French had designs on New Zealand, and believed that Pompallier had referred to the French action in Tahiti in speaking with Maori villagers.[5] The French actions certainly alarmed the head of the Church Missionary Society in New Zealand, Henry Williams. When Williams in his later reflections refers to the threat of similar French intervention in New Zealand as a good reason for Britain taking formal possession to forestall them, he may well have been blurring two sets of events but he almost certainly had in mind the dramatic events of 1838-9. He was not simply throwing in an inappropriate reference to the annexation of Tahiti in 1842 to 'beat up' an ex post facto case for British intervention in New Zealand.[6]

13. The well-established Polynesian monarchy in Hawai'i also fell to the colonisers. By the 1850s it was effectively under the control of American settlers who introduced Asian indentured labour to build their cotton and pineapple plantations, and in the 1850s controlled the 'great Mahele' – the individualisation of land tenure and the subsequent purchase by Americans of all but a small percentage of Hawai'ian land. After that the formal annexation of Hawai'i as a territory of the United States in 1898 and the extinguishment of the Hawai'ian monarchy (following a virtual coup by local American settlers in 1893) was little more than a formality, at least in American eyes.[7]

14. In Fiji too, a similar pattern was followed. Although Fijian society was more complex and heterogeneous than the eastern Polynesian groups, by the late 1840s the chief Cakobau, from the island of Bau, had with the aid of European mercenaries who acted as his armourers, assumed dominance on eastern Viti Levu and called himself Tui Viti. In 1849, however, the house of the American consul, J B Williams was burned and looted by a

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5 Eric Ramsden, *Busby of Waitangi,* Wellington, 1942, pp 82-3; Samuel Carpenter, 'Te Puhipi, He Wakaputanga Me Te Tiriti', October 2009, p 7.

6 As Claudia Orange perhaps assumed in *The Treaty of Waitangi* p 46, following a reference in Carleton's *Henry Williams* (1874), and Professor Salmond in doc F19 in Muriwhenua p 6.

7 *Tides of History*, ed. K R Howe, Robert C. Kiste and Brij V.Lal, Allen and Unwin, St Leonards, 1994, pp 110, 249-53.

mob of Fijians during some festivities. Cakobau was held responsible, and gunboat diplomacy followed when in 1855 the USS *John Adams* under Commander Boutwell turned up, assessed the damage at the ludicrous sum of US$45,000 (equal to over $1 million today) and threatened to exact it by force. The American debt hanging over him led Cakobau in 1858 to seek formal British protection. At first the British sent the ubiquitous George Pritchard as consul to try to build up the Fijian monarchy, but a cotton boom during the American civil war saw a land rush on the group in the 1860s, largely by Australians sent by the Polynesia Company based in Melbourne to plant cotton. The turbulence of these settlers and their defiance of Fijian authority led eventually to the cession of the group to Britain in 1874.[8] The first British governor, Arthur Gordon (notable in New Zealand for his attempted intervention in the Parihaka crisis) developed the authority of a Fijian Council of Chiefs, but much of the cultivable land was alienated and used for sugar plantations with indentured Indian labour. Fiji lives with that legacy to this day.

15. In Samoa the indigenous authority of three leading families (Malietoa, Tamasese and Mata'afa), with their respective advisers and European mercenaries, enabled the group to retain formal independence through the 1870s and 1880s, but periods of stability gave way to increasingly serious conflict between the factions, each supported by representatives of Britain, the United States and Germany, backed by warships, naval landing parties and trained Samoan militia. Germany, which was building a colonial empire based on copra plantations in Samoa, north-eastern New Guinea, Bougainville and the Caroline and Marshall Islands, took a leading role. For their own Eurocentric purposes, however, the western governments agreed on a partition of the group at a conference in Berlin in 1899: Western Samoa became a German possession, while the USA took Pago Pago for its deepwater harbour and holds it to this day.[9]

16. In the same conference Germany relinquished its interests in Tonga, Niue and the Solomon Islands southward of Bougainville, which came under

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8 J D Legge, *Britain in Fiji 1858-1880,* London and New York, 1958.

9 J W Davidson, *Samoa mo Samoa; The Emergence of the Independent State of Western Samoa,* Melbourne, 1967, pp 31-76.

British control. The encroachment of Queenslanders into the Torres Strait islands and Papua saw the Queensland border extended northward and a British protectorate established over Papua. Meanwhile, France had taken possession of New Caledonia in 1853 (sparking demonstrations in Sydney because Australian pastoralists and sandalwood traders were there before the French). When the United States defeated Spain in the war of 1898 it took control of Guam and the Philippines. The New Hebrides was governed for two decades by an Anglo-French naval commission, converted in 1906 into a 'condominium' to forestall further German ambitions.

17. Of the Polynesian groups only Tonga was not formally made a colony, although a 'treaty of friendship' with Britain saw the latter control most of Tonga's affairs. There were three reasons why Tonga was able to maintain a nominal autonomy: Taufa'ahau (who took the name George Tupou I) had conquered his rivals in the 1850s and, with missionary advisers, developed a workable national constitution; there was no valuable resource or strategic harbour in Tonga coveted by settlers or by the western powers sufficiently to motivate them to subvert the Tongan monarchy; and it suited Britain to support Tonga as a curb to German expansion in the region.[10]

18. It was not only small Pacific territories which fell to European imperialism. By the early twentieth century the whole of Africa had been partitioned, as had vast areas of Asia: Britain had extended its empire to include Burma and modern Malaysia, France had taken Indo-China and Holland had consolidated its control of the Dutch East Indies. Even China, though nominally independent, had been obliged to relinquish portions of its eastern cities as 'concessions' to the western powers, which then controlled China's trade. Only two other Asian states retained formal independence: Thailand (which was united under its monarchy and useful to both France and Britain as a buffer state against each other's claims), and Japan, which had been ruled for centuries by its military caste, who now carried out a

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10 For an authoritative but brief summary of the partition of the Pacific see *Tides of History; the Pacific Islands in the Twentieth Century*, ed K R Howe, Robert C. Kiste, and Brij V. Lal, New South Wales, 1994, pp 24-27; for a very detailed treatment of the latter part of the process see Deryck Scarr, *Fragments of Empire; a History of the Western Pacific High Commission 1877-1914*, Canberra, 1967.

quasi-modernisation and embarked on their own brutal imperialism in Korea, Taiwan and Manchuria.

19. Almost everywhere the pattern was the same: substantial penetration of territory by merchants, investors and settlers of one or more western nations, followed by assertion of formal control by their governments, who felt obliged to support their nationals against the claims of those from other states. This was largely to consolidate real economic gain: there was often great wealth to be made from colonies and the trade focused upon them. Strategic concerns then became important, with deepwater harbours being particularly valued as bases from which warships could protect colonies and trade routes. And there was a strong element of irrationality, of jingoistic pressure on politicians in Britain, France, Germany and Australasia, all the more effective because this was an age of mass politics, demographic explosion and great personal mobility and enterprise. Angry debates in the French parliament when Britain asserted sovereignty over New Zealand and street demonstrations in Sydney when the French took New Caledonia are illustrations of this.

20. Four elements of particular significance in the 'partition of the Pacific' that should be noted:

    20.1 In the early and mid nineteenth century the 'tyranny of distance' meant that many decisions on the location, extent and nature of imperial control were taken locally, by powerful merchants, consuls and naval captains, but increasingly the decisions were taken in the capitals of Europe where, eventually, entire territories and their peoples on the periphery were guarded or relinquished like pieces in a great chess game.

    20.2 In the 1820s and 1830s British policy towards New Zealand rested heavily on proposals to give 'extra-territorial' jurisdiction to New South Wales courts, consuls and naval officers to arrest and charge British subjects who committed offences there. These proposals generally came to nothing because the British parliament did not believe it could legislate to grant such authority outside British borders. It is tempting to argue that had the British found or

given themselves extra-territorial authority that would have been the answer to the New Zealand problems and allowed Maori New Zealand to remain politically and constitutionally independent. But later experience in the Pacific suggests otherwise. Under the Pacific Islanders Protection Acts of 1872 and 1875, the Western Pacific High Commission was given such authority. It was an extension of the authority of the Governor of Fiji, backed by warships, and was intended to control 'blackbirding' and crime in various islands of Melanesia and Micronesia. But the historical authority on the subject, Dr Deryck Scarr, had shown that it had limited success for much the same reasons as the New South Wales governors had had limited success in New Zealand: there were all kinds of practical difficulties in administering justice sporadically and from a distance, and non-British subjects could always claim their nationality and escape the authority of British courts. Between 1892 and 1914 the WPHC's authority was diminished and a set of protectorates established over the troubled islands.[11]

20.3 The history of protectorates in the Pacific is not very encouraging either. Some analysts, including Dame Claudia Orange, have written that some rangatira in 1840 possibly saw the Treaty of Waitangi as setting up a form of British protectorate in New Zealand, with Maori still being largely self-governing.[12] What the British intended in 1840, and what Maori may have understood will be discussed further below, but one general point should be noted here: the setting up of a 'protectorate' was by no means a guarantee that the indigenous people concerned would in fact be 'protected', or that they would be largely self-governing. There is no consistent pattern whereby protectorates were governed by indirect rule and colonies (or 'territories') by direct rule. The formal distinction had some relevance in European diplomatic

11 Scarr, pp 252-298.

12 In her seminal work, *The Treaty of Waitangi,* Dr Claudia Orange has written '…from the emphasis on protection, Maori might have expected that they were being offered an arrangement akin to a protectorate' (p 46) and 'Areas where missionary activity was greatest were usually those where a protectorate-style relationship with Britain was greeted most favourably.'(p 89).

finessing, when it suited the powers to leave indigenous authorities nominally in control, but on the ground the formal distinction was virtually meaningless: everything was determined by the nature of the indigenous society concerned, the scale of foreign settlement and the goals of the colonisers. In countries like Malaya and Nigeria, indigenous sultans and high chiefs continued to rule locally (and their subjects were sometimes victims of petty tyranny). On the other hand the British protectorates in Melanesia and Micronesia from the late nineteenth to mid-twentieth century were in fact ruled by British officials commanding armed police patrols, usually very directly and sometimes brutally: local people could be summarily hanged, as were many in the British Solomon Islands Protectorate when the British suppressed traditional head-hunting; or as in the British Protectorate of Papua (subsequently administered by Australia) where until 1945 assaults on white women also incurred capital punishment.[13] (In passing we might note that from the 1870s to the 1920s the French suppressed local rebellions in the *territoire* of New Caledonia with the aid of the guillotine). With regard to land rights, when required for a goldfield or a town or even for a plantation, land in the Melanesian protectorates, if not purchased for meagre sums, was commonly declared 'waste and vacant' and taken arbitrarily. As noted earlier, so long as the colonisers' economic goals were not frustrated, functioning indigenous administrations in Pacific protectorates were left in place but always they were subordinated to the colonists' interests, several were eventually displaced by coups and (in the case of Tahiti and Hawai'i) were subsumed as territories of the metropolitan powers.

20.4 Whether the possession of colonies included the *large-scale* settlement of them by immigrants from the powers concerned is a somewhat separate issue. Where the land and the climate facilitated settlement – as it did in New Zealand, Hawai'i and New Caledonia for example – settlement certainly followed, invariably

13 See Amirah Inglis, *Not a White Woman Safe; Sexual Anxiety and Politics in Port Moresby 1920-1934,* Canberra, 1974.

backed by force of arms. Vigorous efforts were also made to establish settlements in much of Melanesia: they were constrained by one factor only – the prevalence of malaria. (The settlement of the parts of the malaria-free New Guinea Highlands by coffee planters after World War II supports rather than contradicts the argument).

21. The purpose of this summary is to show the sheer scale and speed and power of imperialism in the industrial era – 'capitalist imperialism' in marxist terms - with the great financial houses and industrialists controlling the governments of Britain and France and the USA and obliging the reluctant Chancellor Bismarck to endorse German imperialism. It is literally inconceivable that the attractive group of islands which constituted New Zealand could have escaped the onslaught and Maori been left alone to make their own considered engagement with the outside world. That was simply not going to happen. Serious analysis of the interaction between Maori and the forces of modern industrialisation and imperialism must therefore focus on how the various forces on the ground - British, French, Australian and American - interacted with Maori, and how the British government in particular reacted to that interaction. It is to this that the analysis must now turn.

The 'informal' colonisation of New Zealand

22. In the half-century of New Zealand history before 1840 five themes stand out:

22.1 The economic penetration of the islands by traders and investors proceeded along the pattern for the Pacific generally as set out in the previous section.

22.2 Maori engaged positively with the wider world and to a large extent managed the interaction in New Zealand on their own terms, but by the 1820s serious social dislocation threatened, due to the demographic impact of unfamiliar diseases, the impact of musket warfare and sporadic violence between Maori arising from unregulated day-to-day disputes over trade, women and land transactions.

22.3 By the late 1820s and in the 1830s Maori were experimenting with modifications to their traditional values and modes of regulating social relations. This included engagement with Christian beliefs and practices, and with the 'ture' adopted by *mihinare* communities.

22.4 Transactions by white settlers and entrepreneurs for rights in Maori land grew only slowly in the 1820s but increased in the 1830s and culminated in a 'land rush' in 1838 to early 1840.

22.5 British official responses to the complexity of 'the New Zealand frontier' (to use Peter Adams's term) were sporadic and fumbling until the land rush from New South Wales and schemes for formal colonisation precipitated a push to assert British sovereignty.

23. The following sections enlarge on each of these themes:

Economic penetration

24. Captain Cook formally took possession of New Zealand for Britain in 1769-70 and some subsequent actions by Crown officials seemed to reinforce this. However, other Crown actions appeared not to recognise formal British sovereignty there.

25. Regardless of the formal legal position, from the outset the harvesting of New Zealand flax and timber was integral to the plans for the New South Wales penal settlement. Moreover, there was an ambiguity in the official instructions to Governors Phillip, Hunter, Bligh and Macquarie in that the territories under their jurisdiction included all the islands 'adjacent' in the Pacific Ocean within the latitudes 10 37S and 43 39S. It was not made clear what 'adjacent' meant and the instructions to the New South Wales governor about gathering flax and timber created the impression, widespread among merchants and traders in New South Wales and among their parent companies in England, that New Zealand was in some sense under British jurisdiction.[14]

26. Lt-Governor King's virtual kidnapping of Tuki and Huru in 1793 from the Bay of Islands to Norfolk Island was inept as far as the flax-dressing project

14 E J Tapp, *Early New Zealand, a Dependency of New South Wales 1788-1841*, London and New York, 1958, pp 62-3 and 66.

was concerned but it did initiate a growing interaction between Maori and New South Wales. Encouraged by New South Wales officials, entrepreneurs such as Enderby and Son, Simeon Lord, Kable and Underwood, Campbell and Company, John Jones, the Weller brothers and Peter Hempleman took leading roles in the whaling, sealing, flax, timber and ship-building in New Zealand. The New South Wales entrepreneurs were initially constrained to some extent by the British East India Company monopoly of British trade with Australia and New Zealand (requiring goods for the Chinese and European markets to be shipped through Sydney). This allowed scope for Americans from New England ports to enter the whaling industry, as did the French, encouraged by a government anxious to rebuild French maritime power after the Napoleonic Wars. Nevertheless, by the early 1830s, small groups of agents for the Australian-based entrepreneurs were located in many New Zealand harbours, mostly in connection with the flax and timber trades in the North Island and with whaling in the South Island.

27. The first New Zealand Company of 1825 was largely the initiative of City of London capitalists led by John Lambton (later Lord Durham) together with some members of parliament. It sent out a land-purchasing expedition under Captain James Herd but although some notional purchases were made the colonists were deterred by the turbulence in Maori society. Herd concluded that only a British garrison would 'bring the savages to their senses' and create conditions in which private settlers could flourish. Most of the colonists removed to New South Wales.[15]

28. Despite obstacles and competition, the traders in New South Wales and Tasmania, and their agents or counterparts in New Zealand, continued to flourish through the 1830s. Adams has noted that in 1831 British subjects in New Zealand exported £31,000 of raw materials to the two Australian colonies, the third highest source of imports 'after the massive contribution of Britain and the whale fisheries'. Despite fluctuations, 'New Zealand was a useful second-rank trading partner for Britain's colonies in eastern Australia'. And although the direct economic importance of New Zealand

15 Loveridge, ' "The Knot of a Thousand Difficulties"; Britain and New Zealand 1769-1840', Report for the Crown Law Office, November 2009, pp 33-4, citing the *Sydney Gazette*, 14 February 1827.

to Britain itself was small, the involvement of British merchants, shipowners, insurers and bankers in the whaling industry and in New Zealand timber and flax was not insignificant. City of London interests (including Durham) and members of parliament were again involved in the New Zealand Association (later named the New Zealand Land Company) formed in May 1837 under Edward Gibbon Wakefield's leadership. Adams comments that the Company embodied 'not only the Wakefieldian urge to colonize but also an element of the expansionist drive of British trade and shipping to the Far East which had begun in the previous century.'[16] When he lobbied the Prime Minister, Lord Melbourne, in mid-December 1837, Wakefield presented him with a memorial from forty ship-owners and merchants urging that colonisation of New Zealand was the only security for the British whaling fleets in the south seas.

29. As we know, the formal colonisation of New Zealand was opposed by the 1837 Select Committee on Aborigines in British Settlements, and Melbourne's government was also lobbied by the Aborigines Protection Society which had emerged from that committee. But Parliament was increasingly the domain of the rising industrialists and controllers of capital. Protection of indigenous peoples was only likely to survive as an element of British policy if it could be shown to be not incompatible with the interests of capital and commerce.

30. By early 1839 there were some 2,000 Europeans settled in New Zealand, many of them 'men of capital' as Adams puts it. Although these numbers were still small as against a Maori population of about 100,000, the 1830s had seen a rapid increase in Pakeha settlement which was seen by people of influence as representing an irreversible trend. In April 1839 Henry Williams, leader of the CMS mission in New Zealand, predicted that 'in less than a year…emigration to this country will become general'.[17] In the Colonial Office, the Permanent Under-Secretary, James Stephen, noted the trend as a reason for stronger official intervention than before.[18]

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16 Adams, pp 168-9, citing H T Manning, 'Lord Durham and the New Zealand Company', *NZJH*, 1972, Vol 6, no. 1. See also Adams's tables on New Zealand trade, pp 249-50.

17 Williams Journal, 22 April 1839, quoted Adams p 26.

18 Stephen, minute, 21 January 1839, CO 209/4, folio 193, ibid.

Maori engagement with the wider world, and new problems

31. As is well-established, Maori engaged eagerly with the wider world. By the 1820s many were involved in the trading of pork, potatoes, fish, timber and flax much of it grown or harvested by rangatira and their hapu on their own initiative. Many had served on European ships and visited eastern Australian ports and beyond, often staying for lengthy periods. The engagement was largely due to the positiveness and skill of rangatira such as Hongi Hika and was, in the main, fruitful for both sides. Hongi, Ruatara and others took the interaction a step further when (following their meetings with Samuel Marsden in Sydney) they invited Christian missions into their territory. The visit of Hongi and Waikato to England in 1820, with Thomas Kendall, led to the creation at Cambridge University of an orthography for the Maori language, planning for the printing of a Maori primer and translations of parts of the Bible in Maori by the missionaries, and thence to the great vogue for literacy which swept New Zealand in the 1830s largely under the aegis of Maori teachers.[19]

32. Problems were looming however:

    32.1 Most serious was the impact of newly introduced diseases to which Maori had no acquired immunity. Although not at first dramatically discernible, the demographic impact had begun from the time of Cook's voyages. Modern demographic studies such as Professor Ian Pool's, assuming an annual decline of between 0.5% and 1% per annum, estimate that the Maori population fell from between 125,000 and 175,000 in 1769 to about 80,000 to 90,000 in 1840.[20] In the 1820s and 1830s missionaries reported regular epidemics of influenza and measles which caused many deaths and left survivors vulnerable to tuberculosis and other diseases.[21]

    Equally important for the questions at issue here are the *perceptions* of Maori population by missionaries and among Maori themselves. In the days before the role of bacteria and viruses was understood by either Maori or Pakeha there was a tendency to exaggerate the

19 See e.g. Dr Angela Ballara's article on 'Hongi Hika' in the *DNZB,* Vol I, pp 201-2.

20 Prof. Ian Pool, *The Maori Population of New Zealand, 1769-1971,* Auckland, 1971, p 208.

21 Adams, pp 40-41.

role of warfare and killing of war captives as cause of population decline but even in peaceful periods the losses due to disease were all too evident. By the 1830s Maori communities too were well aware of their losses, highlighted by contrast with the apparently burgeoning Pakeha.[22] The growing anxiety and pessimism for the future that this created in Maori communities cannot be readily gauged but it can scarcely be over-estimated.

Nor can the impact of it among missionary and humanitarian circles in England be over-estimated. In our own time, having been made aware of the huge demographic upturn amongst Maori and other colonised peoples, we may tend to discount the sense of impending decline and ultimate destruction of indigenous peoples that prevailed among concerned European observers during the period of early contact. Yet that assumption was the norm in the 1830s. The history of European expansion up to that time seemed to lead to no other conclusion: in North and South America, in southern Africa and more recently in Australia, whole peoples had disappeared since the time of Columbus or seemed on the way to disappearing. As the reports came in from New Zealand that expectation was applied to Maori. It pervaded the thinking of the 1836-37 Select Committee on Aborigines in British settlements. That committee concluded that the only way to avert the demise of the Maori people was to keep settlement away from New Zealand.

32.2 Although the direct effect of warfare on Maori demography was probably exaggerated by the shocked missionaries, the effect of musket warfare was nevertheless serious. When Hongi Hika, after being feted in England, traded his many gifts in Sydney for muskets and launched massive raids for utu against traditional rivals, other tribes quickly believed it necessary to obtain guns. The effort put into dressing flax or growing potatoes to trade for muskets, the increasing need to control ports in order to access

22 For example, see comments of George Clarke, cited Adams p 40.

trans-Tasman trade and the billiard-ball effect of Hongi's raids on the tribes to the south had deep repercussions. Dr Angela Ballara has written that these raids, and earlier expeditions against Hokianga:

> ...set almost the whole of the North Island on the move, caused numerous wars and expeditions in both the North and South Islands, and eventually brought about a major redistribution of population.[23]

32.3 The destruction of cultivations and food stores and the missed planting cycles during some of the resulting heke and warfare would certainly have had adverse demographic consequences. Lindsay Head paints a bleak picture of whole districts depopulated by the early 1830s. Her interpretation complements that of Ballara. Head argues that the 'one-sided battles' of the musket wars broke the bounds of traditional warfare and 'destroyed the symmetries of tribal relationships'. They were 'a modern catastrophe for Maori not a traditional one'. Warfare had become banal and Maori leaders began to look for ways out of it.[24]

32.4 A third need of growing importance was for appropriate means of regulating day-to-day disputes with Pakeha traders and settlers. Ultimately, Maori could usually resolve these by dominant force. Indeed they had gained an awesome reputation for violent responses when they considered their rights and customs violated. The sporadic clashes in Cook's voyages, the killing of Marion du Fresne and 24 of his officers and men in 1772, and the massacre of the crew of the *Boyd* at Whangaroa in 1810 (together with the loss of her valuable cargo) all loomed large in the European imagination. These events had discouraged secular settlements in New Zealand but from the 1820s the shore stations of timber workers, flax traders, ship builders and whalers became quite substantial, until by 1839 there were some 1,300 Pakeha living in the northern parts of New Zealand and a further 700 in the South

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23 Ballara, p 202.

24 Lindsay Head, 'The pursuit of modernity in Maori society,' in *Histories Power and Loss*, ed Andrew Sharp and Paul McHugh, Wellington, 2001, pp 101-2.

> Island whaling stations.[25] Moreover, by and large, Maori wanted them there. Of course they wanted them on their terms but (as in any society) commercial transactions, appropriate payment for services and rights to occupy land, and quarrels over women inevitably gave rise to disputes, retaliations and sometimes to serious violence. The whole problem was exacerbated by the fact that many of the whalers, traders and shore labourers were violent, arrogant men, convinced of their cultural or racial superiority to Maori. The insults and assaults visited on Maori in Sydney, aboard ships or even on New Zealand soil provoked Maori retaliation on the next ship considered to have some connection with the offence. But the violent responses by some rangatira to injuries real or perceived, or even over-vigorous muru, tended to drive the Pakeha away – not a satisfactory outcome to the wider Maori leadership. From the time of the missionaries' arrival in 1814 Bay of Islands local rangatira began discussing with them the problems of day to day dispute resolution in an increasingly complex situation that included commerce and land transactions involving resident Pakeha.

Maori exploration of new concepts and practices

33. Could the stresses and conflicts involved be managed to the satisfaction of Maori leaders within the values and social processes of customary society or would new values and new institutions be invoked? From the 1820s, rangatira were expressing interest to Samuel Marsden and other missionaries in some kind of 'head' or protecting power (not Maori) to establish an overarching civil authority in New Zealand. Marsden reported in 1824:

> The New Zealanders themselves are very sensible of the want of a protecting Government, and would rejoice if anything could be done to prevent the strong from crushing the weak. The New Zealanders want a head. I had many conversations with the chiefs on this subject when I was in the island last year. They told me no chief would be willing to give up his authority to another, and they could not agree amongst themselves to nominate any one chief as king…If the chiefs could be brought

25 Adams, p 27.

> to act together, under some regular Government, much might be done.[26]

34. A clear thread can be detected from this statement, through the chiefs' statements to Busby in relation to He Whakaputanga, to some of the statements by rangatira at the signing of Te Tiriti. As Lyndsay Head has put it, 'Questions of governance were a pre-Treaty Maori concern.'[27]

35. The chiefs had been urged by the missionaries since 1814 that if they were to successfully cope with the wider world they had to moderate their intense tribal allegiances, stop fighting each other, and accept the gospel of Jesus Christ. As problems mounted in New Zealand this message began to be accepted, though very unevenly. Its influence was apparent when in the late 1820s Bay of Islands rangatira began to accept missionary mediation in tribal feuding and, in the 1830s, to become 'mihinare'.

36. The published histories have shown that, following a decade of apparent indifference towards the Christian gospel of peace, in the late 1820s and early 1830s 'missionaries were allowed, indeed requested, to reconcile opposing parties…[and] there is evidence that the desire for missionaries among the southern Maoris, at Putiki, Matamata, Tauranga, Rotorua and in the Wanganui district , was partly a function of the desire for peace'.[28] The whole question of the motivations which led Maori in the 1830s to 'convert' to Christianity (or rather to become *mihinare*, or *pikopo*) in the 1830s is a complex one. In the 1970s and 1980s extremely competent historians such as Harrison Wright, John Owens, Judith Binney, and Gordon Parsonson combed the documentary evidence and debated whether Maori were motivated mainly by a genuine preference for peace over war, or by expectations that the missionaries' god would prevent the remorseless impact of disease, or because the gospel was associated with written word and Maori had apprehended the importance of literacy in the modern world, or from combinations of all of these.

37. Underlying the debate was the wider question of whether Maori society had become seriously dislocated by the impact of the wider world and their

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26 Marsden to Pratt, 4 June 1824, *HRNZ,* Vol I, pp 627-9.

27 Lyndsay Head, p 101.

28 Adams, p 39.

values had changed; or whether Maori society was still largely intact (notwithstanding declining numbers) and were simply exploring new ideas and practices, adding them to still-strong Maori foundations. There is not space in this report to discuss the evidence in detail but it seems clear that change was uneven, and that there were a number of different emphases in different communities, including quite clear and firm allegiance to Anglican, Catholic and Wesleyan communities, rather formal adherence to Christianity, and amalgamations of traditional and Christian beliefs and rituals in movements such as that led by Papahurihia in the Bay of Islands. Amidst the variety there is considerable evidence of Maori concern about their declining numbers and strength, relative to that of the Pakeha, and for that reason an affirmation of the gospel of peace. Moreover, Maori were modernisers too, eager to engage with the new world and its opportunities and increasingly ready to see traditional feuding, not necessarily as morally wrong, but as an unwelcome distraction from progress. Whatever the main driving influences the tide of Maori allegiance to one or other of the Christian churches flowed strongly in the 1830s and 1840s and missionaries such as the CMS evangelists in the Bay of Islands or those of the Wesleyan Missionary Society in Hokianga gained great influence among their congregations by the late 1830s.

38. Along with mounting interest among Maori in the missionary gospel of peace was their interest in the related concept of the *ture* – mission-inspired law - as a basis of social order. This is partly because the Maori worldview tended to be wholistic: having decided to follow Jehovah or Jesus, adopt *mihinare* rituals and practices, or even form new communities a little apart from the parent kainga, there was a need for guidance on appropriate behaviour. Marsden has recorded the request of a Bay of Islands Christian in 1837:

> Sir, - Will you give us a Law? 1st, if we say let the Cultivations be fenced and a Man through laziness does not fence, should pigs get into his Plantation, it is right for him to kill them? …2nd , Again – should Pigs get into fenced Land, is it right to kill or rather to tie them till the Damage they have done is paid for?…3rd , Again – should the Husband of a Woman die, and she afterwards wishes to be married to another, should the Natives of unchanged Heart bring a Fight [taua muru] against

> us, would it be right to stand up to resist them on account of their wrongful Interference?…….These only are the things which cause us to err; Women, Pigs and fighting one with another…Another Thing which we are afraid of, and which also degrades us, is this, Slaves exalting themselves above their Masters. Will you give us a Law in this also?[29]

39. There is a clear element of conservatism in this statement: the chief's desire to preserve his status. But there is also a desire for guidance to meet new circumstances and a willingness to frame and live by a code providing social order and stability. In the late 1830s and through the 1840s missionaries certainly found themselves with a high degree of influence in the Christian villages, evolving codes of local ture with the aid of village komiti or runanga and enforcing the rules through penalties such as fines and temporary banishment from the community ('sending to the bush').

Land transactions

40. Notwithstanding the fate of the first New Zealand Company, there was the growing tally of transactions in Maori land by visiting whaling and trading captains or company agents. Slow in the 1820s this accelerated in the mid-1830s.

41. The increase was partly the consequence of Governor Gipps' land regulations of 1837 which made 'squatting' in interior New South Wales less attractive in comparison with purchasing land in New Zealand. But there was in any case a momentum within the Sydney-based centres of capital which led the entrepreneurs to move out from their well-established whaling and timber-cutting enclaves and attempt much wider settlement. Thus 'Johnny' Jones, based at Preservation Inlet and Waikouaiti, in 1839-40 sent cattle to his stations there and labourers to look after them. George Weller based at Otago Heads acted similarly, as did Cooper and Holt at Akaroa peninsula. When the New South Wales Legislative Council looked into the question of customs duties on goods from New Zealand these men argued that they invested heavily in New Zealand because they regarded it already as 'a British settlement'; if New Zealand was deemed 'foreign' they would have had to pay significantly higher duties to land their whale oil and

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29 *BPP,* 1838, 680, p 272.

other commodities in Sydney.[30] Men like Jones, with his seven shore stations employing 280 men and capital investment in the order of £15,000 could not easily be ignored. Tapp and Adams have argued, with good reason, that such exemplars of genuine economic growth could bring significant pressure to bear on officials and politicians, well aware of the basis of 'the wealth of nations'.

42. Paul Monin has drawn a distinction between two sets of Pakeha engaged in land transactions: long-standing residents and recent speculators. Many of those involved in timber-cutting or other shore-based ventures – such as Brown, Moores, Dacre, Graham, Webster, and Maxwell – had been resident for some years and were in a sense 'settlers'. They had agreements with local rangatira, who were usually in some way participants in the ventures. But as the speculative transactions increased they were concerned to consolidate possession of their residences and work stations in the face of more recent and grandiose 'purchases', often for many thousands of acres and often overlapping the older claims.[31]

43. The missionary Robert Maunsell noted a difference of attitude between the earliest settlers and those of the late 1830s. The early Pakeha had quickly realised that they were there largely on Maori sufferance, entered into mutually beneficial alliances with local rangatira and commonly took Maori partners – the progenitors of some of the great New Zealand families of today. The later arrivals, Maunsell believed, were much more prone to expect Maori to acknowledge their hastily contrived land deals and to expect Maori to be subject to them. Maunsell feared conflict worse than that on the New South Wales frontier if both sides resorted to force.[32]

44. The nature of the 'old land claims' (i.e. pre-1840 transactions) has been explored in depth in various reports of the Waitangi Tribunal, including the Ngai Tahu Report, the Muriwhenua Report and the Hauraki Report. Considerable attention has been paid in these reports to the flaws in the inquiries by the Land Claims Commissioners, and the making of large awards to the settler claimants, not least in Muriwhenua where missionaries

30 Tapp, pp 62-3.

31 Paul Monin, *This Is My Place: Hauraki Contested, 1769-1875,* Wellington, 2001, pp 94-7

32 Adams, p 35.

had transacted with Maori for large areas, both to provide an endowment for the mission farms and schools but also to provide for the missionaries themselves and their children. However, it is relevant to note here that vast transactions totalling more than the area of New Zealand itself, were initially claimed as purchases, but were either not pursued or greatly reduced once the claimants realised that some evidence of Maori consent was going to be required and some boundaries defined. In the end only about 500,000 acres of the 10 million acres formally claimed were actually deemed to be valid purchases.[33]

45. The sheer extent of the claims, and the possible tumult over competing claims, explains the concern expressed by rangatira at the Treaty debates over the threatened loss of their lands. Of course, whether or not there had been a Land Claims Commission, Maori themselves would have resisted the occupation of land they considered that they had not sold. But this might not have been accomplished without considerable tumult and difficulty, because with the intersecting webs of kinship and mobility in Maori society went complex and intersecting rights to land, and because it was quite common for different groups of right-owners to transact with different Pakeha in the same land.

46. The wave of land speculation, and the concern that settlers would be supported by the British authorities and dispossess Maori, also alarmed Henry Williams and the CMS missionaries. In late 1839 Williams met with local chiefs who had expressed considerable concern 'lest the Europeans should take possession of their country.'

> All approved of their land being purchased [by the missionaries] and held in trust for their benefit alone. Fearing delay the chiefs determined to conclude the affair immediately …and with their secretary drew out a rough draft [of a trust deed] for my approval.[34]

47. When he became aware of the New Zealand Company's plans to colonise the Cook Strait area Williams travelled as far as Port Nicholson making

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33 D Moore, B Rigby and M Russell, *Old Land Claims*, Waitangi Tribunal Rangahaua Whanui series, 1997, p 279. This report excluded the claims by the New Zealand Company and the Nanto-Bordelaise Company which were treated on a different basis.

34 Williams journal, 16 December 1839, quoted F. Sinclair, 'Issues arising from pre-Treaty land transactions', Waitangi Tribunal document I-3 in Wai 45, p 149.

purchases and eventually 19 CMS trust deeds, dating from 1835 to 1839, were submitted to the post-1840 Land Claims Commission.

48. A related issue, discussed by the Tribunals hearing the claims in Muriwhenua and Hauraki among others, is whether the pre-1840 transactions were 'sales' in the European sense or rather were understood by Maori in traditional terms. The Muriwhenua Tribunal indeed considered that generally they were not 'sales' but 'tuku whenua' – conditional grants of rights to occupy and use land, while underlying rights of ownership and control still resting with the donors. Certainly it is scarcely credible that Maori would have considered that they had relinquished all rights in the vast areas included in some of the transactions, often with the vaguest of boundaries and encompassing many thousands of acres. Many of them seem to have expected Pakeha to make use of some of the land while they themselves continued to hunt wild-fowl and gather produce in the forests, and fish in the swamps, lagoons and along the foreshores much as they had before. For their part, Pakeha often accepted this. Nevertheless, disputes soon began about damage to cultivations by introduced animals, or rights to cut timber.[35]

49. There is also considerable evidence that Maori considered that some of their land had passed completely out of their hands. It was certainly likely that in the close and complex interaction between Maori and settlers in the northern harbours and islands some cultural exchange, in matters of property as in matters of spiritual beliefs and practices, would have occurred, albeit that this was still largely a Maori world.

50. Evidence submitted by Dr Fergus Sinclair in the Muriwhenua hearings includes a number of instances in which there was transfer from the original Pakeha transactor to a third party, without the involvement of the original donor or vendor tribe.[36] The chiefs at Waima were concerned that transacted land was indeed gone for good, and by 1839 were organising to prevent further transactions.[37] Giving evidence in the Hauraki claims Dr Michael Belgrave and his colleagues also noted a number of occasions

35 IA 1, 1842/721, cited Sinclair p 186.

36 Sinclair, pp 168-9, 276-82.

37 Sinclair, pp 162-3.

where 'Maori attitudes to the land that had been sold to Europeans illustrate a degree of loss and finality that would not have been appropriate where tuku whenua transactions had taken place'.[38] The Hauraki Tribunal concluded that the long years of commercial interaction between Maori and Pakeha in that district rendered a sharp dichotomy between 'tuku whenua' and 'sales' inappropriate. It cited instances where Maori control over the land allegedly sold continued long after 1840, and other instances where no further interest in it was shown. Much seemed to depend on the nature of the prior occupation by the Pakeha concerned and, perhaps even more potently, on whether there was a stable pattern of customary ownership and control in the first place or whether there was a rather fluid and confused pattern of Maori rights. It was this last situation which was potentially dangerous to long-term Maori interests, because by the late 1830s opportunistic Maori with only a part-interest at best but influenced by the European notion of land as a tradable commodity, sold land in which others had interests but had difficulty asserting their rights. A succession of transactions in the same land was not unusual.

51. Although concerned missionaries commonly said that by the late 1830s many Maori communities had sold most of their land and were well-nigh landless, closer examination, including regard for Maori understandings of the transactions and the complexity of customary title does not support this view. But there is a good deal of evidence of confusion and conflicting understandings about who had better customary right in the first place and what exactly had been alienated, and a growing tendency among the Pakeha transactors to press their claims more strongly rather than await the tortuous and protracted proceedings which the missionaries and James Busby had had to employ to resolve disputes and prevent violence. Coming on top of the losses due to disease, this climate of uncertainty and possible loss of control over the land, seems to have generated increasing anxiety among rangatira, regardless of just how much of the land had in fact permanently passed from their control.

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38 *The Hauraki Report*, Vol I, p 87, quoting Marutuahu witnesses Belgrave, Tulloch and Young, Document V1, pp 103-4; see also Michael Belgrave, *Historical Frictions; Maori Claims and Reinvented Histories,* Auckland, 2005, pp 96-133.

52. It is beyond the scope of this paper to discuss the proceedings of the post-1840 Land Claims Commissions but it will be necessary, in due course, to examine Normanby's instructions regarding the pre-1840 transactions and Hobson's statements at Waitangi concerning them.

Early official responses to the situation

53. Tapp and Adams have traced, in some detail, the history of official British interventions in this situation. Tapp has remarked on the intention of Governor King in New South Wales to offer protection to Maori against casual brutality by whalers and traders aboard ship or in New Zealand, but adds '[I]n the early nineteenth century the difficulties of executing government orders were always with the malefactor rather than with the upholder of law and order.'[39] King's early recall and Governor Bligh's troubles with the Rum Corps delayed further action in New South Wales. Following the *Boyd* massacre, Governor Macquarie and Samuel Marsden were concerned to prevent insults and casual brutality against Maori, especially as Maori retaliations could affect law-abiding Pakeha.

54. Macquarie's first action was a proclamation of December 1813 nominally placing Maori under the protection of the Crown and requiring shipmasters trading in the Pacific to take out a bond of good behaviour. In 1814 he promulgated an ordinance to the effect that no Maori was to be removed from New Zealand without the written consent of the missionary Kendall, who was appointed Resident Magistrate in the Bay of Islands, and no sailor discharged in New Zealand without the consent of Maori chiefs. Adams describes the measure as 'legally dubious and ineffective'.[40] Then a British statute of 1817 included New Zealand in an act for the more effectual punishment of crime in places *not* within His Majesty's dominions.

55. The net effect of these statutes carried the implication that New Zealand was an independent territory, and that jurisdiction from New South Wales was extra-territorial. In any case, the practical problems on the New Zealand frontier remained, and throughout the 1820s the missionaries and traders connected with New Zealand pressed the authorities in New South

39 Tapp, p 67.

40 Adams, p 52; see also Loveridge, 'The Knot…', p 19-20.

Wales and in London for stronger intervention, such as the appointment of a Resident and the stationing of a warship there.[41]

56. So too did Commissioner John Bigge, reporting in 1823 on transportation in New South Wales and related matters – such as convicts escaping to New Zealand. Bigge's report contributed to the framework of a British statute in 1823 (replicated in 1828), setting up Supreme Courts in New South Wales and Van Dieman's Land with authority to try (among other things) offences by British subjects in New Zealand and other islands in the Pacific and Indian Oceans, 'not subject to His Majesty, or to any European State or Power'.[42]

James Busby and He Whakaputanga

57. In the early 1830s Maori in the north were showing increasing interest in missionary teachings, but as yet there were no institutions, other than traditional ones, for maintaining civil order and punishing crime.

58. The limited and ineffectual steps to try to extend the jurisdiction of New South Wales courts to British subjects in New Zealand have been noted in the previous section. Two events in 1831 prompted a new initiative. One was the particularly violent raid by Te Rauparaha and Ngati Toa against Ngai Tahu in Banks Peninsula to which they were conveyed by the merchant ship *Elizabeth* under Captain Stewart; the conveyance of Ngai Tahu prisoners (including the ariki Tamaiharanui) back to Kapiti to face torture and execution; and Stewart's avoidance of punishment for his assistance to Te Rauparaha. The second was a petition to King William IV from Hokianga chiefs, stimulated by the missionary William Yate following the visit of a French survey ship *La Favorite*; the chiefs sought protection against foreign invasion, from 'the teazing of the other tribes' and from the improper conduct of British subjects.[43] These events led Governor Darling to recommend the appointment to New Zealand of a permanent British Resident, a consular official. Lord Goderich, the Secretary of State, agreed that Britain had a responsibility to try to mitigate the problems on the New

41 These requests are outlined in Adams pp 61-3.

42 Loveridge, pp 22-3.

43 Orange, p 12. Carpenter has observed that the reference in the petition to requiring help against the 'teazing' of other tribes was subsequently noted by James Stephen in the Colonial Office. (See Carpenter, p 119, note 353, citing memo by James Stephen, 16 November 1839, CO 209/5, p 51).

Zealand frontier, specifically noted Henry Williams's reports of rapid depopulation among Maori and also observed that preservation of internal tranquillity in New Zealand was necessary for the maintenance of close commercial relations with that country.[44]

59. Adams has shown how Busby (appointed while on a visit to England through his connections to Lord Goderich), managed to antagonise both the Colonial Office and Governor Bourke (Darling's successor) from the outset by his pompous demands. More seriously though, and contrary to Governor Darling's original intentions, the Admiralty declined to station a warship permanently in New Zealand and the Commander in Chief persuaded the Colonial Office that it would be very expensive to station a detachment of troops there. Nor was Busby granted extra-territorial judicial authority and a magistrate's commission. The British parliament declined to pass a Colonial Office bill to establish the authority of New South Wales magistrates over British subjects in New Zealand – the South Seas Bill - because New Zealand was a foreign country for which Britain could not legislate. Adams comments, 'Busby's failure as a mediator resulted partly from Bourke's lack of support, partly from his own rashness and partiality, but mostly because he lacked legitimate authority and the means to enforce it.'[45]

60. Busby, in correspondence with Bourke (the new Governor of New South Wales), had held out hopes that as a magistrate he would have been able to enter into a 'treaty' or 'treaties' with Maori chiefs to promote the security of Maori and Pakeha alike and to secure the surrender of runaway convicts. As it was, Bourke could only instruct him to use his 'influence' with the chiefs towards promoting 'a settled form of government' and that 'by the establishment of some system of jurisprudence among them *their* courts may be made to claim the cognizance of all crimes committed within their territory'.[46]

61. Busby's arrival at the Bay of Islands, to the accompaniment of a seven-gun salute, caused some initial confusion and anxiety; the 1831 petition had

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44 Adams, p 63.

45 Ibid, p 67.

46 Bourke to Busby, 13 April 1833, quoted Loveridge, p 51-2. Emphasis added.

come from the Hokianga chiefs and the Bay of Islands chiefs did not know what Busby was there for.[47] But Dame Claudia Orange has shown that after some discussion Busby was received with ceremony at Paihia. He read the response of William IV to the Hokianga chiefs' petition which expressed the hope that trade relations between Maori and Britain would not be further disturbed and:

> In return for the anxious desire which will be manifested by the British Resident to afford his protection to the inhabitants of New Zealand, against any acts of outrage which may be attempted against them by British subjects, it is confidently expected by His Majesty, that on your part you will render to the British Resident that assistance and support which are calculated to promote the objects of his appointment, and to extend to your country all the benefits which it is capable of receiving from friendship and alliance with Great Britain.[48]

62. Busby said that the king had sent him as a 'kaiwhakarite' or conciliator in disputes between Maori and Europeans. He seems to have been accepted by the assembled chiefs in that spirit. As Orange recounts, Busby:

> …pointed out that the King was honouring them (whakarangatiratanga – literally, increasing their chiefly mana) by his appointment, just as similar appointments were made to European states and America.

63. Dame Claudia rightly notes that there was more than a suggestion here of ambassadorial representation to an independent country.[49] Busby, after all, held a consular appointment, and no magistrate's commission. In his own supplementary address, Busby linked the concept of becoming peaceable and law-abiding with the word of God and with increased material prosperity – a combination which missionaries and officials would maintain through 1840 and beyond.[50]

64. What the British authorities had set in train was an attempt to apply diplomatic and moral influence with the chiefs to encourage *them* to form some kind of settled government, with courts administering local codes of law, applicable to European and Maori alike. Whereas Bourke had laid

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47 William Williams, Journal, 17 May 1833, cited Ward, *Show of Justice*, p 25.

48 T. Lindsay Buick, *The Treaty of Waitangi*, New Plymouth, 1933, p 12.

49 Orange, p 13.

50 Buick, pp 14-16.

greater emphasis on the judicial side of things, Samuel Carpenter's research has revealed Busby's early enthusiasm for building a 'Parliament House' in which he could instruct the chiefs in making decisions by majority, and abiding by them rather than each rangatira acting 'for himself'.[51] He also proposed to introduce a passport system whereby respectable settlers would gain free passage while escaped convicts and other undesirables could be deported. Carpenter cites Busby's text in English of the proposed passport, although the document was to be in te reo Maori. It read:

> The British Resident of New Zealand prays and requires his friends the Chiefs and all the people of New Zealand to suffer the Bearer being a free subject of H. M. the King of Great Britain and Ireland to pass through or dwell in any part of New Zealand without hindrance or molestation. Given under my hand at….

65. It was to have the Royal Arms of Great Britain at the top.[52] Nothing came of the passport suggestion but it is perhaps indicative of Busby's desire to assert his own authority or influence at least as much as to empower the chiefs.

66. Busby's more important initiatives were his arranging for a group of northern chiefs to select a flag for ships built and registered in New Zealand, and his convening of the chiefs again in 1835 to sign a Declaration of Independence (He Whakaputanga) and form the Confederation/Congress (Whakaminenga) of United Tribes.

67. Busby informed his superiors in Sydney of the initiative of a Bay of Islands chief in 1830 to secure registration in Sydney of a vessel built in New Zealand. The New South Wales authorities supported Busby's recommendation to select a flag and this was duly accomplished by a meeting of between twenty and thirty chiefs on 20 March 1834. Rangatira were intensely interested in any symbolism that touched upon or enhanced their mana. In this context there grew from the 1820s an enthusiasm for officers' uniforms, for flags and pennants, for taking the names of ranking Europeans (Macquarie, Pomare, King, Grey etc) and later for seals and

51 Carpenter, p 22.

52 Carpenter, p 23.

crests on documents – all of which were built into Maori culture by the mid-nineteenth century.

68. There can be little doubt then that the chiefs who assembled at Waitangi on 20 March 1834 regarded the selection of a flag as a matter of significance – at the very least a recognition of their mana. That impression would have increased when the flag was saluted by a 21-gun salute from the *Alligator,* and by every instance that it was flown at the Bay of Islands and on ships travelling to Australian ports over the next five years.[53]

69. Yet there was more implied in the use of a *New Zealand* flag than enhancement of personal mana: there can be little doubt that the rangatira had a growing sense of themselves as members of a distinct people or race. Perhaps the most ubiquitous manifestation of this was the adoption of the adjective 'maori' as a proper name – for te iwi Maori – a concept of proto-nationalist feeling, beyond tribal identity, which could only really emerge when different races (Pakeha, Wiwi, Pakiwhera) were encountered.

70. Busby had hoped to use the formal selection of the flag in 1834 to inaugurate some kind of on-going congress of the rangatira, reaching southward of Tai Tokerau. This did not happen but on 28 October 1835, thirty-four rangatira responded to Busby's invitation to rebut the 'Baron' de Thierry's pretentious plans to establish a 'sovereign and independent state' over the territory he claimed to have bought at Hokianga. Busby presumably stressed that there should be no necessary connection between the sale of land and the loss of political autonomy. The extent of de Thierry's land claims was apparently not the main focus of discussion at the meeting; in the end, in the investigations of the Land Claims Commission of 1841-2, they would not be wholly repudiated by the chiefs concerned, but they would be greatly diminished.[54] The focus of the 1835 meeting was on the political implications – on the defence of the independence of New Zealand.

71. The outcome was that the chiefs signed 'He wakaputanga o te Rangatiratanga o Nu Tirene'. The main clauses of the English text were:

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53 Orange, pp 20-21.

54 From the 44,000 acres claimed to about 1,000 acres, according to Buick, p 25.

(1) We, the hereditary chiefs [nga Tino Rangatira] and heads of the tribes of the Northern parts of New Zealand…declare the independence of our country, which is hereby constituted and declared to be an independent state [he wenua rangatira], under the designation of the United Tribes of New Zealand.

(2) All Sovereign power and authority within the territories of the United Tribes of New Zealand is hereby declared to reside entirely and exclusively in the hereditary chiefs and heads of the tribe in their *collective* capacity [emphasis added], who also declare that they will not permit any legislative authority separate from themselves in their collective capacity to exist, nor any function of Government to be exercised within the said territories unless by persons appointed by them and acting under the authority of laws regularly enacted by them in congress assembled. Government to be exercised within the said territories unless by persons appointed by them and acting under that authority of laws regularly enacted by them in congress assembled.

(3) The hereditary chiefs and heads of the tribes agree to meet in Congress at Waitangi, in the Autumn of each year, for the purpose of framing laws for the dispensation of justice, the preservation of peace and good order, and the regulation of trade, and they cordially invite the Southern tribes to lay aside their private animosities, and to consult the safety and welfare of our common country by joining the confederation of the United Tribes.

(4) They agree also to send a copy of this declaration to His Majesty the King of England, to thank him for his acknowledgment of their flag, and in return for the friendship and protection they have shown and are prepared to show to such of his subjects as have settled in their country, or resorted to its shores for the purpose of trade, they entreat that he will continue to be the parent of their infant State, and that he will become its protector from all attempts upon its independence.[55]

72. This document was drafted by Busby, translated by the missionaries, and the translation certified by Busby. The rangatira present put their marks to the document. Henry Williams, George Clarke, James Clendon and Gilbert Mair signed as witnesses.

55 Text taken from Buick, p 28.

73. Viewed against centuries-old traditional Maori society He Whakaputanga proposed several revolutionary elements.

73.1 Whereas the selection of the flag had no doubt contributed to a sense of Maori identity, as an independent *people*, He Whakaputunga was probably the first serious attempt the northern chiefs had encountered which sought to set in train the development of machinery for a functioning Maori *state*.

73.2 A core concept was the subordination of the autonomy of the individual chiefs to the *collective* authority of the United Tribes, both in their legislative and executive capacity.

73.3 A Westminster model of parliamentary government and the rule of law was proposed, in that no function of government was to be exercised except under the authority of laws passed by the congress and by persons appointed under that authority.[56]

73.4 In his discussion of the Maori text of He Whakaputanga, Samuel Carpenter has drawn attention to the legislative power of the Wakaminenga as 'te wakarite ture', using the missionary term 'ture' apparently derived from Torah, the Mosaic Law of the Old Testament. He comments that this would have conveyed a different concept from Maori tikanga or customary law. He quotes Manuka Henare's comment that 'The idea that Maori would pass legislative law and that it would apply to all Maori represented a radical development in Maori custom law and practice.'[57]

73.5 Carpenter submits that the invitation to southern tribes to join the confederation (thus embracing a number of rohe and iwi) was also not a traditional concept.[58] The point is perhaps debateable because alliances of iwi had traditionally formed for the purposes

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56 In his detailed discussion of Busby's reference to He Whakaputanga and Henry Williams's reference to the Treaty as 'Magna Carta' Carpenter enlarges on the place of that document in English thought and constitutional practice. (Carpenter pp 93-114).

57 Carpenter pp 88-9, citing Henare, *From Tribes to Nations*, p 191.

58 Carpenter, p 90.

> of war and heke, and generations-long connections between tribes were made through arranged marriages. Yet such alliances shifted over time and connections through whakapapa and shared history are not the same as an organisational connection, certainly not ones potentially embracing all iwi.

74. This was obviously a very ambitious set of goals. It was in the spirit of Bourke's instruction to Busby to encourage Maori to adopt a 'settled form of government', but probably went further than Bourke had thought possible in one single event. Certainly it was asking a great deal of the chiefs. Notwithstanding their willingness to explore new concepts and new means of achieving social stability, their culture and society were still highly traditional.

75. Indeed on the question of actual *enforcement* of laws the rangatira assembled by Busby revealed a difficulty. Reporting on their proceedings a year later Busby wrote:

> The Chiefs had, however, sagacity enough to see that any resolutions they might agree to or laws they might enact would tend nothing to the establishment of order amongst them. They rightly observed that though eleven of their number should regulate their conduct by the law if the 12th were disposed to break it, they had no recourse left but to let the crime go unpunished or to levy war, Tribe against Tribe as at present.[59]

76. The frank statement of the Confederation chiefs undercut from the outset Busby's hopes that the Whakaputunga would actually become an embryonic government. For the next five years the question of *enforcement* of law – of a police power - increasingly preoccupied the Resident and the missionaries in New Zealand. Missionaries often compared the New Zealand situation with that of the central Polynesian kingdoms. In Tahiti and Hawai'i the use of force against recalcitrant or defiant chiefs, sometimes under the guidance of missionaries, sometimes of secular advisers, was already a common recourse of the Polynesian rulers of Tahiti and Hawai'i (as it would be later in Tonga and Samoa). The missionaries in New Zealand had hoped since

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59 Loveridge, 'The "Declaration of the Independence of New Zealand" of 1835, and the Confederation of United Tribes, 1835-1840', Report for the Crown Law Office, Wellington, 1998, pp 11-12; also 'The Knot…', p 67 citing draft letter from Busby to the Earl of Haddington, 28 October 1836.

1815 that they would be able to stimulate the emergence of a unitary Christian state but to their regret, and that of Busby, there was in New Zealand no dominant indigenous ruling family or hierarchy to take up the responsibilities of secular authority, including police power. Hongi had not wanted such a role and there was no other likely candidate on hand at the time able to command widespread respect. In the relatively large landmass of New Zealand independent-minded young rangatira could defy elders, and lead a section of their hapu in building new kainga or undertaking heke and new conquests. As Busby observed in 1839 'No one Tribe had acquired such a preponderating influence as to overawe the rest'.[60] In contrast to central Polynesia, Maori society had become too segmented and, in a sense too democratic, to easily form a centralised monarchy or a republic under a president.

77. It is theoretically conceivable that the customary authority of ariki and rangatira might eventually have been adapted to that of aristocracy and gentry, in a parliamentary system, as England itself was ruled. Indeed some of the schemes for the governance of New Zealand discussed among leaders of the New Zealand Association in 1838-40 did include the recognition of some chiefs as peers on the English model, to sit along with settlers in an upper house of a national assembly. But aristocratic and gentry rule worked in England only because, after centuries of violent struggle, the independence of powerful barons had been curtailed, first by the Plantagenet and Tudor monarchs and then by parliament. In the end the English lords too had to observe the constitution and the rule of law or face the penalties for treason and rebellion at the hands of the king-in-parliament. While it was clear that Maori chiefs were willing, indeed eager, to subdue upstart commoners or slaves it was by no means clear what authority in pre-1840 New Zealand was going to subdue 'over-mighty barons' in that country.

78. Well before the meeting to discuss He Whakaputuanga Busby had already had occasion to reflect on the question of policing in relation to the attack on his house on 30 April 1834, in which he was slightly wounded. Busby

60 Busby to Glenelg, 25 February 1839, CO 209/4, quoted Carpenter p 134.

was impressed by the fact that Titore and other Bay of Island chiefs convened a hui to probe the event but disappointed that they then took no *collective* action. When, in March the following year, the leader of the attack was identified as Rete, a local chief, the rangatira accepted a suggestion by Henry Williams that Rete's land be forfeited to the King of England as Busby's Head of State, and that Rete be banished from the district. Carpenter has noted Busby's doubts about the appropriateness of the muru (compensation to the injured party rather than severe punishment of the offender) because of the tendency to use muru for personal gain.[61] His concern was no doubt aggravated by the fact that Rete did not stay away for long but returned to taunt the Resident.

79. Busby continued to press his superiors for some police power responsive to his requests – a force such as a salaried 'Native Guard' to work with European constables, or a warship more permanently on station in New Zealand waters.[62] But they gave almost no support for these requests, being reluctant to get drawn into situations which they feared, with good reason, could easily get out of control.

80. During his five years of office Busby had to try to deal with various disturbances to civil peace in the north, without a police presence. In 1990, a University of Newcastle Honours student working under the author's supervision read Busby's lengthy correspondence with his superiors in Sydney.[63] Among the specific matters upon which Busby reported were several which illustrated more general issues (page references are to those in the thesis):

80.1 A week after Busby's arrival a pardoned convict named Poyner, with the aid of a group of Maori, seized the house of the traders Mair and Powditch. Busby collected depositions to send to Sydney and soon found that the incident was sparked by a dispute over which of the Europeans (each of whom had transacted for the house site with different Maori), had the best claim to the land.

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61 Carpenter, p 25.

62 Carpenter, pp 26-8.

63 Virginia Newell, 'James Busby and the Problem of Law and Order in New Zealand in the 1830s,' Honours thesis, University of Newcastle, 1990.

The need was emerging for some due process for investigating competing transactions to land, and of the intersecting Maori customary rights which underlay them. (pp 66-8)

80.2 Control of alcoholic liquor was another general problem. Thomas McDonnell secured from Bourke the appointment as Additional British Resident at Hokianga and initially received more vigorous support from the New South Wales Governor than did Busby. Bourke liked McDonnell's prohibition on the landing of spirits and expected Busby to support it. Busby objected on the ground that the regulation had not derived from the Confederation of Chiefs (which he was trying to promote as the *sole* official Maori authority in the north) and, more fundamentally, because he did not believe it could be enforced. In his view the rangatira would object to having their houses searched for prohibited liquor (as McDonnell intended) as they would see it as an affront to their mana. Until Maori themselves were of a mind to enforce laws, attempts by European authorities to do would only provoke conflict (pp 80-81). McDonnell subsequently fell into furious dispute with the influential Wesleyan missionary at Hokianga, W. White, whom he accused of raping Maori women and other immoral conduct. Busby rebuked McDonnell for exceeding his authority – he had convened a kangaroo court to hear charges against White – and this time was supported by Bourke. McDonnell resigned his position in September 1836. (pp 84-8)

80.3 In 1837 de Thierry complained to Busby that some of the land he claimed had been sold by some of the Maori owners to another European. Overlapping land claims were legion by the late 1830s and in the absence of some kind of regular mediation and arbitration in place which Maori (and their Pakeha clients) would accept, it was very difficult to settle the resulting disputes. (pp 76-77)

80.4 Molestation of Maori women was another cause of dispute and sporadic violence. Poyner's 'interference' with a Maori woman in

1833 resulted in fighting between two groups. Poyner flaunted his immunity from English law. He continued to be a source of trouble in the Bay until his death in 1835. (pp 68-69)

80.5 In early 1837 inter-tribal warfare broke out both between the forces of Titore and Pomare over control of Kororareka. Busby reported that although the lives of settlers and traders had not been threatened, a number of Europeans living in Pomare's pa were participating in its defence and had purchased three guns from American ships for the purpose. Captain Hobson on the *Rattlesnake* was asked to investigate and though he reported that Busby's anxieties were excessive he also noted that 'many of the [Maori] auxiliaries enlisted by the rival Chiefs have come from considerable distances in every direction' (pp 63-4, quoting Hobson to Colonial Secretary NSW, 8 August 1837).

80.6 In March 1838 Busby reported on a running dispute between James Clendon and one Captain Robertson whom Busby thought insane and in need of restraint. The papers came to the Crown Solicitor in New South Wales who stated that Busby had no power to act in the case 'nor has the Government of the Colony the power of appointing a magistrate in that country [NZ], not being a Dependency of the Colony'. Gipps added that even if he were to give Busby orders in the matter, Busby would not expect immunity if he were found to have acted extra-legally. (pp 46-7)

80.7 In May 1838 Busby orchestrated with the Kororareka chiefs the trial and execution of one Kite, a Maori 'slave' who had murdered a European named Biddle. The Attorney-General in New South Wales declined to authorise payment of the expenses involved 'in so strange a proceeding' and Gipps referred the matter to the Secretary of State. Although Busby expressed doubt that the offender would have been surrendered had he been a chief, he nevertheless urged that the proceeding be approved as justice had been done for the first time in respect of a murder in New Zealand. Gipps made the marginal comment that 'Justice

independently of law is rather a dangerous principle I would submit', although the Secretary of State in London approved Busby's action late in 1839. (pp 49-51)

80.8 Instances of murder, rape, plunder and theft were regularly reported in Busby's despatches, sometimes arising from a dispute over trade setting off a sequence of retaliations. The most serious of those that Busby investigated was the massacre of the crew of the French whaler *Jean Bart* in the Chatham Islands in 1838. Busby found that one Captain Robertson of the *Caroline* had employed Chatham Islands Maori in cleaning whalebone but not paid them; he had also carried off four Maori against their will. The Maori retaliation against the crew of the *Jean Bart* was apparently sparked by the presence on the ship of a former crewman of the *Caroline*. The Maori *utu* was disproportionate, but so was the subsequent punitive action by the French warship *L'Heroine*. The tendency for the transgressions of one European to be visited upon another ship which came by had been a problem since the *Boyd* massacre of 1810.

80.9 The brutal punitive action of Captain Lambert and HMS *Alligator* in Taranaki in 1834 was another example of ignorant and wholly inappropriate response to an escalating dispute over trade and promised payment. Busby was by-passed in this matter, when his mediation might well have discovered the root of the problem and led to a peaceable outsome. But when Busby sided with Mair and Powditch over a dispute with Pomare, and arranged to have Lambert train his guns on Pomare's pa, he blundered; an enquiry led by the missionaries found Pomare to be in the right. (pp 70-74)

81. Samuel Carpenter has discussed another important example. In January 1836 the Te Hikitu hapu led by the chief Waikato and a hapu from Whananaki under Noa were in contention over the sale of kauri forest to European traders. Waikato requested Busby's mediation but also brought guns to the hui and, after a scuffle, opened fire on the Whananaki people. Several deaths resulted. Carpenter notes that 'In the aftermath,

Busby avoided calling a hui of the Confederation as he feared it might provoke even greater conflict.'[64] He also discusses Busby's helplessness in the face of Pomare's attempt to retake Kororareka from Titore and the Northern Alliance of hapu. He comments:

> Given this background it is not difficult to comprehend Busby's conviction…that British "Legal Authority" and military power was needed to bring about a more durable framework for law and order. Nor is it difficult to understand his conception that Maori structures of government and law based on British models…would be brought about only over time.[65]

82. Carpenter observes that Busby's thinking was shaped largely be a 'stadial' conception of civilisation, that is that human societies pass through a sequence of stages, from 'savage' or 'primitive' to higher levels such as Europeans (and especially the British) had attained. Consequently, Maori had to experience a lengthy period of tutelage (e.g. by inclusion in jury service) before they could be entrusted to administer justice impartially.[66]

83. 'Stadial' views of society had indeed become a dominant pattern of thinking among educated people in England and Europe generally, since the ideas of the Enlightenment had displaced the 'Noatic myth' of creation previously provided by the book of Genesis. The notion of progression through stages of civilisation affected, among other things, British attitudes towards the right to vote or stand for parliament. Yet we should also note here that in England those rights were linked to the civilising effects supposedly attached to the ownership of individual property and the freedom of private contract. Englishmen considered that their country's progress and power, of which they were extremely proud, was grounded in those concepts and the laws which embodied them. Moreover, they were willing to share those concepts and laws with colonial subjects who showed any promise - such as Maori. Through the taking of individual property (mainly in land) colonised peoples could leap many stages in the ladder of civilisation and become prosperous and strong, like Englishmen. Indeed in New Zealand, from

64 Carpenter, p 59, citing Busby to Col Sec (NSW), 26 January 1836.

65 Carpenter, pp 60-1.

66 Carpenter, pp 63-4.

1852, Maori who owned individual property in land could qualify for the franchise and in Manawatu and Wairarapa some did indeed register.[67]

84. Despite his disappointments, Busby did keep promoting He Whakaputanga as the basis for the British protectorate he had in mind. In forwarding his account of it to Bourke for approval he wrote that:

> It settles that basis of a Government for the country on the principle which I so strongly recommended in my communications recommending that the chiefs be induced to adopt a national flag, viz.- that the powers of a government should be vested exclusively in the chiefs in their collective capacity…that the establishment of the independence of New Zealand under the protection of the British Government would be the most effectual mode of making the country a dependency of the British Empire in everything but the name.[68]

85. Bourke and his council commended Busby's attempt to 'approach' the matter of a regular government – as he had been enjoined to do when appointed. The response of the Colonial Office to He Whakaputunga was a guarded one, however. It approved the declaration as such and again promised the chiefs British support and protection as far as was 'consistent with a due regard to the just rights and to the interests of His Majesty's subjects'.[69] This was a very qualified recognition at best.

86. Busby continued to collect chiefs' signatures to He Whakaputunga: by mid-1839 he had 52 including those of Te Hapuku of Hawkes Bay and Te Wherowhero of Waikato.[70] He also endorsed the flying of the flag of the United Tribes at the Bay of Islands and on New Zealand built ships.

87. Moreover he promoted the concept of the Confederation as the embodiment of Maori sovereignty, however qualified, right up to the drafting of Te Tiriti: the last-minute substitution of 'whakaminenga' for 'huihuinga' in Premble and Articles 1 and 2, at Busby's suggestion, expresses the concept that it was the Confederation which the British had first to treat with in seeking to establish the Crown's sovereignty.

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67 William Renwick, 'Self-government and Protection; A Study of Stephen's Two Cardinal Points of Policy in their Bearing upon Constitutional Development in New Zealand in the years 1837-67', MA thesis, VUW, 1962, pp 194-263.

68 Quoted Orange, p 22; Ramsden, p 63.

69 Glenelg to Bourke, 25 May 1836, CO 209/1, 268-70, quoted Orange p 21.

70 Orange, p 22.

88. But Busby did not try to develop whatever potential the Confederation had as a government of Maori by Maori. Although the convening of an annual congress to discuss problems might well have had some of the educative effect he wished for, he feared to bring them together and the Congress did not in fact meet. Nor did Busby try to use the United Tribes to enforce law among Maori, although in one recorded instance he did seek the signatures of Confederation chiefs in the Bay of Islands for authority to deport some settlers, involved in robbery and murder during the warfare of 1837.

89. The missionaries, however, did encourage their new mihinare congregations (Anglican and Wesleyan) to pass codes of laws to regulate social conduct. There was indeed a felt need among the mihinare Maori in promulgating new laws to meet new circumstances and their new allegiance. I have quoted above, paragraph 38, the example of a Christian chief seeking from Marsden a code of laws in 1837. Indeed the late 1830s was the beginning of the era of komiti and runanga in mihinare communities, and of local experiments with the ture, enforced through traditional penalties such as fines (a form of muru?) and banishment.[71] But this was a slow and patient work and, even in the flush of Maori 'conversion' missionaries were discouraged by 'back-sliding' and continued turbulence among their 'converts'.

90. Had New Zealand been a harsh and barren land, without great forests of timber, wonderful harbours and fertile grasslands tempting to pastoralists, the missionaries and consular agents might have been left to battle on for decades without further secular intervention. But New Zealand was anything but that. It was immensely attractive to European colonisers and it was not long before they intruded in wholesale fashion. However, even before the tide of settlement had really set in, the government in London had resolved upon further measures.

1837: Turning-points

91. Apart from appointing Busby as Resident, policy-makers in London were relatively inactive as regards New Zealand for most of the 1830s. The reasons are well-known: firstly, Britain was anxious to protect her trade and

71 Ward, chapters IV and V.

trade routes but did not want more costly burdens of formal empire if they could be avoided; secondly the humanitarians, who were very influential in parliament and in government circles following their triumph in 1833 when slavery was ended in the British Empire, were strongly opposed to any further formal British colonisation of indigenous peoples. That was the stance taken by the Select Committee on Aborigines in British Settlements as it reported in 1837. The committee nevertheless stressed its deep concern at the evidence of declining indigenous populations in the Pacific and southern Africa. The members hoped that by avoiding further white settlement in New Zealand and leaving it to the benign influence of the missionaries the destruction of the Maori people could be averted. The evidence from New Zealand would be watched carefully.

92. Dr Loveridge and other scholars have traced in detail the interaction between reports flowing from New Zealand in the late 1830s and their effects on the British policy until Hobson's mission to negotiate a treaty with Maori.[72] It would be superfluous for this report to retrace those developments in detail.

93. It is now beyond question that a pivotal influence on British policy was Busby's report of 16 June 1837. However, in a series of despatches in early 1836 Busby had begun to advance proposals for a form of British protectorate in New Zealand. Carpenter has highlighted the importance of Busby's despatch of 18 January 1836, written a week after the attack by Te Hikutu on Whananaki. The now-pessimistic Busby stressed the difficulty of changing 'the savage of yesterday to the Legislator of today' or of bringing into operation an efficient government among a people 'whose minds have not yet conceived the idea of authority and subordination'. However, he suggested, they would allow themselves to led towards that goal by a 'civilized state'. Indeed, 'In their late declaration of Independence, the Chiefs prayed that their Country might be taken under the protection of the British Government'. He continued rather categorically:

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72 The pioneer of detailed study of this interaction was Peter Adams, whose *Fatal Necessity* (Auckland/Oxford 1977) remains an authoritative text. For very detailed and authoritative analyses the reports of Dr Donald Loveridge and Mr Samuel Carpenter for the current proceedings.

> They are perfectly convinced of their incapacity to govern themselves, or to cope unaided with the novel circumstances to which they are constantly exposed by the encroachments of their civilized visitors…and if protected in the enjoyment of their Landed property, and their personal rights they would I am sure gladly become the subjects of the King of England; and yield up the Government of their Country to those who are more fitted to conduct it.

94. Busby then proposed that New Zealand might be taken under British protection on the same principle as the Ionian Islands (part of the settlement at the Treaty of Paris, following the defeat of Napoleon), an arrangement which would give Maori 'such a share in the Government of the Country as is consistent with its welfare; but reserving the ultimate authority for that power which affords that protection which its weakness requires.'[73]

95. Busby's despatch of 16 June 1837 enlarged upon these proposals. He argued that the Declaration of Independence and 'articles of Confederation' vested 'the rights of a Sovereign power' in the rangatira of the Confederation, who were therefore competent to enter into a treaty with a foreign government. The arrival of British troops under the treaty would not be a taking of possession of the country 'but a means of strengthening the hands of its native Government'. The senior British official or Resident, assisted by an executive council of rangatira, would propose laws and regulations to the Congress; when passed they would be forwarded to the British government for approval, and would then be binding on British settlers. The Congress rangatira would be responsible for enforcing the laws in their own rohe and would be paid a small salary. There would be a salaried native police, backed by British soldiers. There would be an advisory council of missionaries and settlers. An independent commission would investigate existing land claims, but Busby seemed to accept that settlement would continue to push into New Zealand, for he raised the possibility of a charter to be granted to a colony of British settlers – a proposal which Carpenter rightly points out was somewhat inconsistent with the bulk of his proposals.[74] In sum, Busby's proposals envisaged that

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73 Carpenter, pp 63-5, quoting Busby to Colonial Secretary, 18 January 1836.

74 Carpenter, pp 67-9, quoting Busby to Colonial Secretary, 16 June 1837.

New Zealand remain at least nominally under Maori sovereignty, with actual power passing largely to the protecting British authorities.

96. As Adams, Carpenter and Loveridge have shown, Busby's scheme of government found less favour with Bourke in Sydney than Captain Hobson's proposal dated 8 August 1837. Hobson's proposed 'factory system', modelled on his experience in British India, envisaged that Britain would purchase of those parts of the country where British subjects were already concentrated and make them dependencies to New South Wales.

97. Bourke feared that under Busby's scheme, administration of law by British troops would be difficult and 'might be eventually perverted by British settlers to selfish purposes' and provoke Maori opposition.[75] Carpenter considers this to be a justifiable objection, but he also notes Busby's concerns about Hobson's approach, focused on settler enclaves. The Resident was at least as much concerned about threats to peace and stability from *Maori* as from Europeans. His protectorate proposal, being nationwide in scope, attempted to address the problem that when some groups of Maori had adopted Christianity and eschewed warfare, they would legitimately expect protection from neighbouring tribes still prone to fighting. Once established in enclaves or factories, the administering power would inevitably be drawn to extend its authority ever-wider. There was also the problem of foreign nationals in the unceded areas.[76]

98. These were very valid points, proven justified in many other parts of the globe where imperial authority sought to establish itself on the fringe of a tribal society where there was no indigenous sultanate or high chiefdom through which indirect rule could function. Papua New Guinea is the classic case in the Pacific: the local people of coastal enclaves at Port Moresby, Rabaul, Lae and elsewhere (*not* the settlers) were subject to constant brutal raids by the inland clans adjacent, until the Australian patrols, the Christian missions and the traders, gradually 'pacified' the interior. To give an example more contemporary with New Zealand, the French, having planted a colony on the coast of Algeria in the 1830s, found

75 Bourke to Glenelg, 9 September 1837, quoted Carpenter pp 117-8.

76 Carpenter, pp 118-9.

themselves drawn increasingly into military incursions in the interior, to protect not only their own enterprises but the local people who had joined in the modern economy and society. This kind of thing was commonplace, and was a major contributing factor to the spread of formal empire. Establishing law and order and stable government, became an end in itself once the coastal fringe had been 'pacified'.

99. Meanwhile in mid-1837 in London, as the rival proposals of Busby and Hobson were on their way via Sydney to the Colonial Office, the New Zealand Association had emerged under E.G. Wakefield's leadership, absorbing some of the ideas and leadership of the first New Zealand Company of 1825 – Lord Durham and Robert Torrens for example. The Association sought from the government a charter to colonise New Zealand on lines not dissimilar from those of South Australia, including the taking over of 'waste' Maori land. Loveridge has shown that the Association accepted that 'the sovereign rights of the chiefs' and 'the complete independence …of the several tribes' had been recognised by the appointment of a Resident and the recognition of a flag, but that the absence of any 'central native authority' meant that British sovereignty would have to be advanced piecemeal, by the purchase of lands where the chiefs were disposed to sell them. These would become part of the British dominions under British-style government, although with 'exceptional laws' appropriate to Maori needs such as tracts of land reserved for the chiefs in the new settlements. Treaty relations would be entered into with the independent tribes to extend British protection over the whole country.[77]

100. As is well-known, the Association was vigorously opposed by Dandeson Coates (lay secretary of the CMS), by the Wesleyan Missionary Society and by the Aborigines Protection Society, all strong defenders of a Maori New Zealand under missionary influence. The story of the struggles between the rival forces in Whitehall and in the British parliament have been traced in detail by Adams and more recently by Loveridge. The dilemma for the Colonial Office (civil servants and ministers alike) was that they were by

77 Loveridge, pp 99-105, analysing Wakefield and Ward, *The British Colonization of New Zealand*, 1837, including the Appendix by the Revd. Montague Hawtrey, 'Exceptional Laws in Favour of the Natives of New Zealand'.

now aware that visiting warships and consular officials could not meet the needs of the New Zealand situation, and that an effective foreign jurisdiction with courts and a permanent naval/military force was needed for effective government; but the establishment of such would derogate from Maori sovereignty. Generally the humanitarian position was favoured by the British government, which hesitated to make stronger intervention, let alone support the Association's colonising venture.

101. However, the historians concur that a key shift of thinking occurred in mid-December 1837. Two elements contributed to the change. Firstly, Wakefield called upon the Prime Minister, Lord Melbourne, with a petition from 40 ship-owners and merchants with interests in the south Pacific stressing the want of law and order in New Zealand and urging that British colonisation was the only safeguard for the British and Australasian whaling interests in the region. Ever-sensitive to Britain's commercial and strategic interests in Australia and the southern oceans, Melbourne prodded Glenelg into taking notice.[78] Secondly Busby's 16 June despatch arrived in London.

102. As Adams explains, Busby's report laid great stress on the continued disease and mortality among Maori, even on the mission stations. As Adams puts it:

> Up until the middle of December 1837, Glenelg had favoured the argument of the protestant missionary societies: that colonization by whites invariably destroyed indigenous races; that this could be prevented in New Zealand if the country was left to the missions, backed by the Government; and that therefore the New Zealand Association must be opposed. At a stroke Busby's report destroyed the middle term of this argument. Haphazard white colonization of New Zealand was already occuring, accompanied by disastrous results for the Maoris. More important, the missions had failed to lessen the impact of colonization, for the disastrous results were just as apparent among the Maori population subject to their immediate influence as elsewhere.[79]

Busby also referred to the need for law and order in New Zealand, to end the 'state of anarchy' developing there, and the inability of the Confederation to remedy the situation.

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78 Adams, p 101.

79 Adams, p 107.

103. Busby's main proposed solution, his protectorate proposal, was greeted in London as sceptically as it had been in Sydney. It was seen as effectively *British* government behind a façade of Maori authority. But Busby himself had also included in his 16 June dispatch the suggestion that a charter of government be granted to a colony of British subjects who are already established in New Zealand. In London, in mid-December 1837, the government resolved to offer a charter to the New Zealand Association if appropriate terms and conditions could be agreed.[80]

104. The key clause in Glenelg's decision was that with settlement 'to no small extent' already effected in New Zealand, the only choice remaining was 'between a Colonization, desultory, without Law, and fatal to the Natives, and a Colonization organized and salutary'.[81] From this point on the die was cast. Some kind of British controlled colonisation of New Zealand, from England, was going to be promoted.

1838-9: Shifting emphases in British policy

105. In 1838-9 British government policy moved steadily closer towards establishing British sovereignty over not just parts but the whole of New Zealand. Then in August 1839 (in a weakening of the requirement that no territory would be acquired without Maori consent) the government opened the possibility of asserting sovereignty over the South Island and Stewart Island by right of discovery. The reasons have been traced in detail by Adams, Carpenter and Loveridge.

106. Important among them was the increasing concern among the missionaries in New Zealand about continued violence in Maori society. Tribal warfare had caused the abandonment of the mission stations at Rotorua and Matamata in 1836, and the eruption of warfare in the Bay of Islands in 1837, as Titore and his people tried to recapture Kororareka from Pomare and the Northern Alliance, had particularly disheartened the missionaries because many of their 'converts' had joined in the fighting. Then, while visiting Sydney, Henry Williams became aware of the New Zealand Association's plans: he and his colleagues feared that New Zealand would

80 Loveridge, 'The Knot…' pp 111-4.

81 Glenelg to Durham, 29 December 1837, CO 209/2, p 410.

be over-run by settlement. In January 1838 a CMS committee headed by Williams and George Clarke recommended (in terms similar to those of Busby):

> That the whole country be secured under the protection and guardian care of the British Government, for a certain number of years, with a Resident Governor and other Officers; with a Military Force, to support their authority and insure obedience to all laws which may be enacted.[82]

107. The missionary committee envisaged the principal chiefs, under the guidance of a governor and council, enacting the laws and providing the authority under which offenders were punished.[83]

108. Coates, the lay secretary of the CMS, and John Beecham, secretary of the WMS, remained extremely sceptical of the introduction of coercive power, which Coates feared would be appealed to by Pakeha injured or threatened by Maori, resisted by Maori jealous of their liberties and embroiled in a struggle to subdue the Maori people.[84] Yet the Revd John Flatt, giving evidence to the House of Lords Committee on New Zealand in 1838 stated that:

> while the older chiefs might object to coercive law 'the younger men, I am confident, are anxious for it; they see the Propriety of it; they say there would be no fear of a Party coming and falling on them, and that unless something was done they would all be dead'.

109. The Revd F. Wilkinson, Marsden's chaplain in New South Wales, thought that the chiefs would be 'very glad' to give up to the British government:

> What little authority they possess, for they possess very little…They would not know what they were doing but they would take it for granted that they were trusting to an honourable people'.[85]

110. The Lords Committee was not wholly persuaded by such arguments, and certainly not by the New Zealand Association's claim that its colonisation

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82 Williams to Coates, 11 January 1838, quoted in Dandeson Coates, *Documents Exhibiting the Views of the Committee of the Church Missionary Society on the New Zealand Question, and Explanatory of the Present State of that Country,* pp 43-4; see also Carpenter pp 137-8.

83 Carpenter, p 138-9.

84 Ward, p 29.

85 *BPP*, 1838, 680, pp 44 and 102, quoted Ward, p 32.

plan would benefit Maori, but the committee noted the continued evidence from New Zealand of the Maori population decline.[86] The mounting conviction in London that Maori were imperilled by disease, by their own turbulence and by the flow of informal colonisation was fundamental to the decisions taken in 1838-9.

111. The second impetus to moving beyond the 'factory' system was of course the rapid increase in land transactions from the mid-1830s, along all the New Zealand coasts. These transactions were mainly by New South Wales entrepreneurs, but also by British, French and Americans. Research for the Waitangi Tribunal has shown that of about 800 transactions which were eventually heard by the Land Claims Commissioners, *exclusive of the claims of the New Zealand Company,* about 80 were made between 1823 and 1834, 70 in 1835, 80 in 1836, 50 in 1837, 110 in 1838, 300 in 1839 and 50 in the first months of 1840. A large number of claims – perhaps another 500 - were initially lodged with the Commissioners but did not proceed to hearing.[87] Busby and the missionaries reported that agents were traversing most of the country, making deals with Maori. They had only limited ideas of what these transactions actually involved, in either culture, and tended to say that whole districts – most of Tai Tokerau, Hauraki, Poverty Bay and Hawkes Bay for example – had been 'sold'. But their experience did lead them to fear, justifiably, that Maori involved in most of the transactions had only limited rights in the tribal patrimony they were transacting and that attempts by Pakeha to claim the land would cause a great deal of confusion and conflict. On top of that, of course, the New Zealand Association was proposing to undertake more large-scale purchases.

112. Awareness of unregulated land purchasing in New Zealand in fact strengthened the Association's case for their own planned settlements, including systematic inclusion of Maori in the new scheme of things. It also leant weight to the stinging attacks by the Association's supporters in

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86 Adams, p 111.

87 These figures have been abstracted from the tabular summaries in the Appendix to D Moore, B Rigby, and M Russell, *Old Land Claims*, Waitangi Tribunal Rangahaua Whanui series, 1997. The authors of that report have drawn their data mainly from the 1862 report of Commissioner Dillon Bell, printed as AJHR, 1863, D 14. The authors point to difficulties in the numbering sequence of the claims and in determining whether the claims were in the end pursued, the land surveyed as required and a determination made. With those reservations, the incidence of claims year by year emerges fairly clearly.

parliament on the CMS and on Busby's protectorate scheme. Speaking to the Association's bill seeking statutory authority for its colonising project, Francis Baring dismissed the concept of Maori government:

> I can hardly think that the native congress, recommended by Mr Busby, with the adoption of collateral measures, such as the establishment of courts, etc – none of which can be admitted without assuming the sovereignty they affect to disclaim – can be in their contemplation. They must know that no number of Europeans are likely to submit to a legislative assembly at Waimate; and that by the time the missionaries have made the first step in their constitutional education, half the population will have disappeared, and the white invader will have increased twenty-fold.[88]

113. Whether Maori did in fact 'know' that such dire consequences were imminent is debateable, although some of them had certainly been expressing to the missionaries their fears that they were dying out and that the Pakeha would take over the country. Baring was nevertheless reflecting the kind of brutal realism that now dominated governing circles in England, on the basis of the information available to them. The bill was defeated because of government concerns about the Association's financial accountability but the government was nevertheless committed to official intervention in New Zealand.

114. The shift of emphasis towards asserting British sovereignty over the whole of New Zealand (rather than 'factories') was given further impetus by the Consul and Lt-Governor designate himself, Captain Hobson. When offered the position in late December 1838 Hobson responded with a memorandum to the effect that his 1837 'factory' proposal was the only measure short of British assumption of sovereignty over the whole country which would afford any protection to Maori. Its limitations were evident: the rest of the country would still be open to foreign influence and British subjects would still hold vast tracts of land without recognised titles. He proposed that, even in the 'factory' system, the senior British official should enter into treaty relations with tribes outside the ceded enclaves, have jurisdiction over British subjects, raise a militia of British subjects and a mixed Maori-Pakeha police force, and have a warship permanently at his

88 *NZ Gazette* (Port Nicholson), 9 September 1839.

disposal. Carpenter comments dryly that 'This was a significantly beefed-up version of the 1837 Factory proposal'. It is hardly surprising then that Hobson should round off his proposals with the suggestion that Britain might extend 'the blessings of civilization and liberty, and the protection of English Law, by assuming the Sovereignty of the whole Country, and by transplanting to its Shores, the Nucleus of a moral and industrious population'.[89]

115. Meanwhile, the planners in the Colonial Office were working on a variation on Hobson's approach, still short of establishing British sovereignty over the whole country. A draft of instructions by James Stephen, probably of late December 1838, envisaged Hobson, by authority of the British parliament, becoming governor of the parts of New Zealand ceded by the chiefs; he would also offer British protection over the areas not ceded and punish crimes committed therein. Crucially, land purchases in New Zealand by British subjects, except through the Crown, were to be forbidden.[90] This is what the Colonial Office meant by 'Crown pre-emption'. With Australian experience very much in their minds, control of unregulated land purchase was to dominate Colonial Office thinking throughout 1839. Draft instructions along similar lines followed on 24 January 1839.[91] Thereafter government planning slowed, partly due to Glenelg's resignation on 20 February 1839 and his replacement by Lord Normanby.

116. But the New Zealand Association was not dallying. It is central to the argument of this report that the driving force behind European colonisation in the nineteenth century was almost always private enterprise, with governments struggling to regulate it in some way but (in Britain at least) convinced they could not prevent it. So it was in England in March 1839. The Association was then considering a new bill to secure authority from parliament, at the same time converting itself into a joint-stock company, the New Zealand Land Company, to try to meet the government's

89 Carpenter, pp 125-6, quoting Hobson to Glenelg, 21 January 1839, CO 209/4, pp 87-93.

90 Loveridge, 'The Knot…, p 140.

91 Loveridge's close analysis of the documentary record had revealed the distinction between the Stephen document dated 21 January 1839 and the draft instructions dated 24 January 1839, and discusses the difference between them. Loveridge, 'The Knot…', pp 137-141.

objections about accepting financial responsibility. By about 12 March 1839, the Company learned (from Henry Labouchere, parliamentary Under-Secretary for Colonies) of the government's determination to insist (in its own bill) upon Crown pre-emption. Spurred on by Wakefield, the Company were moved to swift action: they would send a preliminary expedition to New Zealand to buy land ahead of the Crown's intervention. Informed of this intention by the Company (and of the impending departure of the *Tory* for the purpose) the Colonial Office made no effort to block the Company; it merely stated that the government could give no pledge that the Company's land purchases would be recognised, and that the land would probably be subject to repurchase by the Crown.[92]

117. From this point on the systematic British colonisation of New Zealand was effectively under way. Adams has suggested, with good reason, that the government missed an opportunity to enter into fresh negotiations to give the Company a charter, which, in the right terms, might have resulted in a better regulated colonisation than the one that actually unfolded in Cook Strait and elsewhere, based on the Company's hurried transactions for vast areas of Maori land – purchases as yet unregulated by official controls.[93]

118. In late May, Lord Normanby, Hobson and the officials decided that it was more expedient not to seek the authority of the British parliament (which might be withheld until the outcome of Hobson's mission was known), nor to wait upon the formation of a representative assembly in New Zealand, but to use the Crown's prerogative powers to issue Letters Patent extending the boundaries of New South Wales to include any territory gained in New Zealand. This mode of proceeding was endorsed by the Law Officers on 6 June 1839.[94]

119. In preparing a more substantial draft of Hobson's instructions dated 9 July 1839, the officials make plans for funding the future administration of New Zealand, on the assumption that more immigrants would come into the country. Acquisition of land from Maori was to be a Crown monopoly.

92 Adams, p 141, citing Labouchere to Hutt, 1 May 1839; see also Loveridge, 'The Knot…'. pp 144-5.

93 Ibid, pp 143-4.

94 Loveridge, 'The Knot…' pp 143-51.

The difference between the relatively low payment to Maori and the much higher price of resale to the land to settlers would create a fund – the Land Fund - to pay for the administration of the colony and for new immigration.[95]

120. At all stages of the proceedings so far, the officials proceeded on the basis that the colony should only be established with Maori consent, and the Treasury officials took the same view. Their approval of the financial arrangements was conditional on that.[96] However, there are indications in Colonial Office files, and in Hobson's final instructions, of the belief in London that Maori independence had *already* been undermined by land sales. In his notes or uncirculated draft instructions of December 1838, Stephen doubted whether Maori understood the difference between proprietary and sovereign rights and whether, having alienated the former over much of the country (as was believed in London), there was a strict need to negotiate for the latter. Still, the prior British acknowledgment of Maori independence had been made and British commitment to a policy of 'frank and open dealing' required that Maori consent to the cession should be sought.[97]

121. Carpenter has shown that as the instructions to Hobson evolved through 1839 the drafting reflected different elements of British thinking. The Aborigines Committee of 1836-1837 had recognised Maori independence as their god-given right, being a distinct people. This did not depend upon their having a particular form of civil polity or national government. Consequently, Maori independence and Maori rights to the soil had to be respected. This view was maintained through to the final instructions in the statement that Maori 'title to the soil and to the sovereignty of New Zealand is indisputable, and has been solemnly recognized by the British Government'. As far as Maori property was concerned therefore, the Lt-Governor could only acquire Maori lands through 'fair and equal contracts' freely negotiated.

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95 Loveridge, 'The Knot…'. pp 153-9.

96 Adams, p 151.

97 Adams, pp 149-50, citing CO 209/4, folio 242.

122. On the other hand, Hobson was instructed on 14 August 1839, that *as soon as he arrived in New Zealand* he was to announce by proclamation that:

> Her Majesty will not acknowledge as valid any title to Land which either has been or shall hereafter be acquired in that Country which is not either derived from, or confirmed by, a Grant to be made in Her Majesty's name and on her behalf.[98]

All claims to land allegedly purchased before the date of the proclamation would be investigated by Crown-appointed commissioners before any titles were issued.

123. While highly protective of Maori land rights, this clear intent to proceed by proclamation, *before* the outcome of Treaty negotiations, further suggests that a highly qualified view of Maori political and constitutional sovereignty prevailed in London. As Carpenter has pointed out the instructions reflected what he has identified as a 'stadial' view of Maori society: an 'uncivilised' society could not support 'a lawful dominion in that full and absolute sense…of the more civilized parts of the World'.[99] Thus Normanby's final instructions to Hobson, dated 14 August 1839, read:

> I have already stated that we acknowledge New Zealand as a sovereign and independent state, so far at least as it is possible to make that acknowledgment in favour of a people composed of numerous dispersed and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate in concert.[100]

Nevertheless, the admission of Maori rights, 'though inevitably qualified by this consideration' was binding on the faith of the Crown. Britain could not govern New Zealand 'unless the free and intelligent consent of the natives, expressed according to their established usages, shall first be obtained'.

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98 Normanby to Hobson, 14 August 1839, BPP 1840 [238] pp 37-42, No 16. See also Carpenter pp 128-9.

99 Carpenter p 127, quoting draft instructions, 24 January 1839, CO 209/4, pp 203-220a. Dr Loveridge argues persuasively that only two sets of draft instructions were circulated in the Colonial Office, (those of 24 January, and early July), and that the folios of 21 January 1839 were an internal memorandum embodying Stephen's reflections on the unfolding situation. ('The Knot…' p 137.)

100 Normanby to Hobson, 14 August 1839, BPP 1840 [238] pp 37-42, No 16. (In hindsight Normanby's assessment was unduly harsh. For example, from as early as 1837, Mohi Tawhai had begun organising a committee of the rangatira at Waima to resist landselling, and this movement strengthened in the 1840s. **(**Fergus Sinclair, doc I-3, in Wai 45, pp 160-5). Later of course, in the 1850s, large tribal runanga began to form for the same purpose, and in the Kingitanga and Kotahitanga and in their military resistance to British invasion of their territory in the 1860s, Maori showed that they could not only deliberate in common but achieve concerted action in the face of a common threat. But such developments could not have matured quickly enough to change the course of events in 1839.

124. The instructions, having referred to the qualified British recognition of Maori sovereignty, now argued that the extent of European settlement and land dealing had rendered New Zealand's independence 'precarious and little more than nominal'. Maori would now serve their interests best by giving it up. Hobson was to treat for 'the whole or any parts' of New Zealand which Maori wished to cede.[101] No details were provided in the instructions for how British law was to operate outside of the ceded areas. It seems likely that many in the Colonial Office shared Hobson's view that the whole country should come under British sovereignty and it is unlikely that some of them would not have communicated this feeling to Hobson.

125. In a final important amendment, the principle of requiring prior Maori consent to govern in New Zealand was modified, at Hobson's request, in respect of the South Island and Stewart Island. On 1 August 1839 he had asked whether he could claim those islands for Britain on the basis of Cook's discovery because he believed the Maori there to be too few and too backward to make a meaningful treaty of cession. Normanby agreed, because the process of colonisation already under way might 'perhaps render the occupation of the Southern Island a matter of necessity or of duty to the natives'.[102]

126. Meanwhile, as London was preoccupied with the various proposals of the New Zealand Association and its successor the New Zealand Company and their opponents among the humanitarians, a French plan to colonise the South Island was slipping under the British radar.

The French Threat

127. In London in 1838-9 the supposed threat of French colonisation in New Zealand was believed to hinge around de Thierry. It was feared that the government in Paris might appoint the eccentric adventurer, with his pretentious claims to sovereignty, as French consul and in late 1838 enquiries were made of the French government, through the British Foreign

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101 The drafting of Hobson's instructions in July and August 1839 is analysed in detail by Loveridge, 'The Knot…', pp 153-9. Adams considers that the decision to authorise Hobson to assert British sovereignty over the South Island by right of discovery if he could not do so by cession was 'mainly one of expediency' because in fact neither Hobson nor the Colonial Office knew anything about the South Island Maori to warrant the different approach. (Adams, p 157).

102 Adams, pp 156-7, citing Hobson to Labouchere, 1 August 1839, and Normanby to Hobson 15 August 1839, BPP 1840 [238] pp 44-5, No 18.

Minister, of their intentions regarding de Thierry and New Zealand. The French government at the time denied any plans for formal colonisation of New Zealand. Consequently Peter Adams, from his analysis of Colonial Office records, has noted, reasonably, that supposed threats of French annexation of New Zealand, although vividly entertained by missionaries and traders with interests in New Zealand, were considered in London to be chimerical and played no part in the British decision to annex at least part of the country.[103]

128. However, subsequent research by Peter Tremewan and Peter Low, based on French records, shows that, largely unbeknown to the British, French designs on New Zealand developed in 1839-40 from a quite different quarter.[104] They involved a possible French annexation of the South Island and Stewart Island. The evidence indicates that Hobson's prompt action in May 1840 in declaring British sovereignty over the whole group was more necessary (from the British perspective) than even he and his superiors realised. Despite Buick's denial of it, there really was, in a sense, a 'race for Akaroa' after all.

129. Having established the colonies of New South Wales and Van Dieman's Land, British officials and politicians were very alert to defend those possessions, and the trade routes they opened, against foreign threats. Hence the occupation of west Australian harbours, including the Swan River settlement of 1829, were prompted largely by fears of French interest in the area.[105] But colonies involved heavy responsibilities and the British were not generally rushed into precipitate action, notwithstanding the constant pressure from New South Wales entrepreneurs over supposed French designs on New Zealand. Consequently when the 'scare' over the visit to the Bay of Islands of Captain Laplace and *La Favorite* erupted among the missionaries in 1831, the Colonial Office ascertained that the French had no intention of planting a settlement there (let alone annexing the

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103 Adams, pp 79-80.

104 Peter Tremewan, *French Akaroa, An Attempt to Colonise Southern New Zealand,* Christchurch, 1990; Peter Low, 'Pompallier and the Treaty; A New Discusssion', *New Zealand Journal of History,* Vol 24, no 2, October 1990, pp 190-9.

105 Adams, p 75.

whole country); hence the friendly but non-committal response given by William IV to the petition from the chiefs that Yate had organised.[106]

130. Similarly, in 1835, when Busby organised the Maori Declaration of Independence to rebut de Thierry's pretentions, the British authorities endorsed He Whakaputunga (see above), and Governor Bourke told de Thierry in Sydney that Britain 'desired and would maintain the independence' of New Zealand, but no further immediate action was considered necessary.[107] The British authorities thereafter kept a wary eye out for possible links between de Thierry and the French government but were reassured by what they learned. Adams notes that in February 1839 'Colonial Office officials received a private intimation via the Foreign Office that there was "no ground for the report that the French government intend to establish a colony in New Zealand".'[108] Adams has shown that in the six crucial months of policy formation regarding New Zealand, April-September 1839, fears of French colonisation played no part; Colonial Office officials did note, however, that both the United States and France might protest against a British annexation of New Zealand, because of the presence there of US traders and settlers and of the French bishop, Pompallier. (We should recall the 1838 flurry over the expulsion of French missionaries from Tahiti at the behest of the British consul Pritchard and the vigorous counter-action taken there by visiting French warships).

131. Meanwhile, by the late 1830s, some forty French whaling ships were operating in New Zealand waters, protected by periodic visits from warships. On 2 August 1838, one of the whaling captains, Jean-Francois Langlois, purported to purchase much of Banks Peninsula from Maori at Port Cooper for 1000 francs. He was supported in this by Captain Cecille of the warship *Heroine* who was in Port Cooper at the same time. This so-called purchase of Maori land was as ramshackle as dozens of others made by Europeans, including Frenchmen, before 1840. What is significant about Langlois's purchase was that, back in France, as Freemasons he and Cecille were able to use their contacts with wealthy and influential fellow-Masons,

106 Ibid, p 77.

107 Ibid, p 78.

108 Adams, p 79 quoting Fox-Strangeways to Stephen, 4 February 1839, enclosing Dillon to Palmerston 28 January 1839, CO 209/5, pp 36-8.

such as the Duc d'Aguado and the Duc Decazes, to set up a colonising company for a New Zealand venture to be based around the Banks Peninsula as a base for the French whaling fleet. Aguado in turn secured the support of King Louis-Philippe and his government, through Marshall Soult (Foreign Minister) and Admiral Duperre (Minister for the Navy and Colonies).[109] After much negotiation with entrepreneurs in the Atlantic ports (including Le Havre, Nante and Bordeaux) the Nanto-Bordelaise Company was formed, with strong government support.

132. Buick, in his discussion of *The Treaty of Waitangi*, has put forward the view that the French government of 1839 had 'no grand scheme of territorial aggrandisement', that the ministers 'belonged to the anti-colonising party', that there was no serious official French interest in planting a colony in N Z and no 'race for Akaroa' between French and British warships in 1840.[110] This is quite misleading, if not downright incorrect. Peter Tremewan's research in the 1980s has shown that there was indeed serious French interest, largely unknown to the British authorities.

133. There were several reasons for the French government's interest. Firstly, apart from its island possessions in the West Indies and Reunion in the Indian Ocean, France possessed no overseas empire. For prestige alone the temperate south of New Zealand would be a significant prize. Secondly the government wanted to establish a penal colony on the model of New South Wales, which was much admired in France; rival plans for such a settlement in the Chatham Islands and the Marquesas were tossed about in 1839-40. (Eventually the penal colony was established in New Caledonia). Thirdly, ministers were interested in the commercial possibilities of agriculture in a temperate land and the trade in land that it would support. Fourthly, and perhaps most importantly, the government had long wanted a naval base in the Pacific to support its whaling and trading fleets and to support ship-building in the region. The proposals put to the French government by the whaling captains and bankers included the naval station and 'more than twenty' settlements around the South Island.

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109 Tremewan notes that Aguado had been aide-de-camp to Soult during the Napoleonic occupation of Spain and the two had remained close. (Tremewan p 26).

110 Buick, pp 286-292.

134. Unlike the negotiations between Wakefield's New Zealand Association and the British government, the French entrepreneur's proposals were promptly accepted by their government, in August-September 1839. There was a precedent: in 1816 the French navy had conveyed 300 colonists to St Pierre off the coast of Newfoundland (St Pierre is a French possession to this day). The New Zealand enterprise was intended to be much larger, and the navy was to play a substantial role. The government avoided putting its decisions through the French parliament and gave as a pretext for the navy's involvement, the need to further punish Chatham Islands Maori for the massacre of the crew of the whaling ship *Jean Bart* in 1838: but the main objective of the French government was to secure a naval base in the south Pacific, under the cloak of a commercial purchase, leading to an assertion of French sovereignty. (The French called this 'the British method'). The warship *L'Aube*, under Captain Charles Lavaud, was made ready to support the new colony. The War Ministry gave the Company 500 rifles and bayonets with 10,000 cartridges, 200 swords, 200 pistols with 5000 cartridges, 10 cannons, 600 cannon balls and 200 kilograms of powder.[111] This was said to be for self-defence; in fact the colonists, together with the *Aube* and its sailors, were strong enough to overcome any resistance offered by the small Ngai Tahu communities in Banks Peninsula, still fragile from the effects of Te Rauparaha's raids of 1831.

135. The French planners were aware that Britain had taken the position that New Zealand was formally independent, under the control of Maori chiefs, though they were also well aware that numerous British settlers were already in place in various harbours in the North Island and in the Marlborough Sounds. To the best of their knowledge, Hobson was proposing to annex only portions of New Zealand where British settlers were numerous. The French proposed to plant their nucleus settlement on Langlois's purchase and then buy further land at strategic points such as Bluff, Otago, Banks Peninsula and Cloudy Bay - all well-known to French whalers. The planners also proposed to forestall British expansion in the 'Middle Island' by planting groups of settlers at spots along its west coast.[112]

111 Tremewan, p 55.

112 Tremewan, pp 7-24.

136. As the French plans unfolded in 1839 with considerable publicity, the newspapers also reported the departure of the New Zealand Company ships with colonists aboard, and of Hobson's appointment to replace Busby. In October 1839 Hobson's official instructions were published in France, showing that Britain was proposing to annex all land that Maori were willing to cede to them – that is, possibly more than the areas where British settlers were already located. The French planners and the Nanto-Bordelaise Company then tried to press ahead with their arrangements and their agreements with the French government. There were delays over securing a suitable ship and in recruiting colonists but the *Compte de Paris,* with some 59 settlers aboard, sailed from Rochefort on 28 February 1840. Captain Lavaud and the *Aube* had left Brest on 19 February 1840. It was expected to reach New Zealand before the *Compte de Paris* but its departure had been held up by bad weather and by negotiations with the Marist order to select priests and teaching brothers to join the expedition. Tremewan has shown that when he invited Father Colin, Superior of the Marist order in France, to select the priests, Marshall Soult, the French Foreign Minister, was quite open about his view that Catholic missionary activity in the Pacific was integral to French imperial expansion there: the government wished to back missionary activity, especially in Oceania, he wrote, because if the settled territories 'become Catholic, they will become French'.[113] As we shall see, in New Zealand, Bishop Pompallier held hopes that if the South Island became French it would become Catholic.

137. Tremewan has compared the draft deed that Langlois was given for further purchases outside Banks Peninsula with the Treaty of Waitangi. By the French deed Maori would cede sovereignty and ownership of all 'the land, seas, rivers and waters' in their territory, except about three or four acres per head required for personal needs; Maori would provide labour for the French settlement; the chiefs were to be responsible for maintaining order within their tribe but French law was to apply. In return the tribe would receive a series of payments, conditional on their carrying out all their commitments.[114] Lavaud's instructions were somewhat different. The first

113 Tremewan, p 53.

114 Ibid, p 58.

draft states that he was to declare French sovereignty over the whole of the South Island but this was later deleted.[115] Rather he was to witness the Company's purchases, act as 'King's Commissioner' for the Banks Peninsula settlement (treating Maori there as French citizens) and command all French naval forces in New Zealand waters – generally three warships visiting in sequence but sometimes coming together. Tremewan concludes that the French government wished to avoid provoking the British by a blanket declaration of sovereignty but to support the commercial company in securing effective sovereignty over strategic points of the South Island and take formal possession in due course.

> What is certain is that the French intended that the southern islands of New Zealand – the South Island, Stewart Island and the Chatham Islands - were brought into the French sphere of influence, with a view to becoming French possessions later…[However] Langlois's instructions explicitly referred to the cession of sovereignty.[116]

138. In mid-February, as the French expedition was about to set sail, news of its plans broke in the French press and then in the British press. The flurry continued until April 1840, the British press expressing a mixture of outrage that a French penal colony was contemplated for New Zealand, anger that the British government's vacillation in 1838-9 had encouraged the French to think that the South Island was still open to French colonisation, and confidence that prior British interests (together with the New Zealand Company's venture) would ensure that New Zealand was indeed British, and magnanimous suggestions that the French settlers should be encouraged to become British citizens and introduce the cultivation of grapes, olives and mulberries. Public meetings of influential citizens led to petitions to the Queen and parliament to uphold British sovereignty over New Zealand. The belief that the South Island was virtually uninhabited, and therefore not truly Maori, was emphasised.[117] The furore in both countries is significant in that it reveals the strength of popular feeling about imperial ventures – a feature of European imperialism generally, which made it difficult for governments to back down, or give the appearance of

115 Ibid, pp 62-3.

116 Ibid, p 64.

117 Ibid, pp 72-4.

backing down, in the face of competition from rivals; it meant that throughout the nineteenth century, until the ultimate madness of the First World War, confrontations between rival colonial ventures on the periphery were likely to produce armed conflict between rival powers.

139. However, things were about to go very wrong for the French venture in New Zealand. Tremewan suggests that the fatal mistake was the decision by Lavaud, having reached the longitude of Tasmania on 29 June 1840, to head for the Bay of Islands rather than proceed directly to Banks Peninsula. In doing so he defied his instructions but was influenced by winds adverse to sailing around the bottom of the South Island, by the urgent need to take on fresh food and supplies, and by his desire to take on board missionaries from the Bay of Islands who were familiar with the Maori language before proceeding on his mission. Tremewan writes:

> One can only speculate about what would have happened if Lavaud had gone directly to the South Island and set up the French settlement there before making contact with the British officials in the North Island. It would certainly have made it more difficult for the British to assert their rights without indulging in military confrontation.[118]

140. The assessment expressed in this last sentence is correct, I believe, had Lavaud set up the French colony in early July, either without hearing of Hobson's proclamation of 21 May 1840, or having heard that the British claim to the South Island was based only on the right of discovery – for the French did not consider that discovery was a valid basis of claim, given that Cook was *not* the first European discoverer of the group and Britain had not clearly asserted sovereign authority since Cook's landfall. The scenario could have been different, however, had Lavaud gone straight to Akaroa, learned of Major Bunbury's declaration of British sovereignty on the basis of *cession* on 17 June – a cession derived from the signatures to the Treaty he had taken from a number of prominent South Island rangatira. Even so, Lavaud's later actions suggest that, given that he had had no *official* advice of Bunbury's declaration, or its reception by Bunbury's superiors, he would very likely have pressed forward with the settlement, hoisted the French

118 Ibid, p 77.

flag, asserted French law and left it to his superiors in Paris to press their claims against the British.

141. To Lavaud's dismay, however, on his arrival at the Bay of Islands on the night of 10-11 July, he found the British flag flying and Hobson installed as Lt-Governor. He learnt from the pilot who met the *Aube,* and from Pompallier and others, of the signing of the Treaty and of Hobson's proclamation of 21 May that the North, South and Stewart Island were under British sovereignty – the first by right of cession and the others by right of discovery. According to Tremewan, he did *not* yet learn that Captain Nias and Major Bunbury in HMS *Herald* had collected signatures to the Treaty from South Island chiefs, including some at Akaroa, and that Bunbury had declared British sovereignty over the South Island on 17 June, this time on the ground of cession. Tremewan has remarked that the French were 'two months late for the fair'.[119]

142. That is not quite the end of the story, however. Lavaud was not an aggressive man in the pattern of Dupetit-Thouars. He accepted the main rule of 'the imperial game' as Tremewan dubs it, namely that when one European power has established uncontested possession of a territory the others are obliged to accept it. But he emphasised to Hobson that French citizens had claimed to have purchased land not only on Banks Peninsula but in many parts of the North Island. Ten of them had petitioned him on the matter in the Bay Islands. He would not therefore recognise a British investigation of the French land claims (as foreshadowed by Gipps' proclamation in Sydney on 14 January, repeated by Hobson in the Bay of Islands on 30 January) without instructions from his government. On 20 July he informed Hobson that, in accordance with his instructions, he was going south in the *Aube* to protect the French settlers already there and those about to arrive.

143. That same day Hobson began drafting instructions to Captain Stanley to go to Akaroa in the warship *Britomart* for he had:

> …a strong presumption that he [Lavaud] is charged with some mission in that quarter incompatible with the sovereign rights

119 Ibid, p 86.

> of Her Britannic Majesty, and which, as I have before observed, it will be your study by every means to frustrate.[120]

144. He was right to suspect that Lavaud still had hopes of establishing French authority in the South Island based on Langlois's purchase, and – if his government would support him – of upsetting British claims in the South Island. He had been made aware by the Catholic chief Rewa that Bishop Pompallier had urged him not to sign the Treaty. We also now know (though Hobson did not) that Pompallier, in conversation with Lavaud, had dismissed Hobson's proclamation asserting British sovereignty over the South Island on the basis of discovery as 'a conjuring trick', and urged Lavaud to 'press ahead and annex the Middle Island'.[121] In any case, perhaps having doubts as to how firmly his own government would back his proclamation of sovereignty, Hobson reinforced his strategy on 21 July by instructing two magistrates, Murphy and Robinson, to accompany Stanley, exercise civil authority in every port visited by the *Britomart*, and keep a careful record of their proceedings. This was crucial, because regardless of flag-raisings, proclamations and even of treaties, what really mattered in 'the imperial game' was the exercise of actual governmental authority on the ground. In this sense there was a 'race to Akaroa' after all, and it was not over when Hobson made his proclamation of 21 May, or when Bunbury made it in respect of the South Island and Stewart Island on 17 June; it would really be over when either British or French authority was in force in Banks Peninsula, and acknowledged to be, both in Paris and London.

145. In the Bay of Islands, however, on 22 July, at a final meeting with Hobson, Lavaud made concessions which appear to have all but conceded the race. Concerned as he was for the safety of the colonists on the *Compte de Paris* and hoping at least to see the French settlement established, he agreed with Hobson that he would not formally challenge British rights of sovereignty over the South Island, in return for which Hobson would allow the French colonists to land and not challenge Lavaud's authority over them. Lavaud undertook to erect no fortifications and to fly the French flag only over his

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120 Quoted Tremewan p 94.

121 Peter Low, 'Pompallier and the Treaty, a new discussion', *New Zealand Journal of History,* Vol 24, no.2, October 1990, p 193.

own house, where French settlers could consult him. Yet on 25 July, as he prepared to sail southwards, Lavaud wrote to the Duke Decazes, one of the principals of the Nanto-Bordelaise Company, that he thought 'it will be very easy to get England to renounce its sovereignty over Te Waipounamu'. His belief was based on the British government's reluctance to annex the whole of New Zealand in 1838-9, on the far from universal acceptance of the Treaty by Maori, and the shaky British claim based on discovery.[122]

146. When he reached Akaroa, however, some days after Stanley and the *Britomart,* Lavaud learned that many South Island chiefs, including several of the principal chiefs of Banks Peninsula, had signed the Treaty, and that Bunbury's declaration of British sovereignty over the South Island had been based on cession, not discovery. He also learned of the considerable extent of *British* subjects' land claims on the peninsula. Both of these facts weighed heavily with Lavaud, and by 23 August, he was contemplating the removal of the French settlers to Hokianga to work for de Thierry. But other principals in the French settlement thought differently. Eugene de Belligny, who had come to Banks Peninsula as the representative of the Nanto-Bordelaise Company, believed that Britain's main motive for annexing New Zealand was to control the New Zealand Company rather than to block French settlement; he therefore still entertained hopes that Britain might be persuaded to relinquish its claims to the South Island and Stewart Island and wrote to Paris to counter Lavaud's pessimism.[123]

147. Even more belligerent was Langlois. Confident that his government would uphold his land claims in Banks Peninsula and support the French settlement, he laughed at Murphy and Robinson's claim that New Zealand was British, pointed to the gun carriages on his ship and told the magistrates that France was going to claim sovereignty over the South Island.[124] Belligny and Lavaud considered Langlois something of an embarrassment but they still held out for the final decision from their government. For his part Hobson, who visited Akaroa in September 1841 was happy with the arrangements he had made with Lavaud in July 1840 for administration in

122 Tremewan, p 97.

123 Tremewan, p 120.

124 Ibid, p 121.

Banks Peninsula, and was also prepared to leave final decision on sovereignty to London.

148. As it happened, a few days after Lavaud's departure for New Zealand the government in Paris had changed. Soult was replaced as Prime Minister by Adolphe Thiers, for whom imperial expansion was not the highest priority. Yet public feeling ran strongly in both Paris and London, and the rival claims to the South Island became caught up with the serious imbroglio over the French annexation of Tahiti and the Marquesas. The British were furious about this and again there were angry public demonstrations and debates in parliament. In this context, Belligny, who preferred temperate lands to tropical ones, still hoped that his government would hand the Marquesas over to Britain in return for a slice of New Zealand. But the Paris politicians were not convinced. The next Foreign Minister, Guizot, believed that Britain had acquired sovereignty in the South Island de facto, but he would not formally recognise it. Indeed, according to Buick, in debate in the French Chamber of Deputies, he cited the various British actions in the 1830s which showed that they had relinquished claims to sovereignty in New Zealand.[125] Lavaud languished at Akaroa, instructed neither to recognise British sovereignty nor assert that of France. He maintained cordial relations with the British magistrate Robinson, who referred disputes concerning only French settlers to Lavaud (and then to his successor Bérard). Both Hobson and Robinson, however, had made it clear that this was within the context of British sovereignty (a position reasserted by Acting-Governor Shortland to Bérard in 1843). Belligny left in 1845 and the application of French law in Akaroa ended that year.

149. Meanwhile, in July 1842, Lord Stanley the then Secretary of State for Colonies, had accepted a proposal by Hobson that the land claims of the Nanto-Bordelaise Company be adjudicated on the same basis as those of

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125 Buick, p 91, footnote; Tremewan pp 156-7. Guizot was one of the most formidable statesmen of mid-nineteenth century Europe. He was largely responsible for building rapprochement with Britain after centuries of rivalry, and the alliance between the two countries against Russian expansion on the eastern Mediterranean, an alliance which came into effect in the Crimean War commencing in 1854, just a year after France took possession of New Caledonia. That action angered the Australian traders, stockmen and missionaries who already had a strong presence in New Caledonia, but now it was Britain's turn not to protest. For both Britain and France, the importance of their European entente meant that henceforth they would, in the last resort, settle their colonial differences, but there were to be many hiccups along the way.

the New Zealand Company. Ngai Tahu, led by their principal chiefs, such as Tikao and Iwikau, attended the hearings of the Land Claims Commission in force. Langlois's original 'purchase' was admitted only over a very small area of his supposed claim but new deeds of purchase were negotiated and additional payments made.

150. It is evident that by mid-1839 New Zealand had become caught up in the ambitions of two age-old rivals, Britain and France, led by their entrepreneurs and supported by their respective governments. Although the British decision in 1839 to assert sovereignty over parts at least of New Zealand owed little or nothing to any perception amongst *officials* of threatened French intervention in New Zealand, fears of such intervention were very much alive among British settlers and missionaries in the region and the British public was quickly excited by any evidence of it. These attitudes could not have been unknown to Hobson and Gipps. The fact that the Treaty had been signed extensively in both islands, and that he and Bunbury had both proclaimed British sovereignty over the South Island (Hobson on the ground of discovery, Bunbury on the ground of cession) gave Hobson a great deal of confidence in the British position when Lavaud arrived in the Bay of Islands in July 1840. But not complete confidence. Confronted with evidence that the French were actually landing colonists at Banks Peninsula, he felt it necessary to bolster the British claims in the South Island by sending magistrates down there, and a warship, to administer British authority on the ground. This was an act of considerable significance, bearing upon the French government's de facto recognition in 1842 of British sovereignty in the South Island.

8. Te Tiriti

Immediate prelude

151. Dame Claudia Orange has questioned Busby's emphasis on the alleged 'state of anarchy' in New Zealand, noting that increasing numbers of Europeans were making working accommodations with Maori in the late 1830s and getting on with their businesses.[126] Indeed, in the light of the fact that the British were to spend the next thirty years trying to overcome effective Maori independence in much of the country, the depiction in

126 Orange, pp 17-18.

Normanby's instructions to Hobson of a weak Maori society, whose sovereignty was little more than nominal, was inaccurate to say the least. But that understanding, like the realisation that the Maori were *not* a dying race, is largely dependent on hindsight. Moreover, a people being independent and resistant to foreign control is one thing; having a stable civil polity and regular peaceable modes of dispute resolution is quite another. (Modern Somalia comes to mind.) Maori had considerable capacity to resist British authority. But there were serious doubts among the British missionaries and officials regarding a peaceable civil society in New Zealand. From the evidence available to them *in 1837-9* there were good and proper reasons for Stephens and Normanby to think and plan as they did.

152. These reasons include an acute awareness in Britain of the horrendous destruction of indigenous societies already subject to European colonisation, and the evidence of the swift impact of newly-introduced diseases upon Maori. In hindsight we know of a very different demographic curve among Maori and other indigenous peoples, as natural immunity to new diseases grew. But that knowledge was not available to concerned philanthropists then. There was a genuine fear among missionaries abroad and humanitarians in England that Maori faced with white colonisation would go the way of the indigenous peoples of the Caribbean, most of the Americas and those parts of Australia subject to settlement. This fear dominated the thinking of the parliamentary committees of 1836-7 and 1838, and needed no exaggeration by officials in 1839. The only means of averting the destruction of Maori society it was believed, was if Maori would accept Christianity, give up fighting, and live as peaceful farmers as they were being taught on the mission stations; and if settlement could be kept away from New Zealand. Both these hopes were dashed by the late 1830s; settlement was coming to New Zealand willy-nilly, and the reports of the missionaries and of Busby showed that even Christian Maori were continuing to feud, and to die on the mission stations from diseases.

153. Moreover, by the time Hobson had received his instructions and reached Sydney, events were giving added credence to the picture that Normanby

had drawn. The Company ships were known to be in Cook Strait buying land; the activity of New South Wales speculators also increased dramatically with the expectation that Britain would very likely take possession of the country; alleged purchases, frequently over-lapping, had been made of almost all the South Island and most coasts and harbours of the North Island; so-called purchase deeds were being traded vigorously and auctions held in Sydney. (Within days of Hobson's arrival Gipps stopped one auction of 2,000 acres of Bay of Islands land).[127] The Company's extravagant claims to have purchased vast areas north and south of Cook Strait were also known to the missionaries in the Bay of Islands.

154. In Sydney, Hobson was met by a deputation of colonists who demanded to know by what right the British government thought it could interfere in the transactions they had made with Maori in an independent state. Loveridge has noted the significance of Hobson's reply – to the effect that although Maori independence had formally been recognised, in the northern part of the North Island (hence his appointment as Consul) no Confederation government had been formed to enact laws or fulfil any other function. Asked if it was intended to colonise the whole of New Zealand, Hobson said that that was matter for negotiation, 'but I said I hoped it might be accomplished'.[128] This supports Adams's view that Hobson 'had every intention of annexing the whole country if possible.'[129]

155. Gipps and Hobson then took the pre-emptive action which would enable them to administer any ceded territory, and to control the land trade. On 14 January 1840 Gipps, by proclamation, enlarged the boundaries of New South Wales to include such territory 'which is or may be acquired in sovereignty' in New Zealand (repeating the phrase in the commission issued to Hobson in Britain of 30 July 1839); a second proclamation announced that he had administered the oaths of Lt-Governor of the territory acquired; a third proclamation declared that the Crown would recognise no purchases of land from Maori after 14 January 1840 and would not recognise the

127 Orange, p 33.

128 Hobson to Gipps, 16 January 1840, quoted Loveridge, 'The Knot….', pp 185-6.

129 Adams, p 155, citing Hobson to Gipps, 24 December 1839, 16 January 1840, G/NZ 36/1:1-7, 10-12.

validity of any made before that date until they had been investigated and a Crown title issued.[130]

156. On 30 January 1840, the day after his arrival in the Bay of Islands, Hobson repeated the proclamations and declared that he entered upon his duties as Lt-Governor. In the week preceding the Treaty signing that proclamation must have dominated discussion in the Bay of Islands, among Maori and Pakeha alike. The issuance of the proclamations checked (but did not entirely stop) further 'land-jobbing' and Hobson now turned his attention to drafting the treaty he would shortly put before the Maori rangatira.

The Treaty texts

157. In his report for these proceedings Mr Carpenter has made a number of pertinent points on the texts of Te Tiriti. He suggests that although Article 1 of the English text uses the term 'cede', meaning to 'give up', the rights and powers of sovereignty, the Maori text of the Preamble 'Kia w[h]akaaetia e nga Rangatira Maori te Kawanatanga o te Kuini' ('that the Chiefs may agree to acknowledge the Government of the Queen') is more appropriate. Because, Carpenter continues:

> The sense of this was Maori agreeing to accept a new authority in the land rather than giving up an authority that they themselves exercised.
>
> Viewed in this light, the Treaty did not represent a loss of Maori authority. Rather it was providing them with the protection of a chiefly authority and civil government that they had not previously possessed.[131]

158. Given that the Confederation was not a *functioning* government, there is much force in this argument. Mr Carpenter also points out that the Preamble shows clearly that Kawanatanga was to apply to both Maori and Pakeha, not Pakeha alone. Articles 1 and 3, in both languages, also support the view that 'all were to be encompassed by the Government's

130 Loveridge, 'The Knot…' pp 188-190. Dr Loveridge notes (pp 188-190 and footnote 535) that the phrase 'is or may be acquired in Sovereignty' carries the implication that the politicians and officials in London were keeping open the possibility that some of New Zealand might *already* be under British sovereignty.

131 Carpenter, p 165.

authority'.[132] Alongside this, Carpenter argues, Te Tiriti recognises the authority of the rangatira in their own communities.

159. Since Ruth Ross's celebrated 1972 article 'Te Tiriti o Waitangi: texts and translations,'[133] the Crown officials and their missionary allies have been accused of deliberately, or at least carelessly, misrepresenting the import of the Treaty and so deceiving Maori. In 1973, influenced by Ross's article, not long published, I myself wrote:

> The missionaries and officials appear deliberately to have avoided translating the concept of sovereign power and authority with the term '*mana*' which would have given the chiefs a clearer indication of what they were ceding.
>
> The chiefs were undoubtedly misled, but the Anglican missionaries would probably not have considered themselves as deliberately deceitful. Although in general they sought to eradicate rather than preserve Maori institutions, they still had ill-formed intentions of using chieftainship, transformed by Christian education and with its more violent prerogatives curbed by British power, as the pivot of local administration in the land. They believed that this regenerated chieftainship, of which Waka Nene was considered a shining example, was what most Maori aspired to, or should aspire to, that this would be confirmed and strengthened, rather than threatened, by the advent of British rule.[134]

160. I did not revise that statement in the 1995 edition of the book, but now I would *not* mention Ross's suggestion that 'mana' should have used for 'sovereignty' in the text – except to rebut it more firmly than I did then. Ross, and many others since, have not made a convincing case that the English terms of the Treaty were mistranslated in the Maori text drafted by Williams. The case is certainly not made that he deliberately mistranslated – and was therefore a devious, imperialist lackey. It is not even convincingly made that he did so inadvertently, because of his supposedly limited command of te reo Maori.[135]

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132 Carpenter, pp 143-4.

133 *NZJH,* VI,2, pp 129-57.

134 Ward, pp 44-5.

135 It is not clear whence the claim that Henry Williams had a limited command of te reo Maori originated. Other evidence suggests the contrary. Carpenter notes that soon after his arrival in 1823 Williams organised regular meetings of his colleagues to formalise their learning of the language. He would from that time have necessarily used te reo on a daily basis and, as head of the mission, been involved with his colleagues in translations of the Anglican liturgy parts of the Bible. (Carpenter, p 75, note 216).

161. Part of the confusion in recent years arises from the fact that the term 'tino rangatiratanga' in Article 2 is commonly quoted out of context, by itself, and equated with 'sovereignty'. Maori are thus said to have relinquished 'kawanatanga' (governorship) in Article 1, but retained 'tino rangatiratanga' (interpreted as 'sovereignty') in Article 2, and allegedly signed with that understanding. I can claim no expertise in te reo Maori but some things are evident even to a lay observer.

161.1 '[T]ino rangatiratanga' needs to be read in context: '[T]ino rangatiratanga' over what? Presumably the Maori text is meant to be equivalent to Article 2 in English, which speaks of the 'possession' of lands, forests and fisheries. I accept the argument that 'tino rangatiratanga' implies fuller authority than mere 'possession' but it is still authority over 'o ratou wenua o ratou kainga me o ratou taonga katoa' – mainly a description of material resources. The blurriness of the article derives from two words: firstly it is difficult to imagine 'kainga' without people in them, hence the clause can be read as extending beyond material possession; secondly 'taonga' can have wide meaning (though I doubt that radio waves were a Maori taonga as one Tribunal report would have us believe). But constant reiteration of the words 'tino rangatiratanga', out of context, and deeming them to be an abstract term for 'sovereignty' or some near equivalent, does not necessary convey the meaning of the entire Article.

161.2 In whom is 'tino rangatiratanga' vested? The English text of Article 2 confirms and guarantees:

> to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may *collectively or individually* possess …etc. (Emphasis added).

This shows that the drafters of the Treaty had realised that Maori society was stratified, that property rights were of diverse kinds and that they did not lie only with one level of the society i.e. not

just with the chiefs.[136] In the Maori text this is expressed as 'ki nga Rangatira ki nga hapu ki nga tangata katoa o Nu Tirani…' – not quite so detailed as the English but conveying the general sense of the chiefs and the hapu collectively holding property rights. I am not aware of a detailed discussion by scholars of the implications of this societal division in the texts, (whether for 'possession' or for 'tino rangatiratanga').[137] Presumably it would not have gone unnoticed by the rangatira in 1840, but probably it would not have given them cause for concern: Maori rangatira knew that they were not autocrats but derived their authority in large measure from their relationship with their communities. In short they were not detached from their whanau and hapu in a nearly autonomous chiefly 'class' (which intermarried only among itself) as appears to have been the case in Tahiti. Therefore it may well have seemed to them entirely proper, and scarcely in need of questioning, that the rights conferred in Article 2 lay with chiefs and hapu together, in traditional reciprocity.

161.3 There is no obvious reason why the 1840 text should be read against the 1835 text as if the latter was a more accurate and authoritative use of te reo Maori. Arguably it should be the other way round. At least Williams had had five more years of experience with the language by 1840 (on top of his previous 12 years daily experience!) and Maori a greater understanding of the political concepts that were being negotiated.

161.4 The word 'Kingitanga', though used in 1835, is not mentioned in the Treaty. Yet it was clear in the Preamble and Article 1 that 'kawanatanga' would pass to the English 'Kuini' who would delegate (tukua) that authority to Hobson. I do not see why Maori

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136 Dame Claudia Orange has noted that as early as 1835 Busby had written that 'every acre of land in this country is appropriated among the different tribes; and every individual in the tribe has a distinct interest in the property; although his property might not always be separately defined'. (Orange p 38, quoting Busby to Col Sec, NSW, 31 October 1835).

137 Samuel Carpenter, however, has noted (in discussion of He Whakaputanga) that the term 'rangatira' 'was a status and title embedded in Maori usage and practice', which would have conveyed the ideas of 'social or "civil" freedom and liberty' to rangatira, in the phrase 'he Wenua Rangatira'. He contrasts this with the hypothetical opposite 'he Wenua Ponanga' or 'he Wenua Taurekereka' (noting that Ngapuhi still had 'slaves' at the time He Whakaputanga was signed). **(**Carpenter pp 85-86).

> participants would not have grasped that the English monarch now had the supreme authority and was exercising it in New Zealand through her kawana. Certainly in the 1880s and later, when the settler-controlled parliament had assumed authority once exercised by the governor, Maori leaders went to London to try to appeal to the monarch.

162. I see no grounds for Ross's suggestion that the English 'sovereignty' should have been translated as 'mana' if Maori were to grasp what they were relinquishing. As I understand it, 'mana' refers to power and authority derived ultimately from spiritual sources but more immediately through inherited rank and from demonstrated prowess in many ways (including effective leadership in war and peace). As other writers have pointed out, there were and are many ways of expressing mana. While it was appropriate in 1835 to declare, against de Thierry and other foreigners, that all aspects of mana were reserved by Maori, there was manifestly no intention whatsoever on the part of Hobson and Williams to strip it all away from Maori in 1840. On the contrary they kept saying they wanted to keep Maori society functioning under its chiefs, albeit with warfare suppressed and attention devoted to agriculture and commerce.

163. If we stand back from a semantic analysis of single words or isolated phrases and look at the Treaty texts as a whole the plain meaning seems to be that the Crown was to assume national sovereignty, the supreme authority in a nation-state which did not yet exist but which was about to be called into being in legal-constitutional terms and gradually built over succeeding years. In return Maori chiefs and people were to be guaranteed their customary authority over their lands, forests and fisheries, and the kainga therein. The essential elements of British intentions were spelt out in the Preamble to the Treaty. More specific guarantees were given in the articles that followed. The Article 2 guarantee of 'possession' (in English) and 'tino rangatiratanga'(in Maori) of lands forests and fisheries, until such time as Maori wished to sell them to the Crown, was of central importance, (and contrasts sharply with what the French proposed in their deeds for the South Island); so too was the Article 3 guarantee of the rights and privileges of British subjects - the basis of formal legal equality with the settlers.

Crown and Maori understandings of Te Tiriti

164. The debates at Waitangi leading to the signing of the Treaty on 6 February 1840, and subsequent discussions prior to Treaty signings at Mangungu, Kaitaia and elsewhere, have been recounted many times. Despite this it must be said, firstly, that the record is sketchy and incomplete; and secondly that Maori understandings at the time varied widely, and in some cases shifted only weeks or months after the signings.

At Waitangi

165. The negotiations at Waitangi on 5 and 6 February were heavily coloured by Hobson's proclamation of 30 January to the effect that all previous land claims would be investigated before any would be confirmed by the Crown and that the Crown would recognise no purchases from Maori made after the proclamation. This angered many of the Pakeha transactors, who before, during and after the Treaty negotiation sought, for their own self-interest, to sow suspicion in Maori minds that the governor was coming to reduce their freedom to sell to whom they wished, to diminish their mana and to enslave them. The French and Americans in the Bay of Islands and Hokianga knew that their transactions were also in question and the former, at least, queried the right of the British to investigate them. At least one of the chiefs stated to Hobson that Bishop Pompallier had encouraged him not to sign. Leaving aside semantic debate about the meaning of 'kawanatanga' and 'sovereignty' the chiefs could hardly have been in any doubt that a change of great significance was in train, and that it would impinge on them.

166. The most complete summaries of the speeches at Waitangi are to be found in Dame Claudia Orange's *The Treaty of Waitangi,* Chapters 3 and 4, in Dame Anne Salmond's report Document F 19 in the Muriwhenua proceedings of the Waitangi Tribunal, and in Dr Loveridge's report for these proceedings ('The Knot…', pp 196-209). Key points are as follows:

166.1 Hobson (with Williams translating) explained that since New Zealand was outside the Queen's dominions he lacked the authority to control British subjects. If the chiefs gave him that authority by signing the treaty he could offer the protection they

had asked for. Williams, explaining the treaty clause by clause, assured the chiefs that the missionaries fully approved of the treaty, which was designed to secure to the chiefs their property, rights and privileges, and that it was a fortress for them against any foreign power. Orange remarks that the rangatira would have perceived an emphasis on their being protected. But whether, as she suggests, this would have been perceived in organisational terms as 'something akin to a protectorate' is perhaps another matter.[138] The 'tino rangatiratanga' of the chiefs and people was clearly promised but there is no indication in the record of discussion of formal inclusion of the rangatira in the future administrative machinery of the Colony.

166.2 Busby and Hobson assured the chiefs that 'all lands unjustly held' would be returned to them. When questioned by the Kororareka chief Moka, Hobson stated that all claims by settlers to have purchased Maori land after the date of the Proclamation of 30 January would not be held to be lawful. But Orange doubts whether other chiefs fully grasped the meaning of 'Crown pre-emption' – a reasonable doubt, especially as settlers were soon (if they were not already) suggesting to Maori that the term meant that the Crown had only a right of first refusal.[139]

166.3 The question of 'waste' lands (ie uncultivated lands) was of great importance, both to Maori and Pakeha participants. During proceedings of the parliamentary committee on New Zealand in 1844, it was suggested to a settler witness at Waitangi, Walter Brodie, that ownership of New Zealand 'wild lands' (uncultivated lands) would pass to the Crown 'as comprised in the surrender of sovereignty'. Brodie replied, 'I should say not; Captain Hobson maintained through Mr Williams, that they acknowledged that all the lands belonged to the natives, and that they did not intend to rob them of their land, or take any, but what was purchased from

138 Orange, p 46.

139 Orange, p 47; Loveridge adds Hobson's version Rewa's speech, written down the same night and, summaries of the tenor of the chiefs' speeches by the witness Captain Robertson and by Busby. ('The Knot…', pp 198-200.

them'. Pressed for further clarification, Brodie denied that this meant only land actually used by Maori. 'I think that the natives understood that they were not considered bound to give up any waste land; they never had any idea of that.'[140] The 'forests and fisheries' assured to Maori under Article 2 was crucially important, and was understood by Maori.

166.4 A sequence of speakers at Waitangi argued against accepting the governor, alluding to their concern about ending up like the Australian Aborigines and having to 'break stones on the road'. According to Colenso's account, the Catholic chief Rewa asserted that the Maori people did not need a governor: 'this country is ours but the land is gone. Nevertheless we are the Governor – we, the chiefs of this our fathers' land'.[141] It was a powerful proto-nationalist statement.

166.5 Rewa was rebutted by a series of speakers – Hone Heke, Tamati Waka Nene, and Patuone – who argued that Maori could not manage on their own, that without a governor they would still be open to the influence of the French and unscrupulous Pakeha, that Hobson should remain as a father, a judge, a peacemaker to them.[142] Buick recounts Nene's speech as follows:

> What did we do before the *Pakeha* came? We fought, we fought continually. But now we can plant our grounds, and the *Pakeha* will bring plenty of trade to our shores. Then let us keep him here. Let us all be friends together. I am walking beside the *Pakeha.* I'll sign the *pukapuka.*[143]

Nene seemed to be indicating a concept of equality and partnership between Maori and Pakeha.

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140 Report of the 1844 Committee, BPP, 1844, 556, IUP reprint Vol 2, Minutes of Evidence, pp 50-51. Another witness to the Committee, G W Earp, regretted that the 'waste land' guarantee had ever been given to Maori, but nevertheless maintained that there was 'no question' that Maori understood that the Treaty did guarantee their 'rights and possessions' (including 'waste' lands) and were in the 'constant habit of referring to that treaty as having done so.' (p 150).

141 Orange, p 48. Loveridge has quoted two other versions of Rewa's speech (Loveridge, 'The Knot…', p 198.

142 Orange, pp 49-50.

143 Buick, p 143.

166.6 French documents give a similar indication of what Patuone intended. In July 1840 Bishop Pompallier recounted the events of February to Captain Lavaud; in turn Lavaud referred in his report to the French government to the see-sawing oratory, to the strongly anti-Treaty speech by Rewa and to the crucial intervention of Patuone, who, he wrote

> …spoke at length in favour of Mr Hobson, and explained, by bringing his two index fingers side by side, that they would be perfectly equal, and that each chief would similarly equal with Mr Hobson. Then they broke up without deciding anything.[144]

Patuone's gesture implies that he believed that at least among their own people the chiefs would be equal with the Governor. Buick's account indicates that Patuone regarded the 'father' role for the Governor as ensuring 'that the French have us not.'[145]

166.7 George Clarke, the future Chief Protector, would later testify that the chiefs had been solemnly assured by Hobson 'that they should in the fullest sense of the term be entitled to all the privileges of British subjects' (the Article 3 rights). It seems that the Governor and his associates understood this to mean that by accepting the Treaty, including Article 3, the assenting chiefs thereby agreed to *become* British subjects. The record is not clear, but this (together with acceptance of the Preamble and Article 1), is as close as the discussion came to establishing that the over-arching sovereign authority of the Crown would be introduced *by means of* the Treaty.[146]

166.8 The record is unclear on how much was said about the machinery of government in the new regime. Tino rangatiratanga was of course assured and presumably discussed. This might have included recognition of Maori tikanga apart from violent customs, and it might have included mention that officials would be

144 Quoted Low, p 192.

145 Buick, p 144.

146 See Clarke, in Buick p 347.

appointed as Protectors of Aborigines, but we cannot be sure of this.

166.9 After four or five hours of discussion, the meeting adjourned with opinion apparently divided. But that evening the rangatira gathered on the flat now occupied by Te Tii marae and continued to question Williams and other missionaries who came to join them. Williams later recalled that 'ill-dispossed Europeans' had told the chiefs that their country had gone and that they were enslaved – presumably by the Crown and Hobson. We have no contemporary record of what exactly was said that evening but Williams recalled that he and his colleagues explained the Treaty again clause by clause:

> …showing the advantage to them of being taken under the fostering care of the British Government, by which act they would become one people with the English, in the suppression of wars, and of every lawless act, under one Sovereign, and one Law, human and divine.[147]

167. Williams's explanations were presumably reassuring as regards the chiefs' fears for their lands and their liberties. It is noteworthy that Williams sought to make it clear that the Governor's authority would not apply only to Pakeha but would also be applied in support of the goal, long sought by the missionaries and, in principle at least, by Christian Maori, of ending warfare and 'other lawless acts'. This carried the possible implication, left unresolved by Busby and He Whakaputanga, that defiant and turbulent chiefs would somehow be curbed, but there is no suggestion in the record that this was explicitly discussed on 5 February. However, unless we assume that all the Maori protestations of the desire for peace made over the previous decade, to the missionaries and to Busby, were insincere, what Williams was now telling the rangatira (about ending warfare) must have been viewed as a serious request to commit themselves to working together with the Governor, to pursue civil peace.

147 Orange, p 51.

168. The chiefs agreed that night that they would sign the Treaty. Next morning they asked for the proceedings to be resumed for that purpose (i.e. on 6 February not 7 Febuary as Hobson intended). The assembled chiefs signed the Treaty on 6 February with little further serious debate.[148] However, Pompallier obtained a written assurance from Hobson that the several Christian faiths would be protected by the Crown, and Colenso secured the addition of Maori 'ritenga' to the statement. It is difficult to know just what the chiefs would have drawn from this as it was an action which took place mainly among the Europeans, albeit in their presence, and the statement – sometimes called the fourth article of the Treaty – did not appear on the handwritten copies of the Treaty or the version printed in mid-February. But it is a significant addition given the absence in the Treaty text of any explicit mention of Maori tikanga or ritenga.

169. Mr Carpenter has noted that, in his discourse with Maori in the two years preceding the signing of Te Tiriti, Williams had linked divine law with moral law and civil law, suggesting that civil magistrates, like missionaries, were God's servants.[149] In comparable vein, Dame Claudia Orange (citing the statements of Heke and Patuone) sees the chiefs' signing as something in the nature of entering into a 'covenant' with the Crown. Indeed much of the signing that followed in subsequent weeks has the quality of a sacramental act, often entered into on missionary advice and embracing Williams's concept of 'the Law' as being both human and divine.[150] Lyndsay Head too believes that the chiefs' Christian ideals were strong, and that they

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148 There is apparently a strong tradition on Te Tii marae about that evening korero. During the Waitangi Day ceremonies in 1986, a marae custodian, in casual conversation with a group including the author, pointed to a spot on the marae and said 'That's where they sat and talked and decided to sign the Treaty.'

149 Carpenter, pp 146-9.

150 Williams recalled that at Waitangi:

> We gave them but one version, explaining clause by clause, showing them the advantage to them of being taken under the fostering care of the British Government, by which they would become one people with the English, in the suppression of wars, and of every lawless act; under one Sovereign, and one Law, human and divine. (Carleton, *The Life of Henry Williams*, Vol 2, p 14).

Williams obviously did not see the need to dwell on any possible 'downside' for Maori. He and his colleagues believed that Maori rangatiratanga, and indeed the Maori people, were going to be manipulated and destroyed by the tide of unofficial colonisation, as indigenous societies had hitherto been destroyed by colonisation. *Only* by signing the Treaty and working with the missionaries and Protectors of Aborigines (whose appointment was already foreshadowed in Normanby's instructions to Hobson) would Maori have some chance at least of sharing in the benefits of the new order and of being rescued from its worst predations. Maori rangatiratanga was already under threat; inviting in the governor would protect it. *Not* to sign, and thus admit the introduction of law and government on a national scale, would leave the country still open to increasing anarchy.

saw the ture as anchored in the divine. In 1860-63, Maori leaders were still speaking of 'the Law' in similar terms, and wondering why it was the Crown that appeared to be breaking it.[151]

170. For their part, Hobson and his associates had affirmed that they wanted to bring New Zealand under British sovereignty in terms of the Preamble and Article 1 of the Treaty *in order to* support Maori rights under Article 2 and 3. The Treaty was presented as a total package. Subsequent statements by Henry Williams, and by settler witnesses to the Waitangi meeting, place much emphasis on the recognition of Maori rights to their uncultivated lands – that any land acquisitions by the Crown would be through purchase, *not* through claims to waste lands as a concomitant of Crown sovereignty. Hobson treated the Maori signatories at Waitangi (including a majority of the Confederation chiefs) as having agreed to the whole package. If he had any doubts as to Maori understanding of the 'cession' he put them aside, leaving it to the missionaries to assuage Maori doubts as well. Because of their well-based fear that uncontrolled colonisation would overwhelm the Maori people and their lands, the missionaries accepted the onus placed upon them by Hobson of reassuring Maori that the Lt-Governor was acting in good faith and that their interests would be protected, not injured, by the Crown.

Further negotiations

171. Records of meetings after 6 February are even more sketchy than those of the Waitangi negotiation but a number of points emerge:

Mangungu

172. At a very large gathering at Mungungu on the Hokianga harbour, Taonui (encouraged by the Anglo-Irishman Frederick Maning) expressed the concerns about being degraded by British rule, as the Australian Aborigines had been. Again the discussion focused heavily on the chiefs' fears for their lands and again Hobson emphasised that he needed the chiefs' approval to bring New Zealand under the Crown's authority. 'English laws can only be exercised on English soil.'[152] According to the Wesleyan missionary John

151 The view was commonly expressed by the Christian leaders of the Kingitanga such as Wiremu Tamihana Tarapipipi te Waharoa.

152 Buick, p 172.

Hobbs, Hobson repeatedly told the assembly that no Maori land would be taken forcibly by the Crown but would always be purchased if needed. After a day-long discussion the chiefs sought missionary advice and, upon receiving assurances that the Treaty would be good for Maori, some 43 chiefs signed. Two declined, and others subsequently sought to withdraw their consent.[153]

At Kaitaia

173. Orange records that at Kaitaia the night before the meeting of 28 April there was serious discussion between the paramount chief Nopera Panakareao (a signatory of He Whakaputanga), the missionary Puckey and the government officials, particularly over the word 'sovereignty'. (Presumably including 'kawanatanga' from the Maori text?) Dame Claudia concludes that 'Nopera had failed to grasp the transfer of power and authority implied in the treaty' for in his oration next day he used the much-quoted expression rendered in English as 'the shadow of the land is to the Queen, but the substance remains to us.'[154] Buick's account states that Nopera's next sentence was 'We will go to the Governor to get payment for our land as before', which suggests that transactions over land rights under the new regime was a matter of concern to the chiefs; other chiefs at Kaitaia had also spoken of the material benefits of trading with the Pakeha.[155]

174. Yet the discussion at Kaitaia was not only about land and trade but also about social stability. Referring to their repeated battles, Puhipi Ripi said:

> I am glad you are come; let our hearts be one. If quarrels happen, who will settle them? You are so far off. Murder and theft may be suppressed, but what shall be done with adultery; it is carried on privately; do not let it be said that I hide anything.
>
> Another said that it was right to punish theft. A third spoke of that 'great man who cannot be killed, that is the tongue; it often stirs up great wars.' Panakareao too spoke of the potential of Maori, as well as Pakeha, to offend. He condemned what he alleged to be a plot at Hokianga to kill Hobson, but Nopera welcomed his coming: 'We now have a helmsman for our

153 Orange, pp 65-6.

154 Orange, p 83.

155 Buick, pp 185-6.

> canoe. One said "Let me steer" and another said "Let me steer" and we never went straight.'[156]

On his urging, all chiefs present signed the Treaty. All in all, the discussion seems to indicate a commitment to civil peace and progress under the guidance of the Crown.

175. There is some evidence that the 'shadow' and 'substance' metaphor derives from Williams's explanation of Te Tiriti to Maori. In evidence to the 1844 Parliamentary Committee on New Zealand, the questions and replies between the Committee and J W Child, a Wellington settler, went as follows:

> Q. What effect is [the Treaty] considered by the natives as having had upon their titles and possessions?
>
> R. That it made very little difference; that the shadow only of the land has gone away to the Queen.
>
> Q. When you say that they consider the shadow of the land only has gone away to the Queen, is that their idea of sovereignty?
>
> R. Yes, it is the way Mr Williams interpreted the treaty to them.
>
> Q. That is the way in which Mr Williams interpreted it?
>
> R. Yes, I recollect seeing a copy of his interpretation.[157]

176. Child was not actually present at the negotiations but Mr Carpenter notes the 1860 statement of George Clarke, Snr, who was:

> The expressive language used and fully understood by both parties to the Treaty was this – that 'the *shadow* of the land was to be the Queen's' (meaning the Queen's sovereignty) and the *substance* to remain with the native Chiefs;' – their lands and their 'tino rangatiratanga' (chief chieftainship) over their own tribes.[158]

177. It is still not entirely clear whether Panakareao influenced Williams or vice versa in shaping this metaphor, nor do we know what Maori words were used, but Carpenter quotes further from Clarke's pamphlet: 'the full power of the Chiefs over their own tribes and lands was fully explained to the

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156 Ibid.

157 BPP, 1844, 556, Minutes of Evidence, p 231.

158 Carpenter, 151, citing G Clarke, *Pamphlet in Answer to Mr Busby's on the Taranaki Question and the Treaty of Waitangi by Sir William Martin (Late Chief Justice of New Zealand),* 1923 reprint, p 11.

natives'. Clarke considered that no chief would have signed 'had not Tribal rights been fully recognised and protected'.[159]

Other signings

178. Signatures to the Treaty were then obtained by Hobson's emissaries from chiefs of the western Hauraki Gulf and Waitemata, at Manukau and Waikato Heads, Turanga and the East Coast, Port Nicholson, the Manawatu coast and Wanganui, Coromandel and Otumoetai (Tauranga). Consent was not unanimous: Te Wherowhero refused to sign, as did Mananui Te Heuheu. At Coromandel, Piko declined to relinquish authority over his tribe, as did Taraia of Thames and Tupaea at Tauranga. Orange suggests, with good reason and supporting evidence, that a major attraction for the smaller tribes to associate themselves with the Crown was for security against powerful neighbouring tribes.[160] But this raised the question, put to Major Bunbury by rangatira at Otumoetai, of what protection the British could actually give against an aggressive tribe. Bunbury replied that the Crown would mediate, and seek compensation for injured parties according to Maori custom. He left without obtaining further signatures.[161] In the context of a society still in the process of abandoning tribal warfare the peaceably inclined seemed to desire a strong authority in the land.

179. On 24 June Bunbury met with Te Hapuku of Hawkes Bay, another signatory to He Whakaputanga. The chief at first refused to sign, arguing that those who did were now the Queen's menials. Bunbury gave the argument advanced at Waitangi, namely that it was not the intention of the British government to 'lower the chiefs in the estimation of their tribes' but rather that Hapuku's assent would only serve 'to increase his consequence'. Knowing of Hobson's declarations of sovereignty on 21 May, he also said that British authority was now a fait accompli and threatened to demonstrate his ship's firepower unless Maori from the locality returned a whaleboat they had seized from a Pakeha for a supposed injury (they

159 Ibid.

160 Orange, pp 68-9.

161 Orange, p 75.

complied). Still Te Hapuku did not sign until so advised by Hara, his Ngapuhi companion.[162]

180. In the South Island, Bunbury received the signatures of Tuhawaiki of Ruapuke Island, and of others at Moeraki and Cloudy Bay. On this basis, and aware that Henry Williams had secured signatures from chiefs at Queen Charlotte Sound, Bunbury, on 17 June, declared British sovereignty over the South Island by right of cession. He had already claimed Stewart Island by right of discovery on 5 June.[163]

The implications of these understandings for subsequent conduct of the Crown and Maori

181. Texts and debates are obviously integral to the understanding of meaning, but it was mainly through their actions that Crown and Maori understandings of the Treaty would really be revealed. The following comments are confined to some of the most significant actions in the months following the Treaty signings.

182. By far the most important action arising out of Hobson's understanding of the Treaty negotiations was his declaration on 21 May of British sovereignty over the North Island by right of cession – the chiefs' signatures to the Treaty he had obtained so far – and over the South Island by right of discovery. Although he was not, at that moment, relying on the Treaty as regards the South Island, he had sent Major Bunbury southward on 28 April with instructions to secure chiefs' acceptance of the Treaty if possible; because of the response of the chiefs in the north he had reason to hope that Bunbury would succeed.

183. It was Gipps in New South Wales who had sped things up as regards the South Island. Learning on 26 March that Hobson had suffered a stroke he had despatched Bunbury with 90 troops to be military commander in New Zealand, with authority to succeed Hobson if necessary. The Company settlement in Port Nicholson was already forming, and Adams notes that Gipps' accompanying despatch to Hobson expressed the hope that the New Zealand Company settlers in Port Nicholson would soon be brought

162 Orange, pp 81-2.

163 Orange, pp 78-80; Loveridge, 'The Knot…', pp 215-8.

under the government. He nevertheless 'considered that the annexation of the South Island was a more urgent matter and that an assertion of sovereignty by right of discovery would be "the most advisable course of proceeding"'. Adams considers that 'he probably feared further unauthorized colonization and land speculation there'.[164] Given the spate of land transactions during 1839, and the powerful lobby of the New South Wales entrepreneurs against his 17 January proclamation of Crown pre-emption, this was undoubtedly the case. Gipps was aware of Hobson's successful negotiations at Waitangi and Mangungu (at least) but was not prepared to risk too much delay over the collection of signatures from South Island chiefs.

184. The Company settlers in Cook Strait needed to organise some kind of local civil administration. To this end, before they left England, Colonel Wakefield and other New Zealand Company leaders had drawn up a constitution and code of laws which the Company settlers were pledged to observe. In Port Nicholson, on 2 March 1840, he organised a provisional government and persuaded the local chiefs to agree that the Company constitution and rules should have the force of law in the Wellington district. (Ngati Toa do not seem to have been involved). The flag of the United Tribes was flown on the *Tory* and on shore.[165] Colonel Wakefield's strategy was to treat the local tribes as independent of the Crown, as the basis of the Company's land claims as well as their local government. But it was a blatant manipulation of the local chiefs and a misuse of the symbol of the United Tribes, because, as Dr Loveridge has shown, the ruling committee in Port Nicholson was simultaneously arguing that the British government had recognised *not* the United Tribes but 'every petty tribe in New Zealand as an independent foreign power'.[166] Had the United Tribes had any meaningful existence in the district (which it did not) its reputation and authority would soon have been put at risk by the Company's use of its name (for example in the boundary dispute with Ngati Toa in the Hutt Valley).

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164 Adams, p 159.

165 Arthur S Thomson, *The Story of New Zealand,* Vol II, pp 28-29.

166 Loveridge, 'The Knot…', p 220, quoting the Company journal the *New Zealand Gazette*, of 18 April 1840.

185. Adams explains what followed:

> Hobson learnt of this at 8 p.m. on 21 May 1840 from Captain Pearson of the barque *Integrity*; he had been imprisoned by the new 'government' [over a dispute with another settler], and had escaped vowing vengeance on the 'democrats' as he called them. Before the night was out Hobson availed himself of the 'universal adherence of the native chiefs to the treaty of Waitangi' and, in view of the 'emergency of the case arising out of the events at Port Nicholson' proclaimed British sovereignty over the North Island. 'Similar motives and a perfect knowledge of the uncivilised state of the natives', along with Gipps's advice, enabled him to proclaim sovereignty over the South Island by right of discovery. Thus, his belief that the New Zealand Company's 'republic' was an act of 'high treason' and a usurpation of the Crown's power pushed Hobson into anticipating the complete cession of New Zealand and claiming the whole country for Britain.[167]

186. Hobson backed his proclamations with actual assertions of authority. He despatched his Chief Magistrate, Willoughby Shortland with a detachment troops to Port Nicholson.

> Shortland hauled down the flag of the United Tribes, read Hobson's proclamations of sovereignty and issued a proclamation requiring allegiance to the Crown.[168]

187. As Adams and Orange have noted, it was simply untrue to suggest that the North Island chiefs had given 'universal adherence' to the Treaty, or that South Island Maori were too 'uncivilized' to give meaningful consent to the Treaty. But imperial officials were rarely slow to find reasons for asserting their nations' authority and Hobson was no exception. His action in fact attributed huge significance to the chiefs' adherence to the Treaty thus far. His proclamations satisfied the British government. The proclamations were published in the *London Gazette* on 2 October 1840 and in international law terms British sovereignty over New Zealand was confirmed. The sequence of events reveals the crucial importance not only of the official proclamations of an accredited Crown officer but of actual assertion of

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167 Adams, p 160. Dr Loveridge's research has revealed that Hobson's hastily-drawn proclamation of 21 May did not actually mention 'discovery' but the revised and printed version of June did so. This proclamation was of course reinforced by Bunbury's 17 June proclamation of sovereignty over the South Island by right of cession. (Loveridge, 'The Knot…', p 219.)

168 Orange, p 84.

authority on the ground. So was kawanatanga expressed by Hobson even as the chiefs' acceptance of the Treaty was still being sought.

188. Meanwhile, in April, Hobson had sent Bunbury south to seek the signatures of South Island and Stewart Island chiefs and assert British sovereignty, by cession if possible, otherwise by discovery. On 5 June Bunbury claimed Stewart Island by right of discovery and on 17 June he claimed the South Island by cession. Then, as discussed in paragraphs 143-147 above, a Port-Nicholson-style scenario was effectively played out again when, on 21 July, to forestall Captain Lavaud and the French settlers then heading for Banks Peninsula, Hobson sent Captain Stanley and the *Britomart* to Banks Peninsula, with two magistrates aboard instructed to hear cases and record their proceedings. Again Hobson's and Bunbury's proclamations of sovereignty were backed by assertions of authority on the ground. All of these actions were approved in Sydney and London.

189. Britain's sovereignty over New Zealand was by now clearly established as far as British settlers and other European powers were concerned. When the New Zealand Land Claims Ordinance was passed by the New South Wales legislature in August 1840 and applications were called for, not only the British claimants but Frenchmen and Americans as well, began to register claims.[169]

190. Meanwhile Hobson and the missionaries had begun what was to prove a long and difficult campaign to counter negative portrayals of the Treaty by self-interested Pakeha and to uphold the assurances they had given during the negotiations. To this end, Hobson had a circular letter printed at Paihia, dated 27 April 1840 in te reo Maori. Unfortunately the Maori text does not seem to have survived but key passages of the English text are:

> The Governor has heard that a certain evil-disposed and otherwise mischievous Pakeha in your midst has been stirring you up so that your hearts may be turned against the

169 The New South Wales ordinance was formally disallowed in London late in 1840 because the separation of New Zealand from New South Wales in November 1840, and the agreement that month between the British government and the New Zealand Company as to how the Company claims would be dealt with. It was repeated in New Zealand in 1841 with little significant change except that the term 'leases' was now added to the kinds of transactions requiring investigation by the commissioners. This was a reflection of the fact that Maori and Pakeha were busily negotiating leases (often in extremely loose terms) in order to circumvent Crown pre-emption of purchases.

> sovereignty of the Queen…stating that: 'Your lands will be wrested from you; that your original customs will be trampled down and abolished , and that you will be generally degraded…
>
> I, the Governor declare: That the statements made to you by these evil-disposed persons are absolutely false. I now repeat to you that which I have already assured the chiefs at Waitangi and Hokianga, namely: That the Governor will ever strive to assure unto you the customs and all the possessions belonging to the Maori. The Governor will also do his utmost towards the maintenance of peace and goodwill an industry in this country. Please publish this letter to your tribe.[170]

191. The text is important for its clear inclusion of respect for Maori 'original customs' – (possibly 'ritenga' or 'tikanga' was used in the Maori text of the letter) because the only use of 'tikanga' in the Treaty was in the Article 3 guarantee to Maori of the same 'rights and privileges' as the Queen's English subjects. The other significant word is 'all' (perhaps 'katoa') in reference to Maori possessions, because the allegation was being circulated that the Crown was going to take uncultivated Maori lands by virtue of having asserted sovereignty. It took time, but witnesses to the 1844 parliamentary inquiry on New Zealand were firmly of the view that by then Maori fully understood that their rights to the uncultivated lands were respected and that it was by the Treaty that this was so.[171]

192. A third action conveying the meaning and intent of the Treaty was the appointment of Crown officials with authority in New Zealand. Dr Loveridge notes that on 8 February, Willoughby Shortland, was appointed Chief Magistrate in the Bay of Islands.[172] Shortland had arrived with Hobson, with the authority of Police Magistrate in New South Wales; he and Hobson seem to have assumed that Shortland could exercise magisterial authority almost immediately, presumably on the same basis that Hobson had already declared himself to be Lt-Governor. In April the veteran missionary George Clarke, Snr, was appointed Chief Protector of Aborigines and also commissioned as a JP. So was kawanatanga being expressed, even before Hobson's declarations of sovereignty. The fact that Clarke and so many of the Protectors were appointed from missionary

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170 Buick, p 191.

171 BPP 1844, 556, Minutes of evidence of G W Earp, (pp 150-1), J W Child (pp 231-2), Theophilus Heale, (p 222).

172 Loveridge, 'The Knot…', p 211.

families (because they had been born in New Zealand or spent many years there and spoke te reo Maori), must have conveyed to Maori a sense of continuity with the 1830s – the decade when missionaries had in fact been the principal mediators between Maori and Pakeha, and in Maori feuds as well. This would be all the more so because for some five years the Protectors' role was still largely just that - of mediators in Maori disputes and between Maori and new institutions such as the magistrates and the Land Claims Commission.

193. On the matter or enforcement of law, however, there were also the five troopers Hobson had brought with him and the 90 troops of the 80th regiment under Bunbury, who arrived in the Bay of Islands on 16 April. As early as March, Shortland and the soldiers were involved in the investigation of a dispute in Kororareka when a taua came to support one of their kin, accused of stealing a blanket. In April, Shortland called out the troops when the local chief Haratua brought a taua to the preliminary hearing of charges against one Kihi, a visitor from Tauranga who had murdered a Pakeha shepherd at the Paihia mission. But Haratua had come not to release Kihi but to kill the man who had killed the servant of 'his' Pakeha. The missionaries persuaded the taua to disperse and Kihi, who had become mortally ill with dysentery, was released to the charge of the CMS.[173] In Wellington, from June 1840 Ensign Best and his detachment were soon involved in policing altercations between settlers and Maori. They also intervened in a violent adultery dispute in which the local rangatira were threatening to take sides, disarming the protagonists and arranged payment of utu to the injured husband. Shortland now headed the local bench (after he had overturned the Company's erstwhile government and judiciary) and heard a number of cases against Maori accused of theft, as well as charges against settlers of assaulting Maori.[174] The Wellington chiefs, when consulted, were generally receptive towards the exercise of the law, since it meant that peaceful industry and commerce could continue.[175]

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173 Ward, p 47; Thompson, p 25.

174 *The Journal of Ensign Best,* ed Nancy Taylor, p 228; Ward, p 47. I have discussed other cases of cooperation of rangatira with the Protectors and magistrates in the enforcement of law, in *Show,* pp 42-60.

175 Te Puni and Wharepouri had invited the Company to Whanganui-a-Tara in 1839 partly because they brought commerce and because their presence would strengthen their position vis-à-vis their awkward allies, Ngati Toa. E J Wakefield, writing in 1845, recalled their stating that their tribe would gladly give up

Christian chiefs at Waipa, Raglan and Otawhao also showed a willingness to hand offenders over to magistrates, apparently in a genuine commitment to ending violence in their communities.[176] In general the officials sought to work with and through the rangatira, and because there were many instances where Maori were the victims of crime or fraud, not its perpetrators, there was considerable acceptance by Maori leaders of the Crown's administrative and judicial processes.[177]

194. While these pragmatic and largely sensible arrangements evolved, it was revealed in court the following year that the British were somewhat confused about exactly what authority the Treaty had given them over Maori. At the first Court of Quarter Sessions held in Wellington in October 1841 one Pakewa was charged with stealing a blanket from a settler. The chairman of the bench held that Maori were 'in truth and in fact British subjects', and thus both entitled to the protection of the law and accountable for breaches of it. Dr Evans, assigned as Pakewa's defence counsel, argued that the court had no jurisdiction because 'by the Treaty of Waitangi, all the rights of chieftainship were reserved to the New Zealanders [i.e Maori] and that amongst these rights was that of administering justice among the inhabitants of their own tribe.' The Crown Prosecutor objected that the administration of justice was not one of the traditional attributes of chieftainship, and that in any case this was not an internal dispute but one involving a settler. Next day Evans withdrew his plea saying that on closer scrutiny he did not believe the Treaty bore the construction he had placed upon it; instead he argued that the prisoner was not a British subject at all, that only an act of parliament could make him so, and that he was entitled to the rights of an alien (including a mixed jury half Maori, half settler). The Crown Prosecutor rejected this, saying that Maori became British subjects when New Zealand became a British colony.

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war and cannibalism as the missionaries had enjoined but 'deprecated the incessant praying and singing' that the missionaries required. (E J Wakefield, *Adventure in New Zealand,* vol 1, pp 72-3.

176 *Ensign Best*, pp 287, 294-6; Orange, p 107; Ward, p 54.

177 I have argued elsewhere that by the mid-1840s, when the local law had been amended to include some Maori concepts (such as levying of fines payable, as utu, to the aggrieved party) and rangatira had been appointed as Assessors and police to assist magistrates on circuit, the ture slowly gained support among Maori. Because of their interest in agriculture and commerce, and of free movement to and from the towns along new roads or along the coasts in their own schooners, there was also increasing support for the concept that individuals particularly responsible for crime should be punished rather than that whole communities become involved. (See Ward, *Shaw*, Chapters 4-9).

His view was upheld by the court and Pakewa was found guilty and sentenced to seven days hard labour.[178]

195. Orange has observed that 'Maori compliance with British law had definite limits'. She does not, I think, use 'definite' in the sense of being sharply defined. She discusses the 1842 case of Maketu, a Bay of Islands chief who murdered a Pakeha woman, her two children and the mixed-race child of the chief Rewa.[179] In this case, as in others since 1840, the rangatira accepted the arrest and trial of the offender, not necessarily because of 'in principle' acceptance of the Queen's law but because the murder of Rewa's child threatened to provoke a major inter-tribal fight, and enthusiasm for feuding had generally been diminishing among northern Maori since the late 1820s. Acknowledging the expediency of one man paying the price for crime rather than embroiling the whole community is as good a reason as any for accepting the rule of law but there was considerable revulsion among Maori over the nature of Maketu's penalty – death by public hanging.

196. While generally willing to cooperate with the authorities, when inter-tribal grievances and tensions were very strong, as in serious disputes over land and tribal boundaries, the chiefs were inclined to tell the government and soldiers, and even the missionaries, to keep out of it. Nopera too, despite his commitment to the Treaty in 1840, led Te Rarawa hapu in the fight with Ngapuhi at Oruru in 1843 over land at Mangonui, in which about 12 were killed.[180] But although the rangatira claimed that this was a wholly customary matter it was not; it arose from land sales in which over-lapping customary rights and interests had become confused. Eventually official or missionary mediation of some kind was usually accepted by the rangatira, commonly in the Native Land Court many years later.

197. The establishment of New Zealand as a Crown Colony separate from New South Wales was followed, between December 1841 and March 1842, by

178 Ward, p 46-7, citing E J Wakefield, *Adventure in New Zealand,* Vol II, pp 146-9.

179 Orange, p 107.

180 The Wellington trader G W Earp, giving evidence to the 1844 Committee on New Zealand when asked whether he thought the Governor exercised authority among Maori paraphrased their response at Oruru as 'You go home; what do you bring soldiers here for; leave us to see to our own laws and customs as you have done by the treaty; you do not stipulate any thing as to our laws and customs, and we have a right to do as we like.' (Earp, BPP 1844, 556, Minutes of Evidence p 136).

New Zealand legislation setting up the local courts and judiciary, but this did not wholly end the legal ambiguity. The Attorney-General, William Swainson, had doubts as to whether the Crown's authority extended to tribes whose rangatira had not signed the Treaty. The issue came to the forefront in 1842-3 in relation to tribal fighting in the Bay of Plenty in 1842-3. Taraia of Thames attacked Ngai Te Rangi of Tauranga over land boundaries and Ngai Te Rangi sought government protection. Taraia said that he had not signed the Treaty and that the government had no authority in Maori matters. The government, lacking sufficient force to coerce Taraia, was obliged to try mediation, 'which, fortunately, was accepted' as Orange comments.[181] A few months later, in an even more serious dispute between Ngai Te Rangi and Ngati Whakaue, Tohi Te Ururangi of Maketu also said that he had not signed and that the government had no right to interfere. The matter again 'drifted into negotiated settlement' but Swainson (supported in some degree by Chief Protector George Clarke and the Chief Justice, William Martin) submitted that unless they had given their free and intelligent consent by signing the Treaty it was doubtful if Maori should be regarded as British subjects. He was roundly rebuffed by the Colonial Office. James Stephen and Lord Stanley stated that British sovereignty over the whole of New Zealand had been publicly asserted in 1840 and accepted by all foreign states. 'All the territories and comprised within the commissions for the government of New Zealand and all persons inhabiting those territories are and must be considered as being to all intents and purposes within the dominions of the British Crown.'[182] This did not mean, however, that Maori had to be 'shackled to the yoke of Blackstone's commentaries' as Stephen put it. Non-violent Maori customs could be 'tolerated' (in issues between Maori only) according to the instructions Lord John Russell had issued to Hobson in December 1840, until by education they were brought to acceptance of the general law; it required only statutory authority in New Zealand to provide for this. Legislation did emerge in the form of the Native Exemption Ordinance 1844. This did not go as far towards recognition of Maori custom, nor formal involvement of the chiefs in the administration of law, as George

181 Orange, p 110.

182 Orange, p 111; Adams pp 220-1.

Clarke, Chief Protector, had advocated, and it was applied with mixed success. The recruitment of Maori police, working under Pakeha Inspectors was generally well received by Maori, as was the appointment of chiefs as salaried 'Assessors' under the Resident Magistrates Act 1847, to assist the magistrates on circuit among Maori communities. Provision was also made in the 1852 constitution for Native Districts to be declared where native custom could at least temporarily prevail, although none was in fact declared, Governor Grey arguing that Maori and Pakeha were already too intermingled and that the 'amalgamation' of Maori and Pakeha was proceeding well.[183] But the issue of whether Maori were British subjects had effectively been decided in the affirmative by Lord Stanley's response to Swainson. No further signatures to, or interpretations of, the Treaty were required for the purpose. For their part, whatever their reservations about its application, there was no widespread repudiation of the Queen's sovereignty by Maori. The most vigorous attempt, that of Hone Heke and Kawiti in the Bay of Islands in 1844-5, was opposed by other Ngapuhi, who supported the government in suppressing the rising and re-erecting the British flagstaff at Russell which Heke and Kawiti had repeatedly cut down. By and large Maori remained committed to the modernisation of New Zealand under the Crown – the project they had joined at Waitangi.[184]

198. As regards the pre-1840 transactions, Governor Gipps moved quickly (in May 1840) to introduce a Land Claims Ordinance in the New South Wales Legislative Council. In speaking to the Ordinance, Gipps followed Vattel's theories. He rebutted the claims of the New South Wales speculators that they had bought land from an independent Maori people and the Crown had no right to interfere. Even if Normanby had recognised Maori

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183 I have discussed these matters at length in *Show*, pp 61-91. Carpenter also refers to Clarke's plea to 'raise the influence of the chiefs' by formal recognition and payment for their services, because 'both the peace and prosperity of the country depends very much upon the exercise of their own powers in connexion with that of the Government.' (Carpenter, pp 155-6).

184 Carpenter quotes Henry Williams's statement of 1847 in reference to this:

> That the natives to whom I explained the treaty understood the nature of the same there can be no doubt; for by this explanation alone I was enabled to give considerable check to the proceedings of the natives in arms, and to suppress the irritation excited by unprincipled Europeans as to the intention of Her Majesty's Government, who had spread the report that the country was seized in Her Majesty's name. By this explanation many tribes remained neutral, and others acted with the troops as allies of the British military force. (Williams to Selwyn, 12 July 1847, cited Carpenter p 159)

sovereignty in an *unqualified* way Gipps still insisted on the Crown's right to confirm or disallow titles to land derived from tribal chiefs.

> …it is not independence which confers on any people the right of so disposing of the soil they occupy, as to give individuals not of their own tribes a property in it; it is civilization which does this, and the establishment of a government capable at once of protecting the rights of individuals, and of entering into relations with foreign powers; above all it is the establishment of law, of which property is justly said to be the creature.[185]

199. Valid pre-1840 transactions thus served to create a titles in the Crown, which could be confirmed in the original transactor or retained (as 'surplus') by the Crown for public purposes including further settlement.[186] In general the Crown held to this view in regard to pre-1840 transactions. Maori in general did not, usually holding that they had transacted with particular Pakeha or not at all. The position of W C Wentworth and other settler leaders (including Busby) was weakened by Hobson's proclamations of 21 May, and the New South Wales assembly passed the Land Claims Ordinance on 3 August.

200. But the settler press continued to maintain a campaign against the investigations and Maori concerns about the supposed loss of their rights over land persisted.[187] On the other hand, as the Land Claims Commissions began sitting and the rangatira – including the great and powerful such as Te Rauparaha – could present the facts as they saw them and get a fair hearing, Maori became more understanding of and receptive to the process. Most of the shoddy land transactions were soon withdrawn or lapsed. Others were rejected by the commissioners or, more commonly, renegotiated as to boundary and price during the proceedings. As several Tribunal reports have found, the process was not flawless, and (particularly in Te Tai Tokerau) the Crown's claim to the 'surplus' of land deemed part of a bona fide sale but not awarded to the original settler transactor was not understood by Maori or accepted by them. Nevertheless the Land Claims

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185 Gipps's speech on the second reading of the Land Claims Bill, in Gipps to Russell, 16 August 1840, BPP, Vol 3, p 197, cited Rose Daamen, 'The Crown's right of pre-emption and FitzRoy's waiver purchases', report for Rangahaua Whanui series of the Waitangi Tribunal, 1998, p 35.

186 For a full discussion of this subject, see Dr D M Loveridge, 'The New Zealand Land Claims Act of 1840', Crown Law Office, June 1993, Wai 45, doc #I6 (revised 2002).

187 Orange, pp 94-7.

Commission was one which drew many Maori into engagement with the machinery of state – of kawanatanga – and was widely perceived as at least a part-fulfilment of undertakings made by Hobson and his associates at Waitangi.

201. There was considerable resentment among Maori of the Crown's pre-emptive right of purchase, because it impinged upon their freedom to transact with whom they wished, and limited their opportunities to make money thereby. (The Crown was not a very active buyer at this stage). For this reason in 1840 a growing number of leases were concluded between Maori and settlers until they too, in 1841, were brought under the Land Claims Ordinance. Needless to say, settlers fed the Maori sense of grievance about the constraints of Crown pre-emption, until in 1844 (after discussion with the Protectors and with rangatira, and partly in an effort to assuage Hone Heke's restlessness about the restriction) Governor FitzRoy waived pre-emption. It seems that neither side regarded the terms of the Treaty as absolute.

202. It is beyond the scope of this report to pursue the details of the long struggle *within* the British government and parliament about the extent of the 'waste lands' guarantee in Te Tiriti. It is well-known that Gipps (unlike Hobson, and James Stephen) understood it to refer only to lands on which Maori villages and cultivations were located – a view supported by Lord John Russell, Secretary of State for Colonies from November 1839, and by Lord Howick (later Earl Grey), Chairman of the 1844 parliamentary committee on New Zealand. Their view, which of course was also the New Zealand Company's view, prevailed in the drafting of the 1846 constitution for New Zealand, but the understanding of the waste lands guarantee by the officials and missionaries who negotiated Te Tiriti, and by rangatira, was vigorously upheld by them and ultimately prevailed.[188]

188 For a full discussion see Adams, pp 175-209.

PART B: SPECIFIC QUESTIONS

(1) *Did the Crown and Maori consider He Whakaputanga to be a source of sovereignty?*

The Crown

203. If 'sovereignty' is defined as the authority vested in and exercised by an independent state, the evidence suggests that answer should be 'Yes, in a limited and qualified way':

203.1 British legislation of the 1820s included New Zealand among the Pacific islands 'not subject to His Majesty', William IV.

203.2 The 'King's Letter', drafted by Lord Goderich in reply to the 1831 petition of Hokianga chiefs, referred to 'the inhabitants of New Zealand' and said that Busby was being appointed as Resident in New Zealand (a consular position) to extend to 'your country' the benefits of 'friendship and alliance with Great Britain'.

203.3 Officials in New South Wales also recognised the flag of the United Tribes, selected in 1834, as defining New Zealand as an independent country, with its own shipping register.

204. Thus New Zealand and its Maori inhabitants were seen as an independent country and an independent people. Sometimes British correspondence in the 1830s also referred to New Zealand as an 'independent state', but the correspondence also makes a number of caveats. The formal response to He W[h]akaputanga in 1836 approved the Declaration as such and but promised British support and protection only as far as was 'consistent with a due regard to the just rights and to the interests of His Majesty's subjects'.

205. The British authorities in Sydney and London were well aware from Busby's reports that the rangatira had indicated that they could not control any chief who defied any laws they passed in their congress, except by making war on him; and that in consequence Busby had not called the Wakaminenga together. The Crown politicians and officials were well aware that an independent *people* or *peoples*, indeed a sovereign people, were one thing but that a functioning *nation-state* was another.

206. In the light of the evidence flowing to them, New Zealand was not a functioning nation-state and did not have full sovereignty in the sense of European nation-states.

207. That appears to be the thinking that underlay the qualification written into Normanby's instructions to Hobson in mid-1839, namely:

> I have already stated that we acknowledge New Zealand as a sovereign and independent state, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous dispersed and petty tribes, who possess few political relations to each other, and are incompetent to act or even to deliberate in concert.

208. However, Busby continued to regard the Confederation as a body through which his scheme for a British protectorate might be developed, albeit in a rather manipulative way. For its part the Colonial Office regarded their qualified recognition as binding upon the good faith of the Crown and that therefore Britain could not govern in New Zealand until the consent of the Confederation chiefs, and other chiefs, was obtained. Obtaining that consent became an important goal of the negotiation of Te Tiriti. The main effect of He Whakaputunga in terms of Crown understanding was (like the 1831 petition and the flag agreed in 1834) to prompt the British government further towards its formal position that New Zealand was an independent country, not a British one, and that therefore any assertion of British sovereignty there would need to be preceded by negotiation with Maori for their assent. In other words New Zealand could not be acquired *only* by settlement or act of state. But it was not just the Confederation with whom the Crown would negotiate: the Treaty drafting also included the 'independent chiefs who have not become members of the Confederation' ('nga Rangatira katoa hoki'). That was simply a recognition of the actualities on the ground.

209. The requirement for a cession by Maori was also qualified by the instruction to Hobson that he could declare British sovereignty over the South Island by right of discovery, and by a succession of actions taken by Gipps and Hobson before the Treaty was even debated:

209.1 In particular, the proclamation regarding land transactions that Hobson was instructed by Normanby to make immediately on his arrival in New Zealand, and the proclamations relating to Hobson's office as Lt-Governor (ie an official of the New South Wales government), not just Consul, made by Gipps on 14 January 1840 and by Hobson on 30 January 1840.

209.2 The swearing-in of Shortland as Chief Magistrate in the Bay of Islands on 8 February 1840 (after the Treaty had been signed at Waitangi).

209.3 The stationing of troops in New Zealand and the calling out of those troops in March and April 1840.

210. In these ways the Crown officials were already making inroads into the Maori sovereignty they had previously recognised in a qualified way. They recognised and indeed promise to support the tino rangatiratanga of the chiefs and people in the various tribes but the British recognition of He W[h]akaputanga as an embodiment of Maori national sovereignty had become increasingly nominal by February 1840.

Maori

211. A good number of Maori in the 1820s and 1830s understood quite a lot about what functioning states looked like. Many had travelled, and seen them, in New South Wales, England and America, and met with Tahitians and Hawai'ians on whaling ships. Very early on they discussed with missionaries the possibilities for a nation-state in New Zealand but seemed very conscious of the segmented and warring nature of their own society and referred to bringing in a 'King' or some-such from outside. Notwithstanding this difficulty they were increasingly aware of themselves as a distinct *people*, te iwi Maori, not just an agglomeration of tribes, and of New Zealand as their land. The chiefs who signed in 1835 and others in the north would no doubt have considered that through He Whakaputanga their mana and their full chieftainship ('tino rangatiratanga') over their lands and people had been recognised by their British friends and advisers, and that they need not fear any particular threat from de Thierry and the 'tribe of Marion' at that time. The recognition of their flag too, and the fact that

it was saluted by British ships and flown from New Zealand ships would have reinforced the sense that they were a free people, entitled to manage their lands and continue their engagement with the wider world as before.[189]

212. The signing of He Whakaputuanga seems to have been taken seriously by Te Hapuku in Hawkes Bay, who hesitated to sign Te Tiriti until persuaded to do so by a Ngapuhi chief who had accompanied Bunbury on his mission to obtain signatures. Similarly, Te Wherowhero's signing of He Whakaputuanga might have contributed to his refusal to sign Te Tiriti.

213. In the north, however, despite their agreeing to He W[h]akaputanga, the rangatira recognised that they were not thereby setting up a functioning state and were frank with Busby that he should not expect the Confederation to enforce its laws on a recalcitrant chief. Because Busby never called the Confederation together again there could have been no further sense that it was a functioning government.

214. He Whakaputanga would not therefore had contributed greatly to relieving the chiefs of concerns about increasing confusion and dispute over commercial transactions, land and women. Although the rangatira were generally able to manage the problems within their own communities in the short term, the deeper problems were not going away – that is the increasing numbers of Europeans ashore and the continuing sicknesses and deaths among themselves. The chiefs remained very concerned to defend their mana and rangatiratanga against mounting threats, and worked with the missionaries to try to better order their communities. This related mainly to the various church communities rather than to He W[h]akaputanga. When Hobson arrived in January 1840 the rangatira were likely to have been in a frame of mind to consider engaging with a stronger authority, provided it recognised their rights.

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189 How widely the flag was recognised among Maori is unclear: according to E J Wakefield, when the New Zealand Company expedition hoisted the New Zealand flag (the United Tribes) on the *Tory* and later on shore 'we found that natives in Cook's Strait totally unacquainted with the meaning of a flag, and unable to distinguish the ensign of New Zealand from that of France, England or America'. Wakefield, *Adventuring in New Zealand*, p 207.

(2) ***What would the Crown and Maori have understood by each of the three Articles of the Treaty?***

215. The evidence discussed earlier in relation to this theme is too complex to recapitulate or readily summarise here, and I refer readers to paragraphs 157 to 178 above, and to my response to the next question.

(3) ***Did Te Tiriti represent a meeting of minds? If so, what were the commonly held understandings and intentions?***

216. The evidence indicates that there was a meeting of minds to a considerable extent, though there was some confusion as well:

216.1 The strongest agreement was about the Crown (i.e. the Queen, the Governor she had sent, and the warships and soldiers at his disposal) keeping foreigners, especially the French, from penetrating New Zealand. Maori did not want them there and neither did the British. Nowhere is this more manifest than in the way Hobson dealt with the French colony being planted in Banks Peninsula (with a view to extension through the South Island). First, on 21 May, he declared British sovereignty over the whole country then sent a warship and magistrates to the South Island to exercise British authority on the ground. If he had not done so the South Island would very likely have come under French sovereignty. But Major Bunbury's declaration of British sovereignty over the South Island on the basis of cession was also important, because the French believed that discovery was a false basis on which to claim sovereignty: cession was another matter, at least to Captain Lavaud. In that regard Te Tiriti fulfilled exactly what the Crown and Maori wanted of it, vis-à-vis foreigners.

216.2 There was also considerable agreement between Crown and Maori about controlling the land-buyers. The rangatira were certainly very concerned that they were losing control in the welter of transactions under way, and perhaps losing the land itself. They welcomed the Governor's assurances that the pre-1840 transactions would be investigated. The intervention of the Crown into the Company transactions on either side of Cook Strait was especially important. For Colonel Wakefield's negotiations for

land in the area had been very limited. His alleged purchase of some 28 million acres on both sides of Cook Strait was meaningless and even the more specific boundaries of the Port Nicholson deed were unclear.[190] Before long they were being vigorously contested by Ngati Toa under Te Rauparaha and Te Rangihaeata. Had Hobson not asserted the Crown's authority in Cook Strait, and had the Company tried to confront Ngati Toa in the name of their local government and under the flag of the United Tribes, the outcome would very likely have been chaotic. This is the kind of thing that the missionaries and Crown officials had long been fearing as the likely outcome of unregulated land transactions. The fact that under Governors FitzRoy and Grey, it was the *Crown*, with some Te Atiawa in support, who confronted Ngati Toa in the Hutt Valley, does not invalidate the point.

216.3 Equally important was Hobson's and Williams's assurance that the Crown would not assume the 'waste lands' by virtue of its assertion of sovereignty, but would buy any land it wanted. In his later statements, Williams was particularly emphatic about these points (his view of why Te Tiriti was a 'Magna Carta' for Maori), and felt very betrayed when the 1844 parliamentary committee in England and the 1846 constitution sought to overturn the 'waste land' guarantee. He joined the successful campaign to persuade Governor Grey not to implement the 1846 provisions regarding registration of Maori lands.[191]

216.4 What Maori understood in 1840 by the Article 2 requirement that they sell (hoko) their land only to the Crown is unclear. There can be little doubt that the officials and missionaries made every effort to convey their intention that the Crown was to have a monopoly of purchase; it was, after all, a primary objective of the Crown and one already enunciated in Gipps's and Hobson's January

190 *The Wellington Tenths Report,* Waitangi Tribunal, pp 52-70.

191 Mr Carpenter has observed that in 1847 Williams reiterated to Bishop Selwyn that he saw the Treaty as confirming 'their full rights as chiefs' together with 'their rights of possession of their lands and all their other property of every kind and degree. My view of the Treaty of Waitangi is, *as it ever was*, that it was the Magna Charta of the aborigines of New Zealand' (Carpenter , p 111, citing Williams to Bishop Selwyn, 12 July 1847 (emphasis added).

proclamations. But the matter was probably confused by the fact that Maori had all along held their own conceptions of what they were conveying in their previous transactions with settlers (and 'hoko' might have had broader meanings than 'sale'); and because settlers and investors kept telling them that the Crown had no right to limit their freedom of dealing, and that if they were not to be 'slaves' of the Queen they should continue to deal as they saw fit. By mid-1840, in the face of Gipps's determination to push through the New Zealand Land Claims Ordinance and set up the Land Claims Commission, the meaning intended by the Crown (an exclusive right to purchase) would have begun to come clearer in New Zealand. This, however, did not stop Maori and Pakeha continuing to make transactions over timber and flax and leasing land. (Hence the provision on the New Zealand version of the Land Claims Ordinance, 1841, that the Commissioners were also to investigate leases). In practice neither Maori nor Pakeha acquiesced fully in the Crown monopoly and in 1844 (and 1862) Maori cooperated with the Crown in reinterpreting Article 2 to authorise direct dealing. On the other hand, Maori were by then also aware of the importance of the waste lands guarantee in the treaty. Sometimes the 'meeting of minds' took a while to evolve.

216.5 There was also agreement that the customary authority of the chiefs and tribes would be supported, and that the governor and his officials would work with Maori rather than unilaterally impose their authority. There would be some kind of partnership in the developing nation-state. This understanding was probably strongest between the mihinare Maori and the missionaries, notably Henry Williams who, in mediating Te Tiriti to Maori, was able to link the ture, which they had been teaching as a reflection of God's will, to the civil authority of the governor and his magistrates and soldiers. By and large that is how the Crown's administration actually got under way in New Zealand, with a good deal of practical collaboration between Maori, Crown officials, and the Protestant missions (some of whose members were now

appointed as Protectors). In fact the sense of 'church and state' being at one was probably much stronger in Maori minds than in the minds of some Crown officials and most settlers.

216.6 There seems to be little concern that the words of Article 3 of the Maori text are not reasonably close in meaning to those of the English text. The rangatira would probably have felt assured by the assurance of the Crown's protection and that in the eyes of the Governor they would not be deemed inferior to Pakeha or enslaved. This was no light matter, given the anxieties that were being voiced by Maori during the debates. Nor it there any reason to doubt the sincerity of the officials' intentions as far as the day to day protection of the criminal and civil law are concerned.

216.7 In this context it is wrong, I believe, to suggest that most Maori understood Te Tiriti to mean that the Crown would extend its authority only over Pakeha. The terms of Te Tiriti and the discussions about ending warfare and other violent practices could have left Maori in little doubt that the Crown's authority would extend to them as well as to Pakeha. But just *how* it was to extend to them was not so clear, either to Maori or even to some of the British officials as well. The reason is largely to be found in the dilatory way in which Colonial Office approached the 'New Zealand question' between December 1837 and April 1839, and then (when they became aware of the New Zealand Company's intentions to press ahead with its settlements around Cook Strait) the haste with which they got Hobson's mission under way. Their attention then was, first, on how to establish sovereignty over British enclaves (by attaching them to New South Wales) and then on possibly asserting sovereignty over the whole country. Both matters were resolved by mid-1839, as was the determination to investigate previous transactions for Maori land and to assert Crown pre-emption over subsequent ones. With that much decided and with the actual outcome of Hobson's mission still unknown, no-one in London gave much thought to the relationship between British law and Maori tikanga. When the

outcome of Hobson's mission *was* known in London (by September-October 1840) the officials *then* began to look more closely at the relationship between law and tikanga, between kawanatanga and rangatiratanga. The result of their reflections was embodied in a long section of Lord John Russell's instructions to Hobson in December 1840, which urged at least temporary toleration of non-violent Maori customs and discussed ways in which Maori might be brought into the new society. A general assurance about respect for tikanga was in fact conveyed to Maori in Hobson's circular letter of 27 April 1840, and presumably entered into treaty negotiations thereafter.

(4) *Would there have been any intended limitation to the "Sovereignty" or "Kawanatanga" mentioned in the first Article of Te Tiriti?*

217. In the sense that 'sovereignty' means that the Crown retained the ultimate authority in the state, subject to law, I doubt that any limitation would have been intended. However, I have not found in my reading of the evidence any intention that Te Tiriti was drafted and presented as a constitutional document or as fundamental law. Rather it was regarded as any other treaty negotiated by the British with indigenous peoples in the previous decades, that is, essentially as a political agreement or compact, agreeing upon a set of principles upon which the new nation-state would be built. For those principles to become law, most British planners would probably have assumed, they would have to be enacted in law (as some eventually were). Otherwise, first the laws of New South Wales and then (when New Zealand became a separate colony) the ordinances and laws of New Zealand would apply, as would common law. Moreover it seems to have been understood in London that such laws applied to Maori whether or not they had signed Te Tiriti (although, until it was so ruled, some senior officials in New Zealand were not sure about that).

218. This is not to say that the Crown's sovereignty was absolute; the Crown too was subject to statute law and common law. British officials in New Zealand had to have authority for the actions they took vis-à-vis citizens, whether they were Maori or Pakeha. In this context, although it was clearly a matter of policy in 1839-40, and was discussed during Treaty negotiations,

recent writings have shown that there was considerable confusion among New Zealand officials and judges about the Crown's authority to interdict 'barbarous customs' such as warfare and cannibalism.[192]

219. Nor did the Crown's sovereignty preclude the possibility that specific areas of rights might be reserved for some of the peoples within New Zealand. This includes the Article 2 rights for Maori, and the agreement reached between Crown officials and French officials at Banks Peninsula that disputes among French settlers and French sailors in port would be adjudicated by French officials and naval officers, under the over-arching sovereignty of the British Crown.

220. As regards rangatiratanga, Carpenter has written, 'Te Wiremu and his colleagues did not perceive a tension between British sovereignty and Maori chieftainship'.[193] The missionaries had for years been stressing to the rangatira that they should abandon warfare, infanticide, killing of slaves and other acts of violence. The role of the governor as an enforcer of peace was evident enough in 1840 from the presence of British soldiers and warships. Any issues beyond that must have seemed to the officials and missionaries to be some way off; meanwhile Maori society would come under missionary influence, buttressed by official support. The prohibition on violence and ultimately the governor's power to enforce it was not seen as inconsistent with rangatiratanga in tribal matters generally.

(5) ***Did Maori intend to cede or retain any sovereignty through Te Tiriti?***

221. Insofar as 'sovereignty' includes the traditional reciprocal authority of chiefs and people in their own communities, Maori certainly intended to retain it. Indeed as several sympathetic commentators said at the time, and several historians since, it is unlikely that any Maori would have signed Te Tiriti if that were not the case. Many speakers at the negotiations stressed the importance both of their mana and their land, which they appear to have seen as closely interconnected. The assurances they received from Hobson and the missionaries both as regards the pre-1840 land transactions, and

192 See Damen Ward, 'A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia', *History Compass,* 2003, AU 049, pp 1-24 and Shaunnagh Dorset, 'Sworn on the Dirt of Graves: Sovereignty, Jurisdiction and the Judicial Abrogation of 'Barbarous' Customs in New Zealand in the 1840s', *The Journal of Legal History,* Vol 30, no 2, pp 175-197.

193 Carpenter, p 115.

their future land rights (including customary rights to the 'waste lands') were crucial to their acceptance of Te Tiriti. The chiefs also seem to have considered the right to transact land to whomsoever they pleased (i.e. not just the Crown) was also an aspect of mana or rangatiratanga and many apparently resented the Crown pre-emption imposed by the second part of Article 2. This was partly because of settler incitement of course, but also derived from concern about access to the potential market (and market price) for land. Resentment at the restriction persisted through the nineteenth century and led to Maori support for relaxation of Crown pre-emption in 1844, 1862 and later.

222. The question of warfare and its causes, and the role of the Kawana in regard to them, would almost certainly have been discussed; the rangatira would have been most unlikely to have accepted that the Kawana's authority would be exercised unilaterally, but rather in cooperation with them. Several chiefs in the negotiations indicated that even if they accepted the governor they expected to have authority – essentially traditional authority it would seem - in their own communities. Indeed some chiefs did not sign Te Tiriti at all on that account. From 1840 Crown officials did in fact largely work with and through the chiefs in the administration of law, both in disputes between Maori and settlers and within Maori communities too. In fact they had little choice but to do so, because they did not command the police power to do otherwise. But the formal recognition of the chiefs' role in New Zealand's evolving law and administration was limited (as I have discussed at length elsewhere).[194]

223. In response to question 1 of this section I have argued that the evidence suggests that while Maori had a strong and growing sense of their identity as an independent people, and their authority or rangatiratanga applied to and within their various tribal communities (or their 'hapu cluster', to use Dr Angela Ballara's term); and that their reluctance to claim or assert authority over and above that level frustrated the hopes of the missionaries and Busby to foster a wider, perhaps New Zealand-wide Maori authority. This being so, the Kawanatanga o te Kuini introduced by Te Tiriti and

194 Ward, *A Show of Justice*.

vested in the governor and his officials was a new institution in the land, intended to fill a gap and meet external pressures which could not now be allowed to intrude further without serious risk of conflict and anarchy. Thus it was not so much a matter of the chiefs ceding or retaining that national authority, but accepting it into New Zealand and among them as a new thing. In this context Mr Samuel Parkinson makes a pertinent point suggesting that the phrase in the Maori text of the Preamble, 'Kia w[h]akaetia e nga Rangatira Maori te Kawanatanga o te Kuini' ('that the chiefs may *recognise* [or 'agree to'?] Her Majesty's sovereign authority' in the English text), is more apt than the use of 'cede' in Article 1, or 'tuku rawa atu…te Kawanatanga' in the Maori text. There was thus no *necessary* conflict between Articles 1 and 2, although defining and mediating their respective spheres was not going to be easy.

(6) *Did Crown officials or missionaries deceive Maori in the drafting and/or signing of Te Tiriti?*

224. I have argued in paragraphs 157-163 above that there was no deception in the drafting of Te Tiriti. On the contrary I accept the evidence that Henry Williams in particular, a patently honest man with Maori interests very much at heart before, during and after the Treaty negotiations, did his best to render in te reo Maori the terms being negotiated. The charges that Williams was not translating accurately in the discussion of the Treaty on 5 February were almost certainly overblown and owed much to the vested interests of the complainants. Colenso thought that Williams was simply omitting some repetition and oratorical flourish, although the charges were believed by Pompallier.[195] The sectarian allegiances of both men may have influenced them but Colenso seems to have had a genuine concern (which he expressed to Hobson on 6 February) that the rangatira had not in fact grasped the full meaning of Te Tiriti. This charge would be more worrying if the discourse had been confined to the formal meetings attended by Hobson, but there was also the most important discussion among the rangatira on the evening of 5 February, which Williams and other missionaries attended, explaining the terms of the Treaty again and discussing them with the chiefs. We do not know for certain that Colenso

195 Low, p 196.

attended that korero and what points in particular he thought the chiefs had not understood (It is regrettable that Hobson cut him short on 6 February).

225. Dame Anne Salmond has written:

> What is not clear in the Treaty text was in what precise sphere ture and kai-wakarite would be authorised to operate and what would be the precise source of their authority… [196]

There was clearly some discussion about violent crimes such as murder and rape, and about theft and adultery as sources of dispute, and seemingly agreement that they should, over time, be brought under control. There was probably only limited discussion and little realisation of the extent to which common law and the state's statutory authority would overtake custom and thereby diminish rangatiratanga. For this reason I wrote in 1974 that Maori were misled in the Treaty negotiations.[197]

226. However, that statement does not fairly reflect the historical context. Certainly there was no intention to mislead. Rather there was an assumption among the officials and missionaries that Christianity would continue to be adopted by Maori, and with it the ture which was the law of god as well as of the state. Over time tikanga, in the hands of Christian chiefs, would be ameliorated rather than simply over-ruled. In consequence of this expectation, Hobson's missionary advisers would probably have hoped that there would be no sharp conflict between the state's authority and the modified tikanga of Maori Christianity.

227. Secondly, given the exigencies obtaining *in* 1840, and the sense of urgency that – quite justifiably – operated in the Colonial Office and in the minds of Hobson and his missionary advisers, it is understandable that they would not enter upon full discussion about the extent of the state's future authority. It was simply pragmatic to negotiate the right to introduce the Crown's authority in the first instance and get to grips with the land question. Moreover, as soon as the Colonial Office knew (by October 1840) that Hobson's primary mission had been successful, and that New Zealand would be under the Crown's sovereignty, the officials and their

196 Salmond, Document F-19 in Muriwhenua , p 14 [**check**].

197 Ward, *Show,* p 44.

ministers set themselves to considering what should be the future relationship between Maori and settlers, and between British law and Maori tikanga. Russell's instructions to Hobson of December 1840 are quite elaborate on these matters, diminishing the gap to which Dame Anne Salmond refers.

228. Thirdly, judgements about 1840 tend to be coloured by hindsight. Only some years after 1840, when it became apparent that the Crown was making only limited efforts to bring Maori into the machinery of state, and in the 1850s began to hand authority over to settler assemblies, did the huge shift of power that 1840 introduced became apparent. In the *early* 1840s the Crown Colony administration, the local courts, and the Supreme Court applying common law principles, were reasonably protective of Maori personal liberties and (to a lesser extent) of their property rights, as promised in Te Tiriti.

229. There does not seem to have been any cloaking of the Crown's intentions to govern everyone within its new jurisdiction – British, French, Americans and Maori. The representatives of the various European nationalities were well aware of it: they were going to have their land claims investigated by a Land Claims Commission set up under New South Wales law so they grumbled and protested about it and tried to poison Maori minds against Hobson, Williams and Te Tiriti. If Article 2 needed any further explanation, their complaining must have made it clear to Maori that they too would come under the governor's over-arching authority to the extent that they would no longer be free to sell their land to whomsoever they wished.

230. The officials and missionaries did try to make it clear that the Crown's authority extended over Maori, particularly as far as tribal war and customs involving violence were concerned. It is difficult to believe that Maori would *not* have apprehended that, because the missionaries had for years been preaching against warfare, and because several chiefs at Waitangi expressed concern about how the governor's authority (and his troops and warships) would be used against them. However, the slender evidence we have suggests that the chiefs were given assurances that the governor would

exercise his authority in cooperation with them, rather than unilaterally. That seems to be the meaning of Patuone's symbolism of holding up his two index fingers in parallel, and of Panakareao's reference to the Governor as a 'helmsman'. The chiefs would almost certainly have assumed from the discussions that the British did not intend to diminish their authority *in their own communities* and that there would be something of a partnership between themselves and the Crown officials and missionaries in regulating social order in their respective tribes.

231. Whether, despite their efforts, the officials and missionaries *did* succeed in conveying the meanings of Te Tiriti is another matter. Clearly there was a rapidly growing awareness among Maori of what the Crown's authority entailed. This arose from such matters as customs duties levied by the Crown, prohibitions on cutting kauri and moving the capital from Russell to Auckland - matters which annoyed Tamati Waka Nene and other northern rangatira. Nopera Panakareao's reversal in 1841 of his 1840 statement about the 'shadow' and the 'substance' of the land illustrates the point.

232. There was some confusion about the investigation of pre-1840 land transactions. This partly arose from the Crown's retention of 'surplus' land – land considered by the Land Claims Commissioners to have been alienated in a *bona fide* sale but not granted to the original settler transactor. But that was a difficult concept to have conveyed at the Treaty negotiations and early 1840 was probably too soon for Hobson or Williams or Clarke to have understood its future significance. Hobson's statements about returning to Maori land *not* equitably purchased were much more relevant in early 1840. Even as the Treaty was being negotiated in New Zealand, Gipps in Sydney was drafting the bill that set up the Land Claims Commission, and was confronting the powerful lobby by W.C. Wentworth and the New South Wales speculators who argued that they had transacted with independent Maori and that Britain had no right to retrospectively investigate the transactions. Gipps prevailed, and whatever its shortcomings, the setting up of the Land Claims Commission was a triumph for the good intentions of the Crown. Most of the flimsy claims based on shoddy deeds melted like snowflakes in the sunshine when the Pakeha transactors realised that they had to support their claims with

evidence, including evidence of Maori consent. Many speculators either did not lodge claims or did not follow them up when hearings commenced. The effect was almost more successful than the Crown wished or expected because with the shrinking of the claIms so too shrank the Crown surplus to allocate to future settlement. In 1841-2, when it began to emerge how little land Maori considered they had actually sold (in comparison with the vast areas settlers and speculators claimed to have bought) Crown officials, including Gipps and then FitzRoy began to loosen the requirements for a bona fide sale and to award larger grants to settlers (including missionaries). The shortcomings in the handling of the 'Old Land Claims' are regrettable and have been rightly criticised by the Waitangi Tribunal, but they should not be read backwards as indicating deceptive conduct in the negotiation of Te Tiriti.

Concluding comment: the need for haste

233. It has been the overarching argument of this paper that British governments were reluctant to assert formal sovereignty over New Zealand and assume the responsibilities of governing it. But global economic and demographic processes brought colonisation to the Pacific anyway, and the British government eventually considered that it had inescapable responsibilities in the region, both to its own subjects and to indigenous peoples there. Te Tiriti was part of its response, but only one part. Various executive actions were already in train before 1840 and these would intensify in the region throughout the century. Protection of British interests in Australia, and checking the ambitions of France and Germany, played an increasing part.

234. It is therefore likely that there would have been some kind of British intervention in New Zealand in 1840. Hobson had made clear from early 1839 his desire to bring the whole of New Zealand under British sovereignty. What might have been his likely course of action had Maori at Waitangi and elsewhere declined to sign the Treaty? The probable answer is that he would have returned to Sydney to seek further instructions from Gipps. Given the number and scale of land transactions in the South Island by the whalers and the speculators such as W.C. Wentworth, it iis quite possible that Gipps and Hobson would have agreed that Hobson should exercise the discretion given him to declare sovereignty over the South

Island and Stewart Island by right of discovery. That would have been perfectly consistent with Normanby's final instruction to Hobson on 15 August 1839.[198] Indeed, if they had learned of the French expedition heading towards Akaroa it is almost certain they would have done so. It is also possible that Hobson would have taken his warship to Port Nicholson and declared sovereignty over the area claimed to have been purchased by the New Zealand Company, on the basis that purchases by private British citizens served to create a title in the Crown, and that Maori had in effect relinquished their sovereignty by their transaction with the Company.[199] How this action would have been regarded in London is difficult to gauge.

235. In this context it needs to be noted that had not Hobson reacted promptly when he did realise that the Captain Lavaud was on his way to Banks Peninsula to support the French settlers about to land there, the South Island would very likely have become French. Langlois and Belligny were determined on that, and Pompallier had stiffened Lavaud to the same resolve, notwithstanding Hobson's proclamation of sovereignty based on discovery. With a French settlement actually established, the French government would very likely have supported it because they badly wanted a naval base in the south Pacific. Although the Colonial Office was not fully aware of it, there was a very short window of opportunity to secure southern New Zealand for Britain. The actions of British settlers also gave good reason for haste. The despatch of the Company ships was a strong impetus but perhaps even stronger was the knowledge of the officials in Sydney (Gipps and his colleagues, and Hobson when he arrived) of the scale and militancy of settlement from New South Wales. Wentworth, Macarthur and their associates were aggressive and demanding. So were Colonel Wakefield and his colleagues when they arrived in Port Nicholson. It is not mere hindsight to argue that by the late 1830s New Zealand was already caught in a vast tide of expanding European empire, whose leaders could be very ruthless indeed when it considered their interests to be at

198 See above paragraph 125.

199 Professor Giselle Byrnes has contributed a chapter entitled 'What if the Treaty had not been signed on 6 February 1840', in Stephen Levine, *New Zealand as it might have been,'* Victoria University Press, Wellington, 2006. In it she suggests, in answer to the hypothetical question, that it is 'highly probable' that 'British colonisation would have proceeded over those areas where British settlers were resident with Maori retaining their autonomy in other areas'. She adds 'in the absence of a treaty Maori would have had no special rights beyond that of common law rights'. (Levine p 30).

issue. Already the Wakefield settlers in the colony of South Australia had brushed aside the efforts of the British government to secure the recognition of Aboriginal land rights. The South Australian commissioners simply said that they could not find any proprietary rights to recognise. The humanitarians in England (including the Aborigines Protection Society and its adherents such as Lord Glenelg and James Stephen) were angry and upset that their wishes had been frustrated and were determined to do a better job of protecting indigenous rights in the next Wakefield venture.[200] That is why, even before the Treaty was negotiated, steps were taken by Gipps and Hobson to control the land trade and investigate existing transactions.

236. Nevertheless, considerations of haste aside, James Stephen was entitled to feel pleased (when Hobson's reports of the meetings in Waitangi, Mangungu and Kaitaia, reached London), that the Crown had taken the time to draft and negotiate Te Tiriti. It was, as he said, a better approach to establishing British sovereignty than assertions based on discovery or on Vattel's theory that tribal peoples did not really have sovereign rights and property rights that could be asserted against 'civilised' nations.[201] From a New Zealand perspective, the drafting and negotiation of Te Tiriti recognised significant Maori rights, notably possession of their 'forests and fisheries' of Article 2, and access to the due processes of law. The fact that the Crown *subsequently* began to breach Treaty principles, particularly in its methods of acquiring Maori land, is another matter.

200 See Henry Reynolds, *The Law of the Land*, pp 103-148.

201 Stephen, minute of 9 July 1840, quoted Loveridge, '*The Knot* ...' pp 211-2.

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