OFFICIAL

Wai1040, #A19(a)

IN THE WAITANGI TRIBUNAL

IN THE MATTER OF THE TREATY OF WAITANGI ACT 1975

AND

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

# SUMMARY/RESPONSE OF PROFESSOR ALAN WARD

**Dated 13 September 2010**

RECEIVED
Waitangi Tribunal
13 SEP 2010
Ministry of Justice
WELLINGTON

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## Introduction

1. This report comprises:

   1.1 a preface (paragraphs 3-5);

   1.2 a summary of my brief of evidence of 17 December 2009, including additional research that I have carried out since then and which I set out in the appendices to this report (paragraphs 6-36); and

   1.3 a response to certain points raised by others in this inquiry (paragraphs 37-113).

2. This report also contains four appendices:

   2.1 Appendix A – being a summary of additional research that I have completed since my first report of December 2009;

   2.2 Appendix B – being relevant extracts from CMS correspondence

   2.3 Appendix C – being relevant extracts from Hugh Carleton's biography of Henry Williams; and

   2.4 Appendix D – a bibliography.

## Preface

3. My name is Alan Ward, a third-generation New Zealander of English and Welsh descent. I was born 75 years ago in inland Turanganui-a-Kiwa (Poverty Bay). My mother's father is buried in that land; my mother's mother is buried in that land; one of my brothers is buried in that land, as are many uncles, aunts and cousins. I was raised in that land and educated at Te Karaka District High School (now Waikohu College) and Gisborne High School before proceeding to Victoria University of Wellington.

4. When I began post-graduate studies my Masters thesis was a study of the East Coast Maori Trust lands and the early history of the Mangatu blocks. In my doctoral dissertation at the Australian National University, I broadened this research into a more general study of the intersection of British institutions with Maori society from 1840 to 1893, a work which was

published in 1973 as the book *A Show of Justice*. Since then I have published extensively on the interaction of European and Oceanic societies, based in part on my work for the governments of Papua New Guinea and Vanuatu, and with French researchers in New Caledonia. In 1987 I was asked by Chief Judge Durie (now Sir Edward Durie) to work for the Waitangi Tribunal and have done so intermittently ever since, while holding the position of Professor of History (thence Emeritus Professor) at the University of Newcastle, New South Wales. Largely on account of this work, I was made an Officer of the New Zealand Order of Merit in 2009 and awarded an Honorary Doctorate of Laws by Victoria University of Wellington.

5. In numerous publications I have been very critical of the Crown for incompetence, and worse, in the way the introduced law affected Maori people and their interests. Yet I also believe that 'the rule of law', or 'civil government', properly understood and properly administered, offers the best hope for the liberty and dignity of individuals and of communities that humankind has devised. Consequently I believe that Te Tiriti/The Treaty of 1840 between rangatira and agents of the Crown – an agreement through which the rule of law was advanced in these islands – should be respected and upheld. For this reason I have agreed to present evidence at the request of the Crown in these proceedings.

**Summary of evidence**

6. The following is a summary of my brief of evidence of 17 December 2009, Wai 1040, doc #A19. This summary incorporates additional research carried out since my first report, which is set out more fully in the appendices to this report. The additional research that I undertook has not altered any of my conclusions.

*British attitudes to trade and empire*

7. The establishment of British authority in New Zealand occurred in the context of the massive expansion of industrial Europe, which saw virtually the entirety of the Pacific and Africa, and much of Asia, come under the sway of European empire within a hundred years. New Zealand, with its attractive harbours and resources, could not escape the expansion of European capital, and European entrepreneurs, adventurers and settlers.

Governments tended to follow, as much as lead, in this expansion, and were often able to exert only minimal influence on events.

8. In the late eighteenth century, Great Britain suffered huge losses of blood and treasure from the revolt of her American colonies and the United States War of Independence. In the aftermath, British governments saw little point in fostering colonisation in far-flung places, or fighting expensive wars against indigenous peoples and European rivals, if the colonists were sooner or later, like the Americans, going to assert economic and political independence. In short, British governments were reluctant to assume new imperial responsibilities. This is evident in Britain's very limited responses to the problems emerging in New Zealand between Maori and British settlers and entrepreneurs in the early nineteenth century. Even when James Busby was appointed as British Resident in 1833 he was given neither a warship nor soldiers in support, although both were originally contemplated. Protection of trade, however, was another matter. This was the era of Adam Smith's *The Wealth of Nations* (1776) and 'free trade'. Indeed the governments of all the great trading nations, notably Britain, France and the USA, had strategic motives, including the search for naval bases in the Pacific, for the protection of trade routes and the private enterprise of their nationals. Britain and France were strong rivals in this regard, including in New Zealand.

9. The 'free trade' movement in Britain coincided with the religious revival associated with leaders such as John Wesley, the evangelical movement within the Anglican Church, the anti-slavery movement led in the British parliament by William Wilberforce and the vigorous activity of missionary societies in the Pacific and Africa.[1] It entirely suited British governments to encourage British missionaries to foster and support the indigenous monarchies emerging in Tahiti, Hawai'i and Tonga, and hopefully too a viable Maori government in New Zealand. While there was reasonable stability in these islands, and no evident threat from other European

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1 The leading groups in Australia and the Pacific at that time were the Church Missionary Society (CMS), Anglican; the London Missionary Society (LMS), Congregational; and the Wesleyan Missionary Society (WMS), Methodist. The LMS missionaries, although separated in England from the parent Anglican church, out in the Pacific came for some years under the supervision of the Reverend Samuel Marsden, official Chaplain to the New South Wales colony. See Niel Gunson, *Messengers of Grace: Evangelical Missionaries in the South Seas 1797-1860*, Melbourne, 1978.

powers, periodic visits by British warships was considered the only serious official intervention necessary.

10. But this situation, so convenient to British governments, could not last, firstly because private entrepreneurs increasingly brought instability to all the Pacific islands. And secondly because the French – that is the Restoration monarchy of Louis XVIII and Charles X (1815-30), and the Orleans monarchy of Louis-Phillipe (1830-48) – set about promoting French trade and French naval power in the southern oceans. In pursuit of this policy French governments deliberately entered into alliance with the Catholic church and French missionary societies, with the expectation that French Catholic evangelism would facilitate the resurgence of French empire. The alliance between the French government, the French navy and the Catholic church, is well-established in the published histories of the Pacific.[2] (See also below Appendix C, no. 4).

*The situation in New Zealand*

11. As is also well established in published histories, Maori engaged eagerly with expanding European commerce, acquiring European artefacts and European skills. After Hongi Hika had accompanied the missionary Thomas Kendall to England (where he assisted the Cambridge academic, Professor Lee, to create a written orthography for te reo Maori) and the Anglican mission began publishing works in Maori, the people quickly acquired literacy. But Maori attempts to make a measured engagement with the wider world were compromised by unintended consequences, notably the wider effects of musket warfare and (most seriously) the heavy loss of life from newly-introduced diseases to which they had no natural immunity. Partly to try to grapple with these problems, and partly out of intellectual adventurousness, Maori leaders began to explore Christian beliefs and secular European ideas and institutions.

12. Dr Manuka Henare has noted Samuel Marsden's report of interest among some Hauraki Maori in the introduction of some form of 'regular government' under the protection of the British Crown, both to protect

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2 See W.P.Morrell, *Britain and the Pacific Islands*, Oxford, 1960, especially Chapter IV, 'The impact of France and the beginnings of political intervention in Polynesia', pp 63-88; Colin Newbury, *Tahiti Nui; Change and Survival in French Polynesia 1767-1945*, Honolulu, 1980.

them from the aggression of larger tribes and to enable them to 'reap the fruits of their industry'.[3] From his assumption of control of the CMS mission in New Zealand in 1823, Henry Williams organised the missionaries in daily study of te reo Maori, as their foundation for promoting Christian evangelism. With his brother William, and William Yate, he arranged for the printing in Sydney of Maori texts of extracts from the Bible, hymns, prayers and catechisms, and primers and catechisms for teaching Maori students literacy in mission schools.[4] From about 1828 missionaries, notably Henry Williams, began to be accepted as mediators and peacemakers in tribal disputes and fighting. Their discourse included discussion of the *ture,* a term derived from Tahiti where in 1819 King Pomare had introduced a code of laws (with appropriate penalties), under the aegis of LMS missionaries (who also came under the supervision of Samuel Marsden as did the Anglican missionaries in New Zealand). The prominent Bay of Islands rangatira Whetoi took the name Pomare, on learning from Marsden how the Tahitian monarch had adopted Christian concepts as the basis of his state.[5] In the 1830s *mihinare* Maori communities sought missionary help in framing codes of law to deal with problems such as disputes over adultery, damage to crops by stock, and relations with non-Christian neighbours. There was increasing talk of the goal of peace. (For further discussion of the *ture* see below para 53).

13. Marsden had hoped to promote in New Zealand an independent unified Christian Polynesian kingdom along the lines of the Tahitian and Hawai'an monarchies but Maori society had retained its emphasis on waka, iwi and hapu rather than coming under the authority of one dominant lineage, as had the smaller Polynesian islands. Nevertheless, Maori were increasingly thinking of themselves as a distinct people, a 'nation' in that sense. In the 1830s they sought, from the British Crown, recognition of their independence and protection from other powers such as the French and

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3 Brief of Evidence of Manuka Arnold Henare, Wai 1040, doc #B3, p 27, para 132, citing Marsden in J R Elder, *The Letters and Journals of Samuel Marsden,1765-1838,* pp 46, 335.

4 See Introduction by Professor Dame Judith Binney to William Yate, *An Account of New Zealand,* 1970 reprint of lithograph of 1835, pp xiv-xv.

5 See articles by Dr Angela Ballara, 'Pomare I' and 'Pomare II', *DNZB,* Volume One, pp 345-7. The capacity of Polynesian chiefs to lead dynamic changes was even more dramatically illustrated when Kamehameha I of Hawai'i in 1819 deliberately broke *kapu* and overthrew many of the customs which underlay the authority of the Hawaiian aristocracy. He then invited missionaries into his kingdom to help him organise the new modern state.

from lawless Europeans in New Zealand. Steps in that direction included the 1831 petition from northern rangatira to William IV, the acceptance of James Busby in a consular role (as a *kaiwhakarite)* and the selection in 1834 of a flag for ships built in New Zealand and registered as such in Sydney. As noted in paragraph 8, the British government had no desire to promote formal colonisation in New Zealand or even to incur significant expense in supporting Busby's authority; but it deplored lawless actions by British subjects (such as the involvement of Captain Stewart and the *Elizabeth* in the Ngati Toa raid on Ngai Tahu in 1830). Consequently it approved the appointment of Busby as a consular official (but not as a magistrate) and the 1834 flag was recognised on New Zealand ships.[6]

14. Busby was eager to help Maori not only to achieve recognition as a nation but also to develop the effective machinery of a nation-state. He had bought timber for a parliament house and had hoped that the selection of the flag would inaugurate some kind of on-going congress of rangatira, reaching southward of Tai Tokerau and holding a monopoly of law-making authority. He carried this project forward in October 1835 when some 34 northern rangatira accepted his invitation to rebut the pretentious claims of 'Baron' Charles de Thierry. After two days of discussion the rangatira signed 'He wakaputanga o te Rangatiratanga o Nu Tirene' (drafted by Busby and translated by Henry Williams). The document in English declared New Zealand to be an independent state, with 'sovereign power and authority' to reside exclusively in the rangatira 'in their collective capacity', designated the Confederation of United Tribes of New Zealand. The chiefs were to meet in annual congress at Waitangi and frame laws for the 'dispensation of justice, the preservation of peace and good order, and the regulation of trade'. Southern tribes were invited to 'lay aside their private animosities' and support the welfare and safety of 'our common country' by joining the confederation. The King of England was entreated to continue to be 'the parent of their infant State' and a protector from all attempts upon its independence. As Dr Henare and Mr Samuel Carpenter have pointed out, this was a radical set of goals, especially insofar as it aimed to develop machinery for a functioning state, potentially embracing all iwi, and

6 Claudia Orange, *The Treaty of Waitangi,* Wellington, 1987, pp 12, 20.

requiring individual rangatira and tribes to accept the over-arching authority of the Confederation of United Tribes and its laws.

*He Whakaputanga/The Declaration*

15. Crown Counsel have asked me whether the Crown and Maori considered He Whakaputanga to be 'a source of sovereignty'. The Tribunal's statement of issues asks 'what was the nature of the relationship and mutual commitments' Maori were assenting to in signing He Whakaputanga, how did the Crown understand He Whakaputanga and what were its effects at 1835? A number of comments can be made in the light of such evidence as is available:

15.1 In the first place the English word 'sovereignty' is complex and capable of many and varied definitions, which leads to confusion.[7] I submit that a fundamentally important distinction must be drawn between 'sovereignty' in a legal-constitutional sense, meaning the supreme authority to make and administer laws in an independent nation-state (on the one hand); and, on the other hand, the control of the *economic* resources of a people or nation. It is now generally recognised that in a *pre*-colonial situation, and a *post*-colonial situation (as well as in a formal colony) the wealth of a nation or its people can be controlled by outsiders, even when that nation or people is formally or politically independent. In essence, it was that outside control that was overtaking Maori New Zealand in the 1830s, and He Whakaputanga and the Treaty were both serious and thoughtful attempts by Maori leaders and their British advisers to try to meet the situation. It is therefore necessary to try to see what in practice the parties made of He Whakaputanga at the time, in that historical context.

15.2 As regards Maori understandings, the chiefs who discussed and signed He Whakaputanga would presumably have felt that their

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7 See, e.g., Peter Cleave, *The Sovereignty Game: Power and Knowledge and Reading the Treaty*, Wellington, 1958. In reviewing this book Andrew Sharp expressed the view that Cleave used the term 'sovereignty' in so many contexts and in so many senses as to render it virtually meaningless. (See *NZJH*, Vol 24, no. 1, April 1990, pp 77-8). By way of further illustration, the Republic of China was formally sovereign and independent in the first half of the twentieth century; in fact much of its economy and territory was controlled by imperial powers. When the Japanese invaded Manchuria in 1931 they concluded a treaty with local authorities which nominally recognised the sovereignty of what they called 'Manchukuo', with a puppet emperor. In fact Manchukuo was under Japanese military rule until 1945.

mana and tino rangatiratanga over their respective lands and peoples had been recognised by their British friends and advisers and that any particular threat from de Thierry and the 'tribe of Marion' had been averted. The Declaration, and the recognition of their flag, would have reinforced the sense that they were a free and independent people, entitled to manage their lands and continue their engagement with the wider world as before.

15.3 They might also have regarded He Whakaputanga as confirming their *aspiration* to develop a functioning nation-state, but they did not seem to be under any illusion that in making the agreement they had thereby actually established one. In relation to the proposed monopoly of law-making by the Confederation, rangatira themselves frankly recognised the difficulty of enforcing laws. Busby recorded a year later:

> The Chiefs had, however, sagacity enough to see that any resolutions they might agree to laws they might enact would tend nothing to the establishment of order among 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.[8]

Presumably because he was well aware of this, Busby seems not to have formally convened the Congress to frame or enforce laws (although, as Dr Henare suggests, it is likely that groups of northern rangatira continued to meet with Busby informally to discuss problems as before).[9]

15.4 As Dr Henare also states, the agreement would have helped sustain, among those who had signed it, the ambition to see 'civil government' established in New Zealand.[10] The fact that Busby continued to seek signatures to He Whakaputanga would have

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8 Dr Donald 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, citing draft letter from Busby to the Earl of Haddington, 28 October 1836.

9 Henare, Brief of Evidence, para 346.

10 Ibid, para 353

contributed to this. On the other hand the fact that Busby did not formally call the Confederation together to draft laws would have inhibited any perception of He Whakaputanga as having inaugurated a functioning nation-state. The shaping of the *ture* seems to have remained largely an enterprise of *mihinare* Maori and their mentors, mainly within particular Christian communities through their *runanga* and *komiti*.

15.5 As for the Crown's understandings, Mr Carpenter's evidence shows that Busby, agent of the Crown, only three months after the signing of He Whakaputanga, in the aftermath of a clash between Te Hikatu hapu and a hapu from Whananaki, wrote to the Secretary of State for Colonies lamenting the difficulty of changing 'the savage of yesterday to the Legislator of today' or of bringing efficient government into being among a people 'whose minds have not yet conceived the idea of authority and subordination'. Busby suggested, however, that Maori would allow themselves to be led towards that goal by a 'civilized state', and 'if protected in the enjoyment of their landed property, and their personal rights would…gladly become the subjects of the King of England'.[11] Thus the essence of the Treaty of Waitangi was foreshadowed. In Sydney, Governor Bourke was supportive of the efforts of the Assistant-Resident, McDonnell at Hokianga, to control the liquor trade and was therefore irritated by Busby's effort to secure a monopoly of law-making for the Confederation. Bourke's successor, George Gipps, was quite disparaging of Busby's efforts, asserting (wrongly) that he had exceeded his instructions.[12]

15.6 If 'sovereignty' is defined as the authority vested in and exercised by an independent state, the British authorities in London did recognise He Whakaputanga as a source at least of *potential* Maori sovereignty. As noted in paragraph 8 above, British governments (in the aftermath of the American War of Independence) were cautious about assuming the responsibility of formal empire, lest

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11 Samuel D Carpenter, 'Te Wiremu, Te Puhipi. He Wakaputanga me te Tiriti', Wai 1040, document #A17, October 2009, pp 63-5, quoting Busby to the Colonial Secretary, 18 January 1836.

Britain be drawn into new conflicts, costly in blood and treasure. Moreover, the evangelical movement was becoming influential in governing circles. Under the leadership of William Wilberforce it had succeeded in 1833 in securing the abolition of slavery in the British empire. Fowell Buxton, Wilberforce's successor in the House of Commons, then reorganised the movement as the Aborigines Protection Society, aiming to protect the rights of indigenous peoples in Africa and the Pacific, where British and other entrepreneurs were active. Idealistic motives, as well as pragmatic considerations, therefore led British governments towards support for indigenous authorities, where they were viable, rather than towards hurried intrusion of formal British authority. In this context therefore, the formal British response to He Whakaputanga in 1836 was to note the Declaration, apparently with approval, and promise British support and protection so far as was 'consistent with a due regard to the just rights and interests of His Majesty's subjects'.[13]

15.7 However, officials and ministers in charge of the Colonial Office soon became aware from Busby's reports that he had not formally convened the Wakaminenga in a legislative capacity or try to use it to compel obedience to law. They had recognised Maori as an independent people but remained sceptical that New Zealand was a functioning nation-state, with a viable national government. Consequently there were doubts that Maori New Zealand qualified for full sovereignty in the sense of European nation-states.

15.8 It was this mix of respect for Maori independence and scepticism as to whether they could govern New Zealand effectively in the face of new threats that underlay the drafting of Normanby's instructions to Hobson in 1839, and ultimately of the Treaty. Key passages in the instructions (essentially James Stephens's work) include:

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12 T Lindsay Buick, *The Treaty of Waitangi; or How New Zealand became a British Colony*, New Plymouth, 1936.

13 Glenelg to Bourke, 25 May 1836, quoted Orange, *The Treaty of Waitangi*, p. 21.

We have not been insensible to the importance of New Zealand to the interests of Great Britain in Australia nor unaware of the great natural resources by which that country is distinguished...There is probably no part of the Earth in which colonisation could be effected with greater or surer prospect of national advantage.

On the other hand the Ministers of the Crown have been restricted by still higher motives, from engaging in such an enterprise.

They have deferred to the advice of the Committee of the House of Commons in 1836...in thinking that the increase in national wealth and power, promised by the acquistion of New Zealand, would be most inadequate compensation for the injury which must inflicted on this kingdom itself by embarking on a measure essentially unjust, and but too certainly fraught with calamity to a numerous and inoffensive people whose title to the soil and to the sovereignty of New Zealand is indisputable and has been solemnly recognised by the British Government.

[However] circumstances beyond our control have at length compelled us to alter our course...[The instructions refer to the influx of settlers and to extensive 'cessions' of land, and to the absence of necessary laws and institutions to prevent the 'war and spoliation' under which 'uncivilised' tribes have almost invariably disappeared' when brought into contact with emigrants from the 'nations of Christendom']...To mitigate and, if possible avert these disasters it has been resolved to adopt the most effective measures for establishing among them a settled form of civil Government....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. But the admission of their rights, though inevitably qualified by this consideration, is binding on the faith of the British Crown. [The Crown therefore disclaimed any pretension to govern the Islands of New Zealand] unless the free and intelligent consent of the natives, expressed according to their established usages, shall first be obtained. [14]

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14 Normanby to Hobson, 14 August 1839, BPP, 1840 [238], p. 39 (IUP reprint Vol 3, p 87).

> In other words the intention was clear. Although there had long been a view, especially in New South Wales, that Britain could assert sovereignty on the basis of Cook's discoveries and proclamations, or on the basis that Maori had relinquished territory by selling it (or never truly occupying it in the first place), Stephen and his ministers rejected these approaches. Essentially there was to be a serious and respectful negotiation with Maori for a cession of sovereignty.

*Relationship between He Whakaputanga/The Declaration and Te Tiriti/The Treaty*

16. The Tribunal has asked 'What, if any, was the relationship between He Whakaputanga/The Declaration and Te Tiriti/The Treaty?' It is apparent (as indicated in the previous paragraph), that the recognition of Maori independence, reflected in London's acknowledgment of He Whakaputanga, however qualified, led the Crown to take the position that any assertion of British sovereignty in New Zealand would need to be preceded by negotiation with Maori for their assent. British sovereignty was not to be acquired merely by settlement and act of state, but mainly by cession. Busby apparently regarded the Confederation as qualified to negotiate an agreement on behalf of *all* Maori. Officials in Sydney and London, however, were aware that the Confederation was an agreement only among the northern chiefs of the North Island. (It is doubtful how many would have known about the subsequent adherence of Te Wherowhero and Te Hapuku). Consequently negotiation of the Treaty had to be not only with the chiefs of the Confederation but with the 'independent chiefs' as well. Moreover, the requirement to negotiate for cession of sovereignty was qualified by the amendment to Hobson's instruction, of 15 August 1839, stating that, if circumstances required it, Hobson could declare British sovereignty over the South Island on the basis of Cook's discovery and proclamations of 1769.

17. It might be thought that Maori independence was also impinged upon by a sequence of actions by Gipps and Hobson before the Treaty was signed at Waitangi, and soon afterwards (but before Hobson formally proclaimed British sovereignty over New Zealand on 21 May 1840). These actions included the proclamations concerning land transactions made by Gipps on

14 January 1840 and by Hobson on 30 January 1840; Hobson's proclamation of himself as Lieutenant-Governor also on 30 January; the swearing-in of Willoughby Shortland as Chief Magistrate in the Bay of Islands on 8 February 1840; the stationing of troops in New Zealand and the calling out of those troops in March and April 1840; and the appointment of George Clarke as Chief Protector of Aborigines in April 1840. But, as I understand it, all of these actions were contingent on Maori acceptance of the Crown's sovereignty and Hobson's proclamations of 30 May. Maori leaders made no objection at the time to the appointments of Shortland and Clarke and soon began to work with them. As will be seen, there was some confusion and division of opinion about the import of the Crown's assertion of pre-emption over land purchases.

18. In New Zealand the situation after the Declaration of Independence remained problematic. Tribal fighting continued (reviving even in the Bay of Islands in 1837), diseases continued to take a heavy toll of Maori lives even on the mission stations, and land transactions between Maori and Pakeha entrepreneurs from New South Wales rapidly increased. Busby wrote his pivotal dispatch of 16 June 1837 setting out this situation. He proposed a treaty between the Confederation and the Crown which would introduce British troops, in support of salaried Maori police, to enforce laws passed by the Congress of the Confederation. Captain Hobson's rival proposal, of 8 August 1838, for the establishment of 'factories' where the Crown's authority would be established in enclaves where Europeans had already settled, found more favour with Governor Bourke in New South Wales. But it was Busby's despatch which decided the Secretary of State for Colonies, Lord Glenelg, and his advisers to take the view that the only choice was 'between a Colonization, desultory, without Law, and fatal to the Natives, and a Colonization organized and salutary', and to begin negotiations with E G Wakefield and his associates to grant that body a charter for the colonisation of New Zealand.[15]

19. It is crucial for an understanding of Te Tiriti to recognise the essence of Glenelg's decision. Contrary to suggestions in Dr Henare's brief of evidence

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15 Glenelg to Durham, 29 December 1837, CO 209/2, p 410; Peter Adams, *Fatal Necessity; British Intervention in New Zealand 1830-1847,* Auckland and Oxford, 1977, pp 106-10.

(paragraphs 313, 322, 323, 329), up to this point the British government had *not* supported formal colonisation of New Zealand or the purchase of Maori land for white settlement. On the contrary, officials and ministers had supported the humanitarian/evangelical position, and the 1837 report of the Commons Committee on Aborigines in areas of British settlement, that white settlement was inevitably destructive to indigenous peoples, and that the South Pacific, including New Zealand, should remain independent, under the tutelage of the Christian missions. Glenelg and his advisers changed their minds *only* when it seemed undeniable, from the evidence available to them, that Maori New Zealand was being colonised willy-nilly in any case, and that the missionaries could not, unaided, rescue Maori from their plight. Their attitude was shaped in part by concern for the predicament of Maori and also by their sense of the rights of Englishmen to invest and travel and settle where they wished (although given the rebellious behaviour of British setters in the American colonies, and in Canada in 1837, British governments were reluctant to actively assist colonial ventures.) The government's decision in December 1837 therefore, was to accept the inevitable, but also to introduce civil government, the 'rule of law', to try to promote an orderly colonisation and protect Maori as best they could. That is what shaped the drafting of Hobson's instructions, and ultimately the Treaty.

20. Some historians have suggested that the British government should have gone further and blocked British colonisation of New Zealand altogether. For example, Mr Paul Moon has suggested that:

> ...the British Government had revealed a boisterous disregard for Maori sovereignty through failing to prevent the activities of the New Zealand Association in its quest for land, and by neglecting to restrain the influx of British settlers into New Zealand.[16]

But such comments show a complete disregard for economic and political realities, and indeed of the lawful rights of British citizens. It is very doubtful if the British government had the lawful authority (expect in a state of war or national emergency) to stop its citizens travelling, trading, investing and indeed settling abroad if they so wished. What governments

16 Paul Moon, *Hobson, Governor of New Zealand 1840-1842,* Auckland, 1998, p.48.

concerned for the welfare of indigenous peoples *could* do was to legislate to try to limit the authority of the settlers vis-à-vis indigenous peoples and bolster the authority of officials such as Protectors of Aborigines. And, as the Commons Committee on Aborigines had recommended, they could decline to recognise the land titles of the colonists, at least until they had been investigated and confirmed by an appropriate authority. During 1838-9 British governments resolved to take both of these courses of action. But this pointed towards securing sovereign authority in New Zealand in order for them to be effective. *That* was what Glenelg was talking about when he spoke of the distinction 'between a Colonization, desultory, without Law, and fatal to the Natives, and a Colonization organized and salutary'. Meanwhile, as Paul Moon has conceded, the government had 'strewn in front of the New Zealand Company a series of obstacles designed at least to forestall [the Company's] uncontrolled actions.[17] This is a reference to the unfruitful negotiations between the government and the New Zealand Association (later Company) about a charter, and the government-led defeat of the Association's bill designed to secure it parliamentary authority. But in the end, by April 1839, the Association resolved to send out its immigrant ships anyway. Finally, on this matter of Crown control over private enterprise, it is perfectly obvious that whatever hypothetical control the British government might try to exercise over the free citizens of Britain, it had virtually none over those of New South Wales and certainly none over those of France and the United States.[18]

21. The CMS in London, under its formidable Lay Secretary, Dandeson Coates, continued to oppose the assertion of formal British authority in New Zealand, but the missionaries in New Zealand had become more pessimistic about the situation there. In January 1838 a committee headed by Henry Williams and George Clarke recommended that:

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17 Ibid, p 44.

18 It is relevant to note that the British found some American citizens very hard to contain. For example William Webster claimed to have purchased about 100,000 acres in the Hauraki district before 1840. The Land Claims Commission and the British Governors in New Zealand eventually cut this down to about 20,000 acres. But Webster and his heirs were supported by the United States government which pursued their claims for compensation until the 1920s when a tribunal of the League of Nations made a monetary award in favour of the Webster family which the British government was obliged to pay. (See *The Hauraki Report*, pp. 94, 149-51, and Duncan Moore, Barry Rigby and Matthew Russell, *Old Land Claims*, Waitangi Tribunal, 1997).

> ...unless some protection be given by the British Government, the country will be bought up, and the people pass into a kind of slavery, or be utterly extirpated. The European settlers are making rapid advances, and are beginning to hold out threats. Should any encouragement be given to the [New Zealand] Association, thousands would immediately come and overrun the country; and the natives must give way. The only protection that I can propose is, that the English Government should take charge of the country, as the Guardians of New Zealand; and that the Chiefs should be incorporated into a General Assembly, under the guidance of certain officers, with an English Governor at their head, and protected by a military force; which would be the only means of giving weight to any laws which might be established, and preserve that order and peace so much required. The natives have many years since proposed that this should be done, and have repeated their desire from time to time.[19]

Not unlike Busby, the CMS missionaries in New Zealand envisaged a rather 'strong' form of protectorate, but the phrase 'for a certain number of years' suggests that, in early 1838, they may have assumed that full control could eventually be restored to Maori. The last sentence of the CMS recommendation suggests that discussion with rangatira about stronger British intervention had been on-going, perhaps since He Whakaputanga, perhaps even earlier.

22. During 1838 and 1839 the New Zealand missionaries' statements become increasingly pessimistic about the situation, and increasingly urgent – even desperate – about the need for British intervention. Several factors contributed to this:

22.1 The continued high Maori mortality (See below Appendix B, numbers 1, 2, 4, 10 and 13; Appendix C, no. 5).

22.2 A resurgence of tribal fighting in the Bay of Plenty and Rotorua areas, and in the Bay of Islands itself.[20] This highlighted the

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19 Henry Williams to Secretary CMS, 11 January 1838, quoted Hugh Carleton, *The Life of Henry Williams,* Auckland, 1874, Vol 1, p 232. Carleton quotes similar letters from Richard Davis, 26 May 1838 and Robert Maunsell, 7 August 1838, ibid p 235. A slightly edited version of the Williams/Clarke letter was published by Dandeson Coates' in a pamphlet published in London in 1839. See footnote 82 in my Dec 2009 report.

20 Insights into the influence of uncontrolled British subjects on some of the violent outcomes for Maori is to be found in the pamphlet of John Dunmore Lang, an influential Presbyterian leader in New Soty Wales, addressed to Lord Durham, head of the New Zealand Association, after a sojourn at the Bay of Islands in early 1839. Lang noted that one of the factors leading to fighting between hapu of Kawakawa and of Kororareka, was that a British merchant captain kidnapped and carried off to sea a Kawakawa woman of some rank, and her people mistakenly accused the Kororareka people. Lang also discusses

below, Appendix B, numbers 11, 12, 14, 15, 16, 18, 24 and 26; Appendix C, numbers 7 and 8).

22.5 News of the despatch of the New Zealand Company's land purchasing expedition under Colonel Arthur Wakefield, and of the Company's claims to have purchased large areas either side of Cook Strait, were viewed by the missionaries as a realisation of their worst fears. They pressed harder for the establishment of British sovereignty in order that land transactions could be investigated, and Maori rights to the 'wild' or uncultivated lands upheld. This objective, and the goal of safeguarding the rangatiratanga of the chiefs over their respective territories and peoples, crowded out any further reflection about more general or nation-wide 'protectorate' arrangements in missionary correspondence. (See below, Appendix B, numbers 3, 5, 6, 19; Appendix C, numbers 6, 7, 8, 9, 10 and 12).

22.6 Instead, Henry Williams and his colleagues set about trying to forestall the Company by purchasing Maori lands (including lands at Port Nicholson) to be held under a 'trust deed' for Maori. But there were doubts about the legal effect of the deed. Williams was so pessimistic about the flow of colonisation and about Maori mortality that he began to envisage Maori needing to 'live among our families' on mission lands.(See Appendix B, numbers 11, 14, 20).

See also Appendix A below for further evidence about missionary perceptions.

23. As shown in Peter Adams' *Fatal Necessity* (1977), and in the reports by Dr Loveridge and Mr Samuel Carpenter for these proceedings, the same concerns that affected the missionaries in New Zealand had shaped the policies of the Colonial Office and the British government. Concern over land transactions – including the Company's land transactions - was so strong that the instructions to Hobson required him to issue a proclamation *as soon as he arrived in New Zealand* asserting that the Crown would not acknowledge as valid any title which had been acquired, or would in future

problem of some hapu indicating that they wished to adopt the Christian injunction of peace but did not dare do so while their neighbours 'of unchanged heart' retained a capacity and will to make 'encroachments' and to fight. (See below Appendix B, numbers 5 and 8).

22.3 An apparent threat of French intervention in New Zealand, partly due to the arrival of Catholic missionaries under Bishop Pompallier, but also to the arrival of French warships in the Bay of Islands (See below, Appendix B, numbers 5, 7, 17 and 21). As always, it is people's *perceptions* of things that shape their behaviour, at least as much as the actuality. New South Wales, Tahiti and New Zealand formed something of a 'South Pacific triangle': the pork trade with Tahiti had fed the NSW settlers for two or more decades; Tahiti was evangelised by the English; to see British influence snatched away by swashbuckling French naval officers in support of Catholic priests was intolerable to the Protestant missionaries. In Sydney, Governor Gipps too became concerned and suspicious of the activities of the French naval captains, Dupetit-Thouars and Laplace, who in 1838 and 1839 respectively took their warships to Tahiti and bullied Queen Pomare into paying indemnities and accepting Catholic priests.[21] As shown in my evidence of December 2009, the concern of the missionaries and of Gipps that the same kind of thing could happen in New Zealand was by no means wholly misplaced. (For a fuller statement on French policies and actions see below Appendix A, para 11).

22.4 The continued increase in 'informal' colonisation, the unregulated activity of some British settlers leading to violent outcomes for Maori, and huge land purchases by British entrepreneurs, mainly from NSW, as well as by French settlers and Americans. (See

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how the recruiting, and failure to return, of some Ngati Mutunga men from the Chathams as crew led to the violent retaliation by Ngati Mutunga on the next visiting ship, the French whaler *Jean Bart*, and the equally violent reprisal by a French warship in 1838. (J D Lang, *New Zealand in 1839*, London, 1839, reprinted Sydney, 1873, pp 1-17.

21 Colin Newbury, *Tahiti Nui; Change and Survival in French Polynesia 1767-1945*, Honolulu, 1989, p. 100.

be acquired, which was not derived from or confirmed by a Crown Grant.[22] This was not even to await the outcome of Treaty negotiations. In the light of the reports from Busby and from the missionaries, it was now believed in the Colonial Office that Maori independence was 'precarious and little more than nominal', and that Maori would best serve their interests by relinquishing it to the Crown.[23] In other words, the Colonial Office considered that Maori had largely lost *economic* sovereignty, and Hobson was to negotiate for the cession of legal or political sovereignty. Hobson's 'factory' scheme of 1838 (with British sovereignty over the ceded enclaves of British settlement) had included proposals for a treaty with the chiefs of the non-ceded areas where British law was somehow to operate. From there it was a short step to propose seeking to establish the sovereignty of the Crown over 'the whole or any part' of New Zealand. Since the Colonial Office was aware in April 1839 of the Company's expedition to Cook Strait it was clearly pragmatic to accept Hobson's request to allow him to claim the South Island for Britain on the basis of Cook's discovery and proclamations. The process of colonisation already under way, wrote Hobson, might 'perhaps render the occupation of the Southern Island a matter of necessity or of duty to the natives'.[24]

24. Yet Adams makes a significant point in noting that this 'lapse into expediency' in respect of the South Island was not extended to the North Island. Reliance on Cook's proclamations there 'does not seem to have been considered, even as an alternative should Hobson have failed to gain a cession'. He remarks, somewhat ironically, that 'Maori sovereignty was to be scrupulously respected, particularly in the act of persuading them to give it up.' Hobson was instructed to point out the dangers 'of the presence of settlers who were subject to no laws and institutions of their own, and the impossibility of protecting them unless the Queen was acknowledged as sovereign of their country, or at least of those areas where British subjects were settled'.[25] This is what Busby had indicated in his June 1837 despatch and there can scarcely be any doubt that he had been discussing his ideas

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22 Normanby to Hobson, 14 August 1839, BPP 1840 [238] pp 37-42, No 16 (IUP reprint, Vol 3, p 87).

23 Ibid.

24 Adams, pp 156, quoting Hobson to Labouchere, 1 August 1839.

25 Adams, p 157.

with northern rangatira since the formation of the Confederation. Missionary correspondence also indicates that from early 1838 they too were increasingly emphatic that unless the British Crown's authority was established over New Zealand it would be difficult to ensure the progress of peace and security, control the land-grab and keep out the French; again it is highly unlikely that they would not have discussed their ideas with northern rangatira. (See below Appendix B, numbers 3, 8, 12, 24; Appendix C numbers 5, 7, 8, 10).

*Te Tiriti/The Treaty*

25. The Tribunal's 'Statement of Issues' dated 29 May 2009 asks (in questions 5 and 6) how Maori and the Crown understood Te Tiriti/The Treaty, and (in question 7) 'what then was the effect of Te Tiriti/The Treaty at 1840?' In preparing my evidence of December 2009 I was asked to elaborate on these questions somewhat, in terms of what the Crown and Maori would have understood by each of the three articles; whether Te Tiriti represented a meeting of minds and if so what were the commonly held understandings and intentions; the implications of the Crown and Maori understandings for their 'subsequent' conduct; whether there would have been any intended limitation to the 'Sovereignty' or 'Kawanatanga' mentioned in the first Article; whether Maori intended to cede or retain any sovereignty through Te Tiriti; and whether Crown officials and missionaries deceived Maori in the drafting and/or signing of Te Tiriti. The following paragraphs summarise my views on these matters, as expressed more fully in pages 73-117 of my report of 17 December 2009, together with additional research set out in Appendix A below.

26. First, it is perhaps useful to make some comments on key terms or expressions in Te Tiriti/The Treaty. I should add, however, that I believe that it can be very misleading to take particular words and phrases and discuss them semantically in isolation from the context of the whole document (either in Maori or English), or simply (for example) to weigh 'tino rangatiratanga' against 'kawanatanga'. Important though it may be to do this, the terms of Te Tiriti/The Treaty form an integrated whole, with the three Articles in balance. Key terms or concepts in the Treaty include the following:

26.1 'Sovereignty': Professor Dame Anne Salmond addresses the meaning of 'sovereignty' via a two-line definition from Sir William Blackstone's *Commentaries on the Laws of England* as follows: 'a supreme, irresistible, absolute, uncontrolled authority…placed in hands in which goodness, wisdom and power are most likely to be found'.[26] But these words are taken very much out of context. The authority to which Blackstone refers is not executive authority, as might be assumed, especially not the authority of the monarch alone. It is *legislative* and *judicial* authority – the authority to make laws and see them enforced. The reference to the Crown's sovereignty was in 1840, as it is today, a reference to the 'rule of law', or civil government, which had been achieved in Britain by centuries of inter-action and struggle between the king, parliament and the courts, including such seminal documents as the Magna Carta, the Bill of Rights, the Habeas Corpus Act and the Petition of Right. The rule of law is the means by which people in a 'state of nature' to use (Thomas Hobbes's phrase) surrender some of their supposed liberties (which in fact privilege only the physically and militarily powerful) in order to establish a 'civil society', through which the common people gain true freedom. Thus Blackstone quotes John Locke, 'where there is no law, there is no freedom'.[27] Moreover, Blackstone argues that under the English constitution, the Crown-in parliament must normally use its authority to protect certain inherent personal rights, namely the right to life, the right to personal liberty, and the right to property.[28] (See below, paragraphs 44-50, for further discussion of Blackstone's views).

26.2 Thus several expressions in the Preamble of the Treaty elaborate on what 'sovereignty', in the English constitutional understanding of the time, was expected to do for the inhabitants of New Zealand. It was expected to 'protect their just Rights and

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26 Brief of Evidence of Distinguished Professor Dame Anne Salmond, Wai 1040, doc #A22, pp 24, 26 and 88, citing William Blackstone, *Commentaries on the Laws of England*, Volume 1, 1765, facsimile reprint 1825. My own citations of Blackstone use the University of Chicago facsimile reprint of 1979, but I am not aware of any difference between the texts of these editions.

27 Blackstone, *Commentaries*, Vol 1, p 122.

Property' and secure to them 'the enjoyment of Peace and Good Order'. Under 'Her Majesty's sovereign authority', 'a settled form of Civil Government' could be established, averting the 'evil consequences' which would result, for Maori and Pakeha alike, 'from the absence of the necessary Laws and Institutions'. The vast heritage of English political theory and constitutional practice was thus to become available to Maori under Article 3 of the Treaty, which extended to them 'all the Rights and Privileges of British subjects'. For these reasons I believe the Treaty/Te Tiriti must be considered as a whole – from Preamble through to Article 3.

26.3 There has been some discussion of the meaning of 'kai w[k]akarite', the term used in Te Tiriti to describe Hobson's role. Henry Williams, in his 'back-translation' for Bishop Selwyn in 1847, translates it as 'regulator of affairs' (See Appendix C, number 13). In her evidence, Professor Dame Anne Salmond has translated the term as 'mediator', and 'mediator, adjudicator, or negotiator'. She elaborates 'It seems likely from several references in Te Tiriti that *ture* and *kai-wakarite* would serve primarily to *regulate* [emphasis added] individual Maori-European relationships and transactions'.[29] (For further discussion of this point see below para 84).

26.4 Mr Carpenter has noted the appropriateness of the expression in the Preamble of Te Tiriti, 'Kia w[h]akaaetia e nga Rangatira Maori te Kawanatanga o te Kuini' ('the Chiefs may agree to acknowledge the Government of the Queen') as more appropriate than the term 'cede' in Article 1 of the English text, because the Maori expression implies that Maori were 'agreeing to accept a new authority in the land rather than giving up an authority that they themselves exercised'.[30] I agree with his comment because I believe that it reflects the evolving historical situation.

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28 Ibid pp. 117-36.

29 Salmond, Brief of Evidence, pp. 11, 22 and 28.

30 Carpenter p. 165.

26.5 However, there is an important qualification to this 'newness'. Insofar as 'the Crown's sovereignty' really means the 'rule of law', or 'civil government' this was not a *wholly* new concept or project for Maori. The use of 'ture' in the Maori text - as the means of averting 'nga kino' (evil consequences) from Maori and Pakeha who lived without law ('e noho ture kino ana') - could scarcely have failed to remind northern rangatira of their discussion of the *ture* with Marsden, Williams and others over the preceding ten or 15 years, its inclusion in He Whakaputanga and discussion of it in many *mihinare* congregations. As Dr Manuka Henare has noted, 'In the preamble and in the articles of Te Tiriti are many ideas Maori had discussed with others in the period before'.[31] One can readily concur in his following observation that:

> Maori wanted a civil government and they desired to have laws that would govern the behaviour amongst Maori and between Maori and Pakeha. If the British helped Maori to do this, in return Maori would allow British people to live here in peace.[32]

27. As for the Treaty negotiations, several important points emerge from the available evidence:[33]

27.1 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 transactions would be officially investigated before any would be confirmed by the Crown, and that the Crown would recognise no further purchases from Maori made after the proclamation. This angered Pakeha transactors, who had hoped to consolidate their often shoddy deals without government interference. Some of these people, for their own self-interest, sought to sow suspicion in Maori minds that the governor would deny their freedom to sell to whom they wished, diminish their mana and enslave them. The terms of the Treaty were read by Hobson and repeated in Maori by Henry Williams on 5 February. The official investigation of pre-1840 transactions was reiterated

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31 Henare, Brief of Evidence, para 353

32 Henare, Brief of Evidence, para 354.

and Williams spoke to the issue, saying that the CMS transactions would be among those first considered. Hobson and Busby assured the rangatira that 'all lands unjustly held' would be returned to them. Dame Claudia Orange doubts whether the chiefs grasped the meaning of 'Crown pre-emption' – a reasonable doubt, especially as some settlers and entrepreneurs were quick to tell Maori that the Crown only had a right of first offer.[34]

27.2 The issue of Maori rights to uncultivated or 'wild' lands – including their forests and fisheries - was of huge importance. It had emerged in disputes over land transactions in previous years, and Busby and Williams were well aware that Maori customary rights were *not* confined only to cultivations and habitations. In 1844, Walter Brodie, a settler witness at Waitangi, was asked whether the 'wild lands' passed 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 them....I think the natives understood that they were not considered bound to give up any waste land; they never had any idea of that.[35]

The recognition of Maori rights to the 'wild lands' was central to the missionaries' conception of the Treaty, a main reason why Williams called it a 'Magna Charta' for the Maori people, and why the Anglican clergy unanimously protested against the British government's proposal in the 1846 charter to claim uncultivated lands as Crown demesne.

27.3 There was vigorous debate about the future status of rangatira in relation to the governor, Hoani Heke, Waka Nene and Patuone leading the case for accepting the governor and walking in friendship with the Pakeha. Nene's oration in particular

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33 These points are discussed more fully in pages 78-88 of my brief of evidence of 17 December 2009.

34 Orange, p 47

35 BPP, 1844, 556, IUP reprint, New Zealand, Vol 2, Minutes of Evidence, pp 50-51.

emphasised his view that because Maori had already embraced so much of the European economy, and sold land rights, it was too late to turn the governor away. Hobson should remain as a 'father, a judge, a peacemaker'.[36] Nene had grasped the significance of economic sovereignty as well as legal-constitutional sovereignty. He would no doubt have felt reassured by the Crown's undertaking to respect the *tino rangatiratanga* of the chiefs and tribes, and by the assurance of rights under Article 3 – *nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.*

27.4 On the evening of 5 February the rangatira gathered on the flat now occupied by Te Tii marae, disturbed and anxious about statements that had been made to them by 'ill-disposed Europeans' 'that their country was gone and they were now only taurakereka'. They were joined by Henry Williams and other missionaries. We have no documentary record of the discussion that followed except that Williams's later summary, probably written in the 1850s, and published in Hugh Carleton's 1877 biography of Williams, seems to refer to the evening discussion as well as to the day's oratory. Williams stated that:

> Many came to us to speak upon this new state of affairs. We gave them but one version, 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.[37]

This is a clear statement of the goal of the 'rule of law'. The reference to 'suppression of wars', in particular, is a clear indication that it was to apply to Maori as well as to Pakeha. But the whole statement embodies what the missionaries had been discussing with rangatira for some years. The discourse that ensued on the evening of 5 February was crucial to the negotiations at Waitangi, for by morning all but a few of the assembled rangatira had reached a consensus to accept the Treaty

36 Orange, p. 50; Salmond, pp. 50-51.

37 Hugh Carleton, *Life of Henry Williams*, Vol 2, p 14

and the Governor, and asked for the formal proceedings to resume promptly (rather than on 7 February) so that they could sign.[38] The signing on 6 February was preceded by Bishop Pompallier's request for recognition of the various Christian faiths, and the writing down of the unsigned 'fourth article' which also included Maori *ritenga.*

27.5 At the Treaty negotiations at Mangungu Hobson again emphasised the need to bring New Zealand under the Crown's authority in order to protect Maori land rights, saying : 'English laws can only be exercised on English soil.'[39] At Kaitaia there was discussion about punishing offences and controlling disputes within Maori society. The debate was summed up in Nopera Panakareao's celebrated metaphor in welcoming the Governor: 'We now have a helmsman for our canoe. One said, "Let me steer" and another said "Let me steer" and we never went straight.'[40]

28. Addressing more explicitly the Tribunal's question as to how Maori understood Te Tiriti/The Treaty and what then was the nature of the relationship and commitments they entered into with the Crown I submit that:

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38 The Rev Richard Taylor has given the impression that it was on his initiative that a message was sent to Hobson to bring the adjourned meeting forward from 7 February to 6 February. (Orange, p 51). The original source for Taylor's alleged claim is not clear, and it is very unlikely that Taylor (who was a newcomer to the mission, only arriving at the Bay of Islands in September 1839), would have had the authority, either in relation to the rangatira or to Hobson, to send such a request. Henry Williams's account states that on the morning of 6 February, 'the chiefs asked me why there need be any further delay, as their minds were made up, and they were desirous of concluding at once and returning to their respective places.' (Carleton, Vol 2, p 14).

39 Buick, p 172.

40 Panakareao's speech is set out in full in Professor Anne Salmond's submission, Wai 1040, doc #A22, pp 81-2. Professor Salmond has also noted, p 74, that Panakareao had written to Marsden in 1837 asking for a governor to be sent to New Zealand, *'mo tatou, hei tiaki ia taou'*). She surmises (p 74) that in discussing with Puckey the meaning of 'sovereignty', Panakareao was presumably considering the word 'kawanatanga', the neologism in Te Tiriti. Yet many Maori in the north, especially those who had considerable interaction with missionaries and traders, spoke some English. Panakareao, a very serious and thoughtful man by missionary accounts, invited his Pakeha guests to join him in English-style tea in his sawn-timber cottage, with table, chairs, crockery and cutlery. It is quite likely that a rangatira already well-versed in English cultural idioms would have probed for an understanding of the English term 'sovereignty' as well as 'kawanatanga' A witness to the 1844 committee on New Zealand, J W Childs, referred to Panakareao's other celebrated metaphor about 'shadow' and 'substance' stating that it meant that 'substance' referred to the land, which was assured to Maori by the Treaty, and that 'shadow' referred to British 'sovereignty'. Childs claimed that that was how Williams interpreted the Treaty, in a written translation that he had seen.(BPP, 1844, 556, Minutes of Evidence, p 231). This evidence is suspect. Williams was not at the Kaitaia meeting and I am not aware of any written text by him that explicitly translates 'shadow' and 'substance'..

28.1 Land issues were central. As indicated in the two preceding paragraphs, I believe that the rangatira would have understood that the Crown would have recognised and supported Maori land rights, as they customarily understood them, including their rights to their 'wild lands' and their fisheries. They would have understood that pre-1840 transactions would be officially investigated and that lands which had been unjustly acquired would be returned to them. It is not clear from the 1840 evidence in what ways the expression 'unjustly acquired' would have been understood, but presumably it would have related to the excessive scale of alleged purchases and their very loose boundaries (to say the least), and whether the land had been acquired from the wrong people or for inadequate consideration. (Some chiefs referred in the Treaty negotiations to the trivial consideration they had received). The evidence is not clear whether Maori would have understood the Crown right of pre-emption as an exclusive right to purchase Maori land or a right of first offer only – probably both views were held.

28.2 Maori certainly expected that the Governor would control aggressive Pakeha and protect New Zealand from foreign powers such as the French.

28.3 There is a stream of evidence, discussed above, that indicates that the rangatira could scarcely fail to realise that the Crown's authority would extend over Maori as well as over Pakeha. Most importantly this includes the emphasis in the Treaty negotiations on the primary goal of *kawanatanga,* namely, to establish an effective civil government, via the *ture,* in a situation where people were living 'e noho ture kino ana'; and to explicit discussion about suppressing warfare and violent customs – a goal discussed by the missionaries and Busby with the chiefs for many years past. Nene's reference to the governor as 'a father, a judge, a peacemaker' and Panakareoa's reference to him as a 'helmsmen' also show that the governor was recognised to be a governor for *them*, as well as over Pakeha.

28.4 Yet I believe that rangatira would have considered that the Crown recognised their customary authority over their respective lands and tribes and would work with them rather than unilaterally impose their authority – that there would be some kind of partnership in the shaping of judicial and administrative machinery. Given the prominence of the CMS missionaries in the Treaty negotiations, it is likely that Maori would have assumed that missionaries would continue to play a role in the developing administration; the appointment of George Clarke as Chief Protector in April 1840 would have confirmed this. The use of the term *ture* in Te Tiriti, and Williams's reference to the Treaty as introducing 'one Law, human and divine', would also have conveyed a sense of considerable continuity with what missionaries and Maori had already been trying for over several years. Missionary mediation and the evolution of local codes of law in Christian communities continued. Thus many Maori may not have perceived a radical change from what had gone before.

28.5 The future inter-relationship between *kawanatanga* and *rangatiratanga*, or between *ture* and *tikanga*, were not discussed in detail in 1840. Several missionaries (Robert Maunsell and Richard Davis for example) noted that the rangatira accepted the governor and Te Tiriti largely through their trust in the good faith of the missionaries, who stressed that it was the necessary and right thing to do. (The missionaries were very conscious of the onus this placed upon them). Hugh Carleton, Henry Williams's son-in-law, later summed up what he had presumably learned from Williams:

> The land was the leading idea in the Maori mind…Consequently, during the negotiation of a treaty for cession of sovereignty to the Queen they troubled themselves not about abstruse points of international law, but kept steadily in view the one substantial consideration, 'How about the land if we admit the Sovereignty? Does that remain to us as it did before?' They were assured, in the most express words that could be desired, that it was so; with one single

reservation, namely the cession of the right of pre-emption to the Crown.[41]

28.6 After the negotiations, rangatira continued to place trust in the missionaries (both as missionaries and as officially designated Protectors) and soon extended it to magistrates trying to deal with disputes, including some between Maori as well as between Maori and Pakeha. Insofar as policing was now stronger in the main settlements, via the magistrates and troopers posted there, local rangatira generally approved of it. Officers such as Ensign Best recorded their very good relations with rangatira at Port Nicholson.[42]

28.7 But Maori expected their trust and cooperation to be reciprocated by the Crown, including a fair share of the benefits of the new economy. The disappointment of northern Maori when Hobson shifted the capital to Auckland, and began to collect the customs duties at northern ports, is well-known. When the northern rangatira wrote to the governor in December 1841 informing him of their hugely important decision to surrender Maketu to the Crown authorities, to be tried for murder, they added rather plaintively that they were waiting for the governor to send 'a book [?pukapuka, letter] to raise us up who are sitting in darkness in the woods and elsewhere'. (See Appendix C, no. 14 below).

29. The instructions for my report of 17 December 2009 asked the supplementary question. 'Did Maori intend to cede or retain any sovereignty through Te Tiriti?' This takes us into more of the complexity of the term 'sovereignty', including whether it is a reference to the several *sovereignties* of the pre-1840 tribal communities and their rangatira, or whether it pertains more to the English concept of sovereignty as explicated by Blackstone and discussed above, paragraphs 26.1 and 26.2.

29.1 Insofar as the term 'sovereignty' includes the traditional reciprocal authority of chiefs and people in their own community I believe Maori certainly intended to retain it – and the mana that went with

41 Hugh Carleton, *The Life of Henry Williams*, Vol II, Auckland, 1877, p 146

it. Many speakers at the negotiations stressed the importance both of their mana and their land, which they appear to have seen as closely interconnected. Some chiefs seem to have considered their right to transact land to whomsoever they pleased was also an aspect of traditional rangatiratanga. This might have been stimulated in part by settler incitement but it also related to a sense of the potential market (and market price) for land. Significantly, some Maori responded quite quickly to the Crown monopoly of *purchase* by entering into *lease* agreements with settlers.

29.2 As far as suppression of warfare and violent social practices is concerned, rangatira would not have accepted that the Governor's authority would be exercised unilaterally but in cooperation with them. While agreeing to Te Tiriti some chiefs stipulated that they must punish offences within their own communities.[43] Over the next few years rangatira sometimes accepted (or even invited) the intervention of Protectors and officials in disputes over customary matters, often they did not.

29.3 I have remarked, in relation to He Whakaputanga, that Maori leaders had a growing sense of their identity as an independent people and an aspiration, at least, to promote (with British assistance) a New Zealand-wide civil government; but that their own strong sense of tribal identity and allegiance inhibited this development. The authority vested in the Governor and his officials and soldiers by Te Tiriti was a new thing in the land but, insofar as sovereignty/kawanatanga equated with the rule of law, many rangatira probably accepted it largely because it accorded with an existing aspiration for a nationwide civil government. Dr Henare has made the same point. In this context it is also relevant to recall Mr Samuel Carpenter's point that under the Maori text of the Preamble the chiefs 'recognise' or 'agree to' the introduction of Crown's authority.

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42 See Alan Ward, *A Show of Justice,* Auckland, 1974, pp 45-52.

43 Ward, *Show,* p. 43

30. As to the Tribunal's question regarding Crown understandings of Te Tiriti/The Treaty, and the nature of the relationship and mutual commitments they were entering into with Maori, I submit that:

30.1 The British government decided to honour its prior recognition of Maori independence and enter into a serious and respectful negotiation with the Confederation and the independent chiefs to introduce the rule of law in a meaningful way – a rule of law in cooperation with rangatira but backed by the authority of the governor and his officials and police. The Crown regarded the negotiation of a treaty of cession as the main means by which they would establish sovereignty. (Though not the *only* means: where circumstances dictated, various acts of state were employed, including the January proclamations by Gipps and Hobson and the actual introduction of magistrates at the Bay of Islands, at Port Nicholson, and at Akaroa.[44]) It is tempting to speculate on what might have happened if northern Maori had *not* signed the Treaty: probably, Hobson would have had to return to Sydney for further instructions, but he and Gipps might well have decided to assert Crown sovereignty over the South Island on the ground of discovery, and possibly over enclaves in the North Island based on the *fact* of British settlement, especially in region of Port Nicholson. That being said, it is worth noting that when he received Hobson's despatches reporting successful negotiations At Waitangi and Mangungu in Feb-March 1840, James Stephen was exultant. It revealed, he said, the correctness of conducting an open negotiation with Maori, rather than relying on Cook's discovery or upon Vattel's theories about the right of 'civilised' nations to occupy vacant tribal land.[45] In the eyes of the ministers and officials of the day the Treaty was a serious agreement between independent parties. But, as I understand it, the Crown's view of treaties was that they did not, of themselves, constitute domestic law, and they did not see the Te Tiriti as such, or as a

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44 For a detailed discussion, in legal-constitutional terms, of just how the Crown's sovereignty was established over New Zealand, see Professor James Rutherford, *The Treaty of Waitangi and the Acquisition of British Sovereignty in New Zealand*, Auckland, 1949.

45 Adams, p 162, quoting Stephen to Vernon Smith, 9 July 1840, CO 209/6, folio 33.

constitution. Laws still had to be enacted to give effect to the goals and principles of the Treaty and a New Zealand constitution had yet to be drafted.

30.2 The law-making process began swiftly, with the New South Wales Legislative Council in mid-1840 passing an ordinance extending the laws of NSW to New Zealand, 'as far as applicable', and the ordinance which set up the New Zealand Land Claims Commission to investigate pre-1840 transactions.[46] Other laws dealt with customs duties and courts. New Zealand was made a separate colony under Letters Patent issued under the authority of the British parliament on 16 November 1840, and in 1841 the New Zealand Legislative Council repealed the NSW ordinances and enacted comparable ordinances.[47] This was Crown sovereignty, or the 'rule of law' in action.

30.3 While not relying wholly upon the Treaty to achieve its goals, the British government certainly regarded it as significantly advancing its three major objectives for New Zealand. As noted, the most pressing of these objectives was to control the land trade and investigate previous transactions. Published histories have shown that there were significant differences of opinion among Crown officials of the day as to the *extent* of the Maori customary land rights they had recognised. Governor Gipps thought the Treaty guarantee did not extend to the 'waste' lands; Hobson and Busby, and James Stephen in London, thought it did. In general the latter view prevailed and was in effect confirmed by the Land Claims Commissions. In the main it also survived the furious challenges mounted by the New South Wales entrepreneurs and by the New Zealand Company through sympathetic ministers and MPs in London in 1844-46. The Treaty guarantee was invoked by Chief Justice Martin and the Anglican clergy in New Zealand, and by sympathetic lobbyists in London, to defend Maori rights to the 'waste' lands. These events are a reminder that 'the Crown' is a

46 These New South Wales laws are designated 3 Vict No 28, and 4 Vict No 7.

47 A H McLintock, *Crown Colony Government in New Zealand*, Wellington, 1958, pp98-9

very complex entity, and that it is not easy to say precisely how 'the Crown' viewed the Treaty at any particular moment.

30.4 The British government's second main purpose in 1840 was to frustrate the aspirations of any other power to assert sovereignty in New Zealand. The most important of these powers was the New Zealand Company, which sought to establish an independent administration based in Port Nicholson, allegedly under the auspices of the United Tribes. News of this was the trigger for Hobson's declaration of Crown sovereignty on 21 May, on the basis of cession for the North Island, and of discovery for the South Island. Hobson drove home the Crown's authority by sending the ship *Patriot* to convey Acting Colonial Secretary Shortland and police, to Port Nicholson. Similarly he sent a HMA *Britomart* (Captain Stanley) and magistrates to Akaroa in July when he learned of French plans to plant a settlement and the French flag there. Dame Claudia Orange has pointed out that Hobson took these actions before the Treaty negotiations had been undertaken in all southern districts. The Treaty was significant, however, because Bunbury's declaration of Crown sovereignty over the South Island, on 17 June, on the basis of the southern chiefs' acceptance of the Treaty, added important weight to the British position in the eyes of the French commander at Akaroa, Captain Lavaud. In London, ministers and officials of the Crown regarded Maori acceptance of the Treaty, underlying Hobson's proclamation of 21 May, as a genuine cession of sovereignty in respect of the North Island, and gazetted it accordingly on 2 October 1840 (along with the proclamation of sovereignty over the South Island, with the reference to 'discovery' omitted).

30.5 The Crown's third main purpose was to extend the rule of law in New Zealand, among settlers and Maori alike. Hobson and his associates at the Bay of Islands considered that the chiefs' acceptance of the Treaty indicated Maori support for that project, to which end Shortland was appointed as Chief Magistrate and George Clarke as Chief Protector of Aborigines, even before

Hobson's declaration of sovereignty on 21 May. Extending the rule of law included, where practicable, bringing into court Maori as well as Pakeha who committed thefts or assaults, when they were brought to the notice of magistrates or protectors. However, this did not mean that (as James Stephen later put it) Maori everywhere were to be subject immediately to 'the yoke of Blackstone's commentaries'.[48] On the contrary, Normanby's instructions to Hobson emphasised rather that the missionaries were to be supported in their evangelising and educating work, and schools established, teaching literature, but that until by such means 'brought within the pale of civilized life' Maori

> ...must be carefully defended in the observance of their own Customs, so far as these are compatible with the universal maxims of humanity and morals. But the savage practices of human sacrifice and of Cannibalism must be promptly and decisively interdicted.[49]

As discussed above, this policy was broadly indicated in the reference to *ture* in the Treaty, although (as Dame Anne Salmond has pointed out) the Treaty texts did not make clear 'in what precise sphere ture and kai-whakarite would be authorised to operate'.[50] This of course reflected the Crown's view of Te Tiriti as an agreement on a broad set of principles rather than a precise set of laws or a constitution. Hobson tried to make things a little clearer on 27 April (while negotiations over Te Tiriti were still under way) by having a circular letter printed at Paihia and distributed to rebut the assertions of 'certain evil-disposed and otherwise mischievous Pakeha' who had been turning the hearts of Maori against the 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 what I have already assured the

48 Stephen, minute, 28 December 1843, CO 209/22, pp 252-3

49 Normanby to Hobson, 14 August 1839, BPP, 1840, [238], p 38.

50 Salmond, Brief of Evidence, p 28

> 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 do his utmost towards the maintenance of peace and goodwill and industry in this country.[51]

30.6 Yet just how the Crown's authority would interface with tikanga would remain unclear for some years. Crown policy in this area was addressed more explicitly in the Colonial Office's new instructions to Hobson in December 1840 – instructions which included the direction to enact a positive declaratory ordinance 'tolerating' non-violent Maori custom. Chief Protector George Clarke worked towards the design of this ordinance, and towards the formal involvement of Maori in the administration of law. The outcome was Governor FitzRoy's Native Exemption Ordinance 1843.

30.7 I have already remarked that the Crown did not entirely wait upon Te Tiriti before undertaking executive action. The proclamations by Gipps and Hobson in January 1840 were illustrative of this and other executive acts by Hobson by-passed the rangatira. This was evident when the Crown began to collect customs duties from shipping in northern ports – revenue that had previously gone to rangatira in Tai Tokerau. When he moved the capital to Auckland, Hobson again overlooked the wishes of northern rangatira although he no doubt pleased the chiefs of Tamaki-makaurau. It seems that, in general, the Crown saw the recognition of tino rangatiratanga as applying to local and tribal matters, and that matters of *national* concern, such as the building of new machinery of government applying to the emerging nation-state, lay mainly within the realm of kawanatanga.

31. My instructions of 1 September 2009 asked the supplementary question, 'Did Te Tiriti represent a meeting of minds? If so, what were the commonly held intentions and understandings?' In general I believe that there was a

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51 Buick, p 191.

meeting of minds to a considerable extent, though there was some confusion as well:

31.1 One of the strongest ares of agreement was that Te Tiriti was the basis upon which the Crown kept out foreigners, especially the French. As noted earlier, Bunbury's declaration of British sovereignty over the South Island on the ground of cession (following the signing of the Te Tiriti by many South Island chiefs) was very important in helping block French colonisation there.

31.2 There was also considerable agreement between Crown and Maori about controlling land transactions. Rangatira were very concerned that they were losing control of their lands in the welter of transactions and increasingly aggressive attitudes by settlers. They welcomed the Governor's assurances that the pre-1840 transactions would be investigated. When the Land Claims Commissions were eventually set up, rangatira readily gave evidence in them, throughout the length and breadth of the country. For many Maori this was one of their earliest and most important engagements with the machinery of state. Hobson's and Williams's assurances that the Treaty guarantee extended to 'lands, forests and fisheries' (i.e. to the 'wild lands' as well as cultivations and habitations) was crucially important. All of the Anglican clergy considered that Earl Grey's attempt under Chapter XIII of the 1846 charter to treat 'waste lands' as Crown demesne was a betrayal of the Crown's Treaty undertakings. Their concerted lobbying helped to frustrate the implementation of Chapter XIII and was a high point in the common understanding of the Treaty.

31.3 It is not clear what Maori understood in 1840 by the Article 2 requirement that they sell (*hoko*) their land only to the Crown. Gipps and Hobson certainly intended that 'Crown pre-emption' meant a Crown monopoly right of purchase and there can be little doubt that Hobson, Williams and others tried to convey that understanding. But some Maori probably saw it as a right of first refusal only.

31.4 There was also common understanding that the customary authority of rangatira among their own people would be recognised, at least for the immediate future, and that the Governor and his officials would work with them rather than unilaterally impose their authority. This understanding was probably strongest among mihinare Maori, who would have recognised in Henry Williams's explanations of Te Tiriti, the link with the *ture* which they had already been evolving.[52] Maori conceptions of the *ture* as a reflection of the will of God as well as the will of man was indeed probably stronger in the minds of many Maori than it was in the minds of some Crown officials and settlers.

31.5 Rangatira would have felt reassured by Article 3 of Te Tiriti that they would not be deemed inferior to Pakeha or enslaved. This was no light matter, given the concerns expressed by the chiefs in their speeches at Waitangi and elsewhere. There was common ground on the matter of Maori receiving the same rights as Pakeha under the criminal and civil law. There was little time or opportunity to spell out all the details of this in 1840. Eventually, it emerged that there was some distance between Crown and Maori understandings about access to *political* rights – the right to vote and stand for parliament – which in English eyes were linked to the holding of individual property and the responsibilities that went with that. But this was not really on the horizon in New Zealand in 1840. What was important in 1840 was the recognition of *rangatiratanga*, which recognition the Crown agents in 1840 regarded as safeguarding or even advancing the mana of rangatira in their own lands and among their own communities.

31.6 There was also a common understanding that Kawanatanga would be exercised in good faith, for the common good, including that of Maori. This was the moral dimension of the Treaty, or 'the

52 I have recently been reminded of the PhD thesis of Dr Monty Soutar which shows the interconnectedness for Ngati Porou adherents of Anglican Christianity, of what European culture tends to compartmentalise into 'religion', 'law' and 'politics'. Dr Soutar's perceptions would very likely apply also to mihinare Maori in the North.

spirit of the Treaty' as we say today. It was very evident in the unanimous fury of the Anglican clergy in 1847 when it appeared that the British government was going to legislate to declare all 'waste lands' Crown demesne. It is the basis upon which Maori today, in making claims under the Treaty of Waitangi Act, can call upon the honour of the Crown.

32. My instructions of 1 September 2009 also asked the supplementary question, 'Would there have been any intended limitation to the 'Sovereignty' or 'Kawanatanga' mentioned in the first Article of Te Tiriti?' In reply:

32.1 I believe that the British politicians and officials in 1839-40 would have understood 'sovereignty' in William Blackstone's terms. Those who had legal training in English universities and Inns of Court would probably have studied Blackstone in detail. For other educated citizens of the United Kingdom, a Blackstone view of the British constitution would have been common ground. They would all have been acutely reminded of it by the great struggle over the Reform Bill of 1832 which extended the franchise beyond the aristocracy and upper middle class, and by the agitations of the British working class in the Chartist movement. 'Sovereignty' in British political philosophy and constitutional theory, meant the 'rule of law' as expressed, ultimately, by parliament, and by the courts, upholding both common law and statute law. The agents of the Crown in New Zealand in 1840 would have intended no limitation, via Te Tiriti, on this conception of sovereignty. Until a local legislature was established, it would have been assumed that the governor's proclamations, certain laws of New South Wales and aspects of British common law would apply in New Zealand

32.2 It should be stated immediately, however, that British law has always recognised a wide range of local customs, and still does, even in the United Kingdom. Indeed, as has been noted in para 30.5 above, Normanby's instructions to Hobson envisaged respect for non-violent Maori customs until Maori were persuaded by Christian education to relinquish them. In other words, Article 2

(as well as Article 3) rights could be spelt out in New Zealand law, without any essential limitation of the sovereignty of the Crown-in-parliament; and it was, and is entirely possible for Maori to be authorised to join in the administration of such law.

33. My instructions of 1 September 2009 ask the further supplementary question, 'Did officials or missionaries deceive Maori in the drafting and/or signing of Te Tiriti?'. In response:

33.1 I have argued in my December 2009 evidence, at paragraphs 157-63, that there was no deception in the drafting of Te Tiriti. On the contrary I believe that Henry Williams, a patently honest man, with 17 years of patient toil among the Maori people, often in difficult and even dangerous circumstances, did his best to render in te reo Maori the terms being negotiated. The charge that Williams was not translating accurately at the Waitangi meeting was certainly overblown, by self-interested whites. It was refuted by Colenso (even though Colenso had some doubts that Maori had fully grasped the import of the Treaty terms, which is a different matter). (See below, paragraph 60).

33.2 According to the Preamble of Te Tiriti, the advent of the of the Crown's authority would introduce of the rule of law *(ture)* and provide for the protection of 'rangatiratanga' and 'wenua' and the achievement of peace and good order, all of which (the Preamble stated) were threatened by the unregulated settlers already in New Zealand and by the further flow of emigration from Europe and Australia. Taking the Preamble into account there was therefore no necessary contradiction between the Crown's authority and rangatiratanga. It is very clear from missionary records and British official papers, that the missionaries and the humanitarians in Britain were very fearful that the Maori people would be overwhelmed and actually destroyed by unregulated white settlement, as had indigenous peoples in the Americas, southern Africa and Australia. That therefore the missionaries and officials at the Treaty negotiations were perfectly sincere in arguing at Treaty negotiations that the introduction of the Crown's authority

was urgent and imperative, for the protection of the Maori people and their lands and customs. There was probably very little realisation of the extent to which the state's statutory authority and common law would *ultimately* impinge upon custom and thereby diminish traditional rangatiratanga. That realisation emerged in subsequent years and then only gradually. Instead, in 1840, there was a common assumption that Christianity would continue to be adopted by Maori, and with it the ture that was the law of God as well as man. The missionaries and officials believed that, over time, tikanga, in the hands of Christian chiefs, would be ameliorated rather than simply over-ruled.

34. I return to the Tribunal's final question, 'What then was the effect of Te Tiriti/The Treaty at 1840?' As argued above, I believe the most important effects were that:

34.1 Hobson felt that he had the necessary mandate from rangatira to start building the machinery of government necessary to develop the rule of law in New Zealand, via the appointment of Protectors of Aborigines and magistrates, the introduction of police and the hearing of disputes between Maori and settlers in the courts. This began within weeks of Te Tiriti being signed at Waitangi.

34.2 Hobson considered that Te Tiriti gave him sufficient mandate to declare Crown sovereignty over the North Island by cession on 21 May (as well as over the South Island by right of discovery). Bunbury's declaration of sovereignty over the South Island, on 17 June, on the basis of cession via Te Tiriti, was influential in persuading Captain Lavaud that he could not persist with asserting French sovereignty in that island.

34.3 Te Tiriti and Hobson's proclamations together assisted Gipps in securing the passage of the New Zealand Land Claims Ordinance, 1840, through the NSW Legislative Council, and to call for the registration of pre-1840 transactions for hearing by the Land Claims Commissioners. The mere establishment of this procedure caused a great many of the grandiose but flimsy claims to simply

disappear, and others, though registered, not to be pursued in the eventual hearings. Though flawed, the process was so successful that in the early 1840s the Crown soon began to struggle to find land for the Company settlers and other recent immigrants. Meanwhile Maori and settlers began to make new accommodations in relation to use of Maori land, often on the basis of leases.

34.4 Under Te Tiriti, and Hobson's proclamation of 30 January, private citizens ceased making new purchases of Maori land. Large claimants, notably the New Zealand Company, began negotiations both with Maori and the Crown as to exactly what their pre-1840 transactions entitled them to. Reluctantly, and tardily, the Company ceased relying on its deeds of purchase to press their claims to land still occupied by Maori in Wellington.

34.5 Te Tiriti inaugurated a fresh wave of cooperation between the missionaries and rangatira in the development of the *ture* and (via George Clarke and the Sub-Protectors) discussion of the place of tikanga within it, and the kinds of official posts which rangatira might hold.

34.6 In London, the Colonial Office drafted a complete new set of instructions for Hobson, including the instruction that 'some positive declaratory law' be passed authorising the 'toleration' of non-violent Maori customs.

*Concluding comments*

35. I believe that there is a temptation, apparent in some recent historical analysis, to 'read history backwards', and to expect the participants of 1840, to have understandings and assumptions that are only available to us with hindsight:

35.1 Because the Maori population burgeoned from the 1880s, there is a tendency to forget that in the 1830s and '40s, there was a very real belief among European observers that the Maori race was

dying out, and anxiety among Maori themselves about the lack of children and young men in their families.

35.2 Because it soon became apparent during the Land Claims Commissions operating from late 1841 that Maori had *not* relinquished all their interests in land loosely described in deeds of 'sale' we tend to forget that the common assumption among Pakeha in 1839-40 was that Maori had 'sold' most of the country, some of it several times over, and anxiety among Maori themselves that the Europeans who had made these transactions would thereby get control of the land.

35.3 Because we are now accustomed to the power of the modern state to limit the movement of its citizens, by measures such as passport controls, we tend to overlook the fact that it was actually very difficult for British governments in the 1820s and 1830s to stop wealthy citizens from forming colonising projects and sending out immigrants if they so wished. Still less could British Governments control the movements of free citizens of New South Wales, let alone those of France and the United States.

35.4 Because Maori gave very strong physical resistance to colonisation from about 1843, there is a tendency to forget that, in 1840, most European observers thought that the country was already being overrun by white settlers and land-purchasers, capable of organised force, and that Maori would not be able to resist them.

35.5 Because the French attempt to colonise the South Island was frustrated by Hobson's prompt action in July-August 1840, there is a grave under-estimation of the seriousness of the French effort and how close they came to succeeding in planting their colony.

36. My own submission is an attempt to capture the understandings of the participants in 1840 in the light of the information available to them at that time. Viewed from that perspective I believe that the compact negotiated by Hobson, Henry Williams and northern rangatira on 5 and 6 February (and with other rangatira subsequently) was arguably the single most

important effort in the nineteenth century to control European imperialism in the interests of an indigenous people.

**Questions put to me regarding the evidence of others**

37. I have been asked to respond to the following questions regarding the evidence of others in this inquiry:

*Review of the brief of evidence of Prof Dame Anne Salmond, #A22*

38. I was asked to review the evidence of Prof Dame Anne Salmond and advise where my views diverge.

39. In particular, I was asked for comments on the following:

39.1 What is my response to the view (expressed at page 30) that "there must be an element of doubt about how far their [the chiefs'] signatures or marks signified assent, when their speeches had expressed a contrary opinion"?

39.2 What is my response to the conclusions reached at page 54 concerning the questions of mana, lands and laws?

39.3 What is my response to the notion (expressed variously and particularly at page 57) that "it is clear that while the Treaty in English was a draft document, Te Tiriti is the official record of the agreements between the Crown and the *rangatira* at Waitangi"?

39.4 What is my comment about the use (at pages 62-63 and 69-71) of the "satirical" accounts by Frederick Maning?

39.5 What is my response to the following views set out at page 87?:

> "Overall, the relationship between the *rangatira* and the Crown described in Te Tiriti, and reinforced by these explanations, was one of a chiefly alliance, a balance of powers within largely autonomous spheres of action, with *ture* and the Governor's role as *kai-wakarite* probably applying to the interactions between them. ... The Governor would not intervene within territories that were controlled and owned by Māori, nor interfere with 'native laws and customs,' but rather, protect the rangatira and their people against unscrupulous, lawless whites."

39.6 At page 89 Prof Salmond states:

> "It may be, rather, that the most fundamental contradiction in Te Tiriti lies between Articles 2 and 3 – between *tino rangatiratanga*, the right of the *rangatira* and the people of various *hapū* to exercise autonomous control within their own domains, guaranteed in Article 2; and the promise by Queen Victoria in Article 3 to give to Māori as individuals all and exactly the same customary rights (or customs – *tikanga*) as her people of England."

In respect of the above, I was asked whether, in agreeing to article 3 of Te Tiriti, would the rangatira signing Te Tiriti have considered themselves equal with the Queen or her Governor? Would they have considered themselves as subjects of the Queen? Is this consistent with, or a contradiction of, Article 2 of the Te Tiriti/the Treaty?

*Dr Merata Kawharu, 'Te Tiriti in its Northern Context in the Nineteenth Century,' #A20*

40. I was also asked the following questions that stem from chapter three of Dr Merata Kawharu's report:

40.1 At page 81 Dr Kawharu states that, in the new colony, mana whenua would have no place and that only a limited form of custom would be permitted and protected, so long as it did not interfere with the establishment and assertion of sovereignty. I was asked whether I agreed with these comments.

40.2 On page 82 Dr Kawharu states that the Colonial Office was planning "only minimally to ensure Māori would properly understand the treaty and annexation process." I was asked whether I agreed with this statement.

40.3 On page 82 Dr Kawharu also states that the "general Colonial Office position was that Māori signatures or marks were sufficient for the purposes of establishing imperium whether or not Maori clearly understood what was explained to them." I was asked whether I agreed with this statement.

40.4 On pages 104-105 Dr Kawharu states that Hobson and the missionaries deliberately chose to explain the advantages of

protection rather than governance mechanisms and processes relating to land to rangatira. In addition, Dr Kawharu states that the term kawanatanga had no meaning to Māori. I was asked whether I agreed with these statements.

40.5 At pages 134-135 Dr Kawharu states that the chiefs' perspective was that they gave conditional support to the Treaty: "The Governor was permitted to remain in New Zealand and fulfil his promises, but he was on probation. Signing was not the end of the matter. It was only a beginning." I was asked whether there is any evidence that supports the notion that the rangatira who signed Te Tiriti did so on the understanding that the Governor was "on probation"? I was also asked whether I agreed with Dr Kawharu's statements in this regard.

*A first draft of the Treaty?*

41. I was asked whether there is any evidence that supports the notion that a draft of the treaty in Māori was put to chiefs in which they were asked to cede their sovereignty.

**Response to Professor Dame Salmond's evidence**

42. I should say at the outset that I agree very fully with Professor Salmond's evidence (Wai 1040, doc #A 22) in her second and third paragraphs on p. 85 and the first para on p. 86. These paragraphs outline the historical changes affecting northern Maori, the unintended consequences of their contact with Europeans, the effects of musket warfare, the devastating impact of introduced diseases and accelerating land transactions. She states that 'the impacts of European settlement were spinning out of control', and I agree that there were serious and largely uncontrolled threats to Maori society; and that there was a lurking fear in the north of a return of the French. She is correct too in stating that it was these challenges – 'a wish for peace, a fear of further land losses to Europeans and further diminution of *mana* – that preoccupied the *rangatira* in trying to weigh up the Treaty of Waitangi'. She rightly says that an understanding of the wider historical context of the Treaty negotiations is required and in my Brief of Evidence of December 2009, and in this report, I have sought to provide that

context. I also agree with Professor Salmond's emphasis, in the first para on p 17, on the importance of the *ture,* a concept actively discussed in the north since Samuel Marsden launched the Christian mission; and with her remark that Maori perceived the *ture* as a system of law both human and divine.

43. My views diverge from those of Professor Salmond in respect of three issues:

43.1 Her views on 'sovereignty' as understood by the British in that period.

43.2 The matter of in whose hands sovereignty was to be placed.

43.3 The questioning of Henry Williams's abilities and the impugning of his good faith.

*On 'sovereignty'*

44. Professor Salmond addresses the meaning of 'sovereignty' on p.24 via a two-line definition from William Blackstone's *Commentaries* as follows: 'a supreme, irresistible, absolute, uncontrolled authority…placed in hands in which goodness, wisdom and power are most likely to be found'. She cites this definition again on pp. 26 and 88. But the definition is taken very much out of context. Sir William Blackstone's lectures at Oxford University were published in four volumes between 1765 and 1769, and describe the evolution of the British constitution and jurisprudence up that time. He sets out in great detail the way in which, in Britain, the executive (the king and his ministers), had been obliged over many centuries to work with parliament (the legislature) and to recognise the authority of the law. The 'absolute, uncontrolled authority' to which Blackstone refers is not the authority of the executive (as in the absolute monarchies of Europe) but of the *power to make laws* – laws which ensure the rights and liberties of British people, Commons as well as Lords.

45. Blackstone traces the evolution of this concept through landmark events in English history: the growth of the Common Law in the 12th century under Henry II, which curbed the arbitrary power of the warlords (the barons); the Magna Carta of 1215 which in turn constrained the power of the

monarch; the Petition of Right 1628, the Bill of Rights 1689, the Habeas Corpus Act and it various amendments. (Vol 1, p 122).

46. These measures strengthened not only the authority of parliament (which is 'in truth the sovereign power' says Blackstone, Vol 1, p 90), but also the authority of law, which guaranteed the rights and privileges of British subjects. These developments in the English constitution reflected the thinking of the political philosophers Thomas Hobbes and John Locke. Hobbes famously wrote that the lives of humankind in a 'state of nature' were 'nasty, brutish and short', but that in a 'civil society' they would gain real freedom by relinquishing some of their supposed freedom to do as they pleased (which in fact privileged the powerful and destroyed general security) to the constraints of law. Thus Blackstone quotes Locke, 'where there is no law, there is no freedom' (Vol 1, p 122). To this end, civil society vests authority in the state, the parliament of which makes laws and authorises the enforcement of laws, via the courts and police.

47. In his chapter 'Of the Absolute Rights of Individuals' Blackstone implies limitations on how even parliament can use its authority. These rights include the right to life (interestingly, 'as soon as the infant is able to stir in the mother's womb' rather than from the moment of conception); the right to personal liberty; and the right to property (Vol 1, pp. 117-36). None of these could be constrained, save as punishments for breaches of the law (crimes), when individuals had forfeited some of their rights by infringing the rights of others. Blackstone's volumes were standard texts in the law schools of England and the United States for about a century.

48. It is central to the current proceedings that all of what Blackstone sets out as the rights of Englishmen in principle became available to Maori under Article 3 of the Treaty, without which no discussion of the Treaty is complete, and against which any discussion of the 'sovereignty' (or 'kawanatanga') ceded under Article 1 must be considered.

*In whose hands is law-making authority to be placed?*

49. Professor Salmond observes, with regard to the second part of her quotation from Blackstone that 'very few if any Europeans believed that those hands were Maori' (p 88). She quotes a reference by Henry Williams

to 'these poor natives' and some one-word or two-word comments by other missionaries (unsourced and undated) which imply that Maori were seen as children, inferior in terms of the 'stadial' models of society then current (i.e. the division of humankind into lower and higher social orders), and less capable than members of 'civilized' societies to exercise judicial and legislative power. There is considerable truth in her observations about stadial models in relation to British attitudes towards tribal societies, and I too have stated in earlier writings that many Englishmen in the 1840s and '50s thought that Maori had to pass through some tutelage to qualify for full civil rights – most importantly the tutelage deriving from the ownership of individual property.

50. But it not quite as simple as that. Besides the 'stadial' model, other views of society were in common currency and very influential. The most important of these was the evangelical view – the Christian view that God created all men equal, with inherent personal liberties such as Blackstone described. Under this view, the real test of man's progress, as Mr Samuel Carpenter has noted, was man's relationship with God.[53] The orthodox evangelical view was the very antithesis of a 'racist' or even a 'stadial' view: in the eyes of evangelicals such as William Wilberforce (leader of the anti-slavery movement in the British parliament) *all* men were tainted by sin and needed the redemption of Christ. Among the most depraved, Wilberforce argued, were the whites who held black men in slavery. His views became so influential that they led, first to the decision (in 1772) that any slave who set foot in Britain received thereby the rights of the English law and constitution and became a free man; and in 1833 to the freeing of slaves throughout the British empire. In 1836 Wilberforce's successor in parliament, Thomas Fowell Buxton, founded the Aborigines Protection Society and set up the Parliamentary Select Committee on the Aboriginal Tribes in British Settlements.[54] The Aborigines Protection Society was closely connected with the Church Missionary Society through the Lay Secretary of the latter, Dandeson Coates, and with the Colonial Office through the Permanent Under-Secretary, James Stephen. As is well known,

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53 Carpenter, p 48, citing S Dingle, 'Gospel Power for Civilization: the CMS Missionary Perspective on Maori Culture 1830-1860', PhD thesis, University of Adelaide, 2009.

54 See Robert Kenny, *The Lamb Enters the Dreaming*, Melbourne, 2007, pp 46-54.

both societies, became thorns in the side of the Edward Gibbon Wakefield and the New Zealand Association. What is particularly pertinent to Professor Salmond's comments is that a reading of the CMS correspondence from 1837 to 1840, shows that every proposal by the NZ Association, every bill relating to New Zealand in the parliament, every report from a parliamentary committee and every pamphlet published in the paper war between the humanitarians and the NZ Association, was sent to Henry Williams and the missionaries at Paihia for their information and comment. The correspondence is also replete with their replies, which shows that many of those most responsible for drafting the Treaty/Te Tiriti would have been well-versed in the evangelical position on indigenous peoples and colonisation. Much of the correspondence dealt with the threat to Maori land rights and with the need for civil government. But it is fundamentally important to note that in the evangelical perception, Maori were immediately lifted from the state of 'savagery' by Christian baptism and church membership (which was burgeoning in the late 1830s and through the 1840s). Thus the comments about pre-Christian Maori quoted by Professor Salmond, were rapidly being rendered obsolete. 'Godly' Maori were expected to qualify for civil rights. It is largely for this reason that whereas Professor Salmond presents the advent of the Crown's sovereignty as a sharp departure from pre-1840 Maori values and goals, I see it as a new phase in a project already under way, especially among Christian Maori.

51. In regard to the then current Colonial Office views of Maori, we should note the comments drafted by James Stephen in November-December 1840 for the new instructions to Hobson when it became clear that British sovereignty would be established in New Zealand:

> They are not mere wanderers…nor tribes of hunters or of herdsmen; but a people among whom the arts of government have made some progress; who have established by their own customs a division and appropriation of the soil; who are not without some measure of agricultural skill and a certain subordination of ranks; with usages having the character and authority of law.[55]

In 'stadial' terms, this already a fair step up the scale. Christian education and swift grants of individual property was expected to complete the

process. Meanwhile, the instructions said, the governor was to pass some 'positive declaratory Law authorising the Executive to tolerate' the non-violent aspects of Maori custom. The thinking of British officials and missionaries in 1840 about Maori and their tikanga was not nearly as negative as Professor Salmond's brief remarks imply.

52. As a footnote concerning the access to the legislature (so central to Blackstone's thinking), obviously the subject is a vexed one, because the individual property qualification at first denied most Maori the vote. Still, some Maori voters with individual property were enrolled in Otaki and in the Wairarapa in the elections held under the 1852 New Zealand Constitution act; in the creation of the four Maori seats in 1867 the property qualification was set aside (for Maori but not for Pakeha); and when New Zealand led the world with the grant of universal suffrage in 1893, Maori women found themselves with voting rights some 30 years before the women of Britain and 55 years before the women of France. The Treaty of Waitangi cast a long shadow.

53. As to the sovereign law so dear to Blackstone, this was being discussed in New Zealand from the 1820s in missionary proposals about the *ture*.

53.1 The term *ture* was used in Tahiti in respect of the code of laws framed by the LMS missionary Henry Nott, translated by King Pomare and adopted by an assembly of chiefs and people at the royal chapel in 1819, as the *Ture no Tahiti*. It set out penalties for theft, desertion, adultery, murder, bigamy, rebellion and sedition; penalties included restitution of property, fines and compulsory labour such as road-work or cloth-making. The death penalty was reserved for murder. The code was to be enforced by chiefs appointed as judges, in various district courthouses.[56] Several of the LMS missionaries moved to NSW, and came under the patronage of Samuel Marsden, who, although Anglican, was NSW patron of the Methodist LMS, as well as of the CMS missions in NSW and New Zealand. Introducing to New Zealand the

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55 Russell to Hobson, 9 December 1840, CO 209/8, pp 480-7.

56 Colin Newbury, *Tahiti Nui; Change and Survival in French Polyesia 1767-1945*, Honolulu, 1980, pp 50-51.

concept of the *ture*, as a code of law enforced by local judges, was thus a natural extension of the practice in Tahiti.[57]

53.2 In any case, by 1840 the *ture*, and sanctions to uphold it, had been a core element of the discourse between missionaries and Maori for more than twenty years. In 1835 Busby, Henry Williams and the rangatira who joined in the shaping of He Whakaputunga, used the term in the third clause, in reference to the proposed annual meeting at Waitangi, 'ki te wakarite ture…etc'. In early 1840 essentially the same purposes were carried forward into the drafting and negotiation of Te Tiriti. There was innovation in 1840, in respect of the machinery of state that Hobson and his officials and soldiers epitomised; otherwise, in terms of the deep social concerns of rangatira and missionaries, and the urgent need to assuage them, there was continuity. For decades the missionaries had been presenting Christianity as bringing both spiritual salvation and earthly benefits, both reinforced by new systems of law – the *ture*. Since 1835 at least, these concerns had had been linked with a role of some kind for the British Crown. In 1840, Henry Williams presented the same argument in urging the chiefs to sign the Treaty, by which they would 'become one people with the English…*under one Sovereign, and one Law, human and divine*'.[58] Dame Claudia Orange has accurately discerned that in the Treaty negotiations 'Chiefs had indicated already that they were disposed to think of the treaty in spiritual terms; Heke and Patuone had both likened the agreement to the new covenant'.[59] (Orange, *Treaty*, p 57). It is largely for these reasons that I view the Treaty/Te Tiriti as a new phase in the same project, rather than a wholly new project.

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57 However, the etymology of the word *ture* given in Herbert Williams's *Dictionary of the Maori Language* is puzzling. The dictionary states that it came from the Hebrew word *torah*, (the instructions and judicial decisions of ancient Hebrew priests understood to be a revelation of the divine will) but with the vowel sounds 'altered to avoid unpleasant suggestions'. Williams's Maori dictionary defines *tora* as 'Burn, blaze' and 'Be erect (sensu obsceno)' – presumably a reference to the erect penis. But Polynesians are not notably coy in such matters even if missionaries were, and such a mis-pronunciation (of *tora* as *ture*) by an oral-language culture seems strange. Perhaps linguists can supply a better explanation.

58 Carleton, *Henry Williams*, vol 2, p 14, emphasis added.

59 Orange, *Treaty of Waitangi*, p 57.

*The denigration of Henry Williams*

54. There are a number of comments in Professor Salmond's evidence which cast doubt on the competence and integrity of Henry Williams. E.g. on p 2 she observes that 'the fidelity of the translation...is thus material to questions about good faith in the negotiations at Waitangi and elsewhere'. Possibly some of her scepticism derives from Ruth Ross's 1972 article 'Te Tiriti o Waitangi; Texts and Translations', where Ross makes the strong inference that Williams and his colleagues deviously seduced rangatira into signing the Treaty by the careless, or even deliberate, use of inaccurate and misleading terms which cloaked from Maori the real shift of authority and power involved.[60]

55. Linguistic arguments aside, this is unconvincing. Williams was one of the most plain-spoken and patently honest Pakeha in the country. He made no bones about his pro-active role at Waitangi. Until 1837 he and the other CMS missionaries had vigorously opposed formal colonisation of New Zealand, but once they were convinced that informal colonisation was already well under way they changed tack and began to urge upon their parent society that the whole country should in some way come under the formal, legal authority of the British Crown. By 1838 the most pressing need, in the missionaries' perception, was to establish an effective civil authority – a sovereign authority - sufficient to secure peace, investigate land transactions and uphold the Maori right to 'wild' or uncultivated lands. (A view shared by Busby since his experiences with de Thierry and other Pakeha land buyers). Writing to the Secretary of the CMS in January of that year to urge British intervention, Williams stated that 'many years since' Maori themselves had proposed something of this nature and 'repeated their desire from time to time'.[61] It is highly unlikely that Williams would not have renewed that discussion in 1838-9. As to the negotiation of Te Tiriti itself, in summarising his role in the discourse of 5 February 1840, Williams recalled:

> We gave them but one version, explaining clause by clause, showing the advantage to them of being taken under the fostering care of the British Government, by which act they

60 Ross, 'Texts and Translations', *NZJH*, Vol 6, no 2, pp 129-157.

61 See above, Part I, para ii(a)

> 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.[62]

There is no hint of deviousness here – just the blunt Williams putting the case for the Treaty, and the Crown's authority over Maori as well as Pakeha.

56. Following Ross, Professor Salmond uses the expression 'missionary Maori' in reference to the Maori-language text of Te Tiriti. (Ross had written, 'The language of the Treaty of Waitangi is not indigenous Maori; it is missionary Maori, specifically Protestant missionary Maori'). But this is a false distinction. All languages constantly evolve, and they evolve very swiftly when the speakers are exposed to other languages and to new experiences and artefacts. Te reo Maori was no exception. The documentary record from the early 1800s shows a rapid accretion of words associated with trade, with new material objects and with new concepts (e.g. poaka, hoiho, hipi, Pakeha, Wiwi, ture, mihinare). Existing words gained new or extended meanings, a process encouraged by the missionaries' use of Maori words such as atua, karakia, tapu and utu for Christian concepts. Northern Maori in particular had been discussing new words and concepts for some forty years before the Treaty debates and it is scarcely conceivable that their day-to-day language would not have reflected the changes that were going on around them. Where then did 'Maori' end and 'trade Maori' or 'missionary Maori' begin? Of course the contemporary meaning of terms such as 'kingitanga' and 'kawanatanga', and new uses of old terms such as 'tangata maori' and 'rangatira maori', in important documents such as He Whakaputunga and Te Tiriti must be analysed and elucidated; both documents used neologisms to some extent and gave new meanings to old terms, as language always does. But to denigrate Te Tiriti for being allegedly written in 'missionary Maori' rather than 'Maori' is petty and fundamentally misleading. It appears to be part of the pattern of Ross's denigration of missionaries in general and Henry Williams in particular. (Implicitly Ross's criticism could be applied to He Whakaputuanga as well for it too uses neologisms such as 'Kingitanga', 'Kawanatanga' and 'ture').

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62 Carleton, *Williams*, vol 2, p. 14.

57. Ross has also suggested of Henry Williams and his son Edward (the men most responsible for writing the Maori text of Te Tiriti from the English draft), that 'neither father nor son was an experienced translator' and that Edward in 1840 was 'a green young man of twenty-one'.[63] Professor Salmond carries this argument forward, stating that Henry Williams was 'not, however, recognised as one of the better translators among the missionaries – Edward Williams, William Williams, William Puckey, James Hamlin, Robert Maunsell and the Wesleyan John Hobbs had that reputation'.[64] It is true that William Williams and Maunsell were the principal translators of the Bible, and compilers of dictionaries of Maori, and that Maunsell had a particularly outstanding reputation. But he had only arrived in the Bay of Islands in 1835, whereas Henry Williams had been working there since 1823, in constant day-to-day discourse with Maori. Moreover, it was Henry Williams who, on his arrival, led the mission's shift from its original emphasis on 'civilising' Maori first (as a means of introducing Christian concepts) to a more direct emphasis on evangelising.

58. To better carry out this essential task, Henry argued that mission members needed to spend more time learning the Maori language, preaching to the tribes in the surrounding area, and teaching in the schools on the mission stations…[at Paihia] the missionaries began by devoting regular amounts of time to learning Maori together.[65]

59. Thus for sixteen years before the Treaty negotiations Henry had personally led the work of evangelising, founding and teaching in mission schools *via the medium of te reo Maori.* For this purpose he had also arranged for the printing in Sydney of a Primer and wordlist in Maori, for use in the mission schools; in the early 1830s, with Yate, William Williams and Puckey, he oversaw the translation and publication (in Sydney) of Maori catechisms, prayers, hymns and biblical extracts. Next he arranged for the setting up of the CMS press at Paihia in 1835 and the translation of the Bible into te reo Maori. He would certainly have been involved with Colenso and others in the small community at Paihia in the discussion of the translations

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63 Ross, p. 131

64 Salmond, 'Brief of Evidence', p 10; her footnote 18, however states that Puckey and Hamlin were regarded as fine *speakers* of Maori.

65 Robin Fisher, 'Henry Williams', *DNZB*, Vol I, p 593.

themselves, which went through several revisions. Given Henry's leading role in a language-based approach to evangelisation and over ten years of publication I find very unconvincing the Ross/Salmond implication that Henry Williams was incompetent in te reo or in rendering English terms in Maori and vice versa. As for Edward, he had come to the Bay as a small child in 1823 and would have acquired te reo Maori almost as a first language. He had lived intimately with many remarkable changes at the Bay of Islands since 1823 and could scarcely be considered 'green'.[66]

60. Prof Salmond has stated rather categorically, 'nor does he [Henry Williams] seem to have acted as a faithful translator, at least during the Waitangi meeting, excising some comments unfavourable to the C.M.S. missionaries' (p 10). This presumably relates to the account in Colenso's *Signing of the Treaty of Waitangi*, where the writer refers to an unnamed 'white man' interrupting proceedings to claim that on 5 February Williams was not translating correctly what Hobson was saying to the chiefs or they to Hobson, and nominating a Mr Johnson, (according to Colenso an old resident of Kororareka who dealt in spirits), to take over the translating. But challenged by Hobson to take Williams's place as interpreter Johnson declined, contenting himself by asking that Williams should speak more loudly so that those at the back of the tent could hear, and stating that the chiefs were saying a 'great deal about land and missionaries' which Williams was not translating. Colenso, an abrasive personality who was not slow to challenge Williams on various matters, nevertheless further states in a footnote in his pamphlet that Johnson's comment 'can only refer to their [the chiefs'] immense amount of repetition; otherwise Mr Williams translated fairly what they said.'[67] Insofar as her questioning of the 'fidelity' of Williams's translations relies on testimony of Johnson and the other unnamed 'white man', Professor Salmond is on very thin ice. (In regard to Colenso's role and evidence, we should note that his intervention on 6 February, just before Hone Heke Pokai put the first Maori signature to Te Tiriti, was (by his own account) to query Hobson as to whether the

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66 Professor Salmond observes that Edward was regarded as 'facile printemps' in the Ngapuhi dialect 'according to his father'; it seems rather that it was Carleton who gave him that accolade, although perhaps he derived that opinion from Henry. (See Carleton, Vol 2, p 12)

67 Colenso, *An Authentic and Genuine History of the Signing of the Treaty of Waitangi,* Wellington 1890, from notes taking during the Treaty meeting, Wellington, 1890, p 20, footnote.

rangatira fully *understood what Te Tiriti signified*, rather than to query the text as such.[68]

61. Professor Salmond makes a number of references to Williams apparently exaggerating the French threat in order to persuade Maori to sign Te Tiriti. Two points might be made in relation to this:

61.1 On p.8 she notes a later statement by Williams that he had represented to Maori the concept of the Treaty being a fortress for them against a foreign power taking possession of New Zealand *'as the French had taken possession of Otaiti'*.[69] In her 1992 submission for the Muriwhenua hearings of the Tribunal, Prof Salmond added to this the comment, '[Tahiti: an event which did not take place for another two years.]' In her submission to these proceedings she has wisely added to that comment the words 'although in 1839 the French had sent a frigate to Tahiti to force the acceptance of Catholic missionaries' (p.8). This rightly acknowledges that Williams, in his later recollection, was conflating French actions in Tahiti *before and after* 1840. On p 15, however, in discussing the protection offered to chieftainship and land in the Preamble, Professor Salmond notes that this refers to an implied threat from an ill-defined quarter, 'no doubt that elaborated by Henry Williams in his claim that the French had already taken possession of Tahiti'. This rather gratuitous remark thus restores the suggestion that Williams 'beat up' the French threat by saying, *in 1840*, that the French had already taken that action. But there is no evidence *from 1840* that Williams told Maori that the French had *already* taken possession of Tahiti. Nor could there be, because the French had *not* yet taken possession.

61.2 What the documentary evidence does show is that Williams had written to the Lay Secretary of the C.M.S. on 11 January 1839, about the arrival of two French warships:

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68 See Ross, p 138, Colenso, p 33.

69 Salmond, p. 8 citing Carleton, 1948 edition, A D and A H Reed, p. 313. Emphasis added.

> The first frigate, *L'Heroine*, M.Cecille, sailed about three months ago to revenge the seizure of a French whaler & the murder of her crew [at the Chatham Islands]...The *Venus* French frigate of the largest class, 550 men, Commodore Du Petit Thouars, 1500 tons, arrived from Tahiti where [in 1838] she levied a fine on account of the Queen not allowing the R.C. Bishop & priests who now here to remain on that island. We have reason to fear therefore that the French may have designs not yet known upon this island, & would therefore urge most strongly that the British Government should take immediate steps for the protection of the people. (See below, Appendix B, number 7).

No doubt Williams *did* allude in February 1840 to this fear of French colonisation of New Zealand. And by July 1840 Captain Lavaud and *L'Aube,* escorting the French colonists to Banks Peninsula, had called at the Bay of Islands on his way south. Williams's fears had not been exaggerated, and he had not been falsely manipulating the French threat. In the end, the French, angered by the British assertion of sovereignty over the whole of New Zealand, declared a form of protectorate over Tahiti in 1842 and annexed the Marquesas Islands. They did not depose Queen Pomare and formally annex Tahiti until 1880.[70]

61.3 There is an issue about the extent to which Bishop Pompallier was influencing Maori against signing the Treaty. On pp. 8-9 Professor Salmond notes, rightly, that Williams blamed much of the Maori opposition to at Waitangi to the influence of the 'Popish Bishop'. Williams and the other Protestant missionaries were indeed prone to sectarian jealousy and had been writing exited letters to the CMS secretary since 1838 about the influence among Maori of Pompallier and his priests. On the other hand, on p 9 Professor Salmond is inclined to accept Pompallier's own assessment of himself as neutral, merely advising Maori to think carefully before they put themselves under obedience to a great European chief. We now know, however, from the research in French sources of Drs Peter Tremewan and Peter Low at Canterbury University, that

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70 See Robert Aldrich, *The French Presence in the South Pacific 1842-1940*, Basingstoke and London, 1990, pp 19-24.

Pompallier was not neutral, but hostile to the advent of British authority and actively encouraged Captain Lavaud's mission in mid-1840 to challenge the British claim to the South Island on the basis of discovery and to colonise the South Island themselves.[71] Professor Salmond notes the work of Tremewan and Low in her footnotes but does not seem to have realised their significance in relation to the Williams/Pompallier rivalry.

*Doubt about the assent given by chiefs whose speeches expressed a contrary opinion*

62. I do not think that chiefs' expression of contrary opinions earlier in discussion *necessarily* renders doubtful the assent they subsequently gave in signing the Treaty. Rather, the *act* of signing was a serious public commitment by the rangatira, and not taken lightly, notwithstanding objections they had expressed earlier in debate. My understanding of Maori conventions of oratory and debate on the marae and in comparable formal meetings is that they commonly involve forceful challenges to proposals raised for consideration and possible assent. It seems that orators consider it their responsibility to raise (for the benefit of the whole assembly, including their kin who will not be speaking) relevant aspects of the 'negative' case (as well as the case 'for') - that this was (is) a necessary part of the search for full understanding, and for an informed consensus; and when a consensus was (is) reached it might well include speakers who had earlier taken contrary positions.[72] This seems to have been the case at Waitangi and other Treaty negotiations although some chiefs held out to the end and did not sign. Even when consenting, it seems that orators could still maintain a formal challenge, perhaps to remind the other party of their obligations. Thus Dame Claudia Orange records that even as the signing at Waitangi got under way on 6 February 'two chiefs, Ruhe and Marupo, kept up a running challenge in the traditional manner.'[73]

63. Nor, I believe, was (is) the search for understanding, prior to consent, confined to the formal speeches. Discussion commonly continued

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

72 See comments on 'speechmaking' by Dame Joan Metge, *The Maoris of New Zealand;Rautahi,* London, 1976, pp 235, 258-9. (My own understanding of the matter derives from attending some of Dame Joan Metge's lectures on the *kawa* of the *marae*, and from attending many hearings of the Waitangi Tribunal).

73 Orange, *Treaty of Waitangi,* pp. 54-5.

(continues) long after the more formal proceedings had (have) introduced the issues – discussion which can last long into the night. The available evidence is fairly clear that this is what happened on the evening of 5 February on the flat at Te Ti, when Henry Williams and others joined the rangatira in further (and probably more detailed) discussion of Te Tiriti, a discussion resulting, by the morning of 6 February, in a general (though not total) consensus to sign, and accept the governor. But Professor Salmond barely mentions the discussion on the evening of 5 February and does not consider its importance in shaping a consensus.

64. Thus I do not consider that the challenging oratory was 'all mere show' as Colenso contemptuously dismissed it, but rather a search for full understanding. Yet in the last resort the public and formal act of signing probably had deeper significance for Maori than many of the previous oratorical statements. Signatures by some senior leaders and communities also seem to have influenced others. One illustration of this is perhaps to be found in Te Hapuku's long refusal of Bunbury's efforts on 24 June 1840 to persuade him to sign, but his finally agreeing to sign when the northern chief Hara told Hapuku that he had signed and advised him to do likewise.[74]

*My response to Professor Salmond's comments concerning mana, lands and laws on page 54 of her evidence*

65. On the question of mana, Professor Salmond's summary in the first paragraph of p. 54 of her submission is incomplete. The paragraph refers to the oratorical statements of *some* of the speakers, but other evidence, some of it cited by Professor Salmond herself earlier in her submission, shows that several speakers considered that under Te Tiriti they would be on parity with the governor, in some kind of partnership. These included Waka Nene and Patuone (who made the gesture of holding up his two index fingers side by side).[75] Nopera Panakareao's speech at Kaitaia in which he refers to the governor's role as that of 'a helmsman' implies a recognition of a leading role for the governor but not loss of mana by Maori. In that context I note the observation by Mr Rima Edwards (in his English text) that:

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74 Orange pp. 81-2.

75 See my Brief of Evidence, 17 December 2009, pp 80-81.

> Maori did not consider they were relinquishing anything that would ultimately harm themselves and their people. Rather through accepting the parent governor on the basis of love they were enhancing their position because the two sides would actually be mutually supportive.[76]

And while, in oratorical statements, some of the speakers (referred to by Professor Salmond), who said they would not sign Te Tiriti because it would put the governor above them, at the end of further discussion did in fact sign.

66. On the question of the loss of lands it is undoubtedly true that this was a major concern of many if not most of the Maori orators. As Professor Salmond has noted, we cannot be sure what Maori words were used for the statements reported in English as complaints that land was 'stolen' and that even if it had been 'sold' they wanted it back. It may be that the speakers used 'tuku' rather than 'hoko' for 'sold', or perhaps both terms were used by different speakers. The Hauraki Tribunal, with whom I worked for several years as principal report writer, did not believe that it could conclude that *all* pre-1840 transactions were *tuku*; rather that many were but that some involved a fairly complete relinquishment of rights by the 'vendor', and that we simply cannot tell in any particular case without examining it in detail.[77] That said, regardless of whether *tuku* or *hoko* was used by the Maori speakers, they were strongly asserting that they did not consider that, by their transactions, they had relinquished all interest in or connection with the land, and Professor Salmond rightly draws attention to this.

67. The Maori comments cited by Professor Salmond (in para 3 on p 54 of her submission) actually relate to *police power* rather than to *laws*. A good many northern Maori were indeed aware of the authoritarian British rule in the penal colonies and did not need to be prompted by self-interested whites to feel concern about British police power; and some speakers were prompted by seeing the small group of police who accompanied Hobson to raise concerns about whether they might be employed against Maori. But Hobson's mention of the negative propaganda of self-interested whites should not be dismissed either. For nearly two years the New Zealand

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76 Wai 1040, doc #A25, para 7.2.

77 Waitangi Tribunal, *The Hauraki Report*, Vol I, pp 153-4.

Association and the land speculators from New South Wales had been opposing the assertion of British sovereignty in New Zealand, or (if it were established) the right of the Crown to examine and possibly strike down their pre-1840 land transactions. The agitation against this would have reached new heights in the Bay of Islands after Hobson's proclamations at Kororareka on 30 January made clear that the transactions would be investigated (and possibly not confirmed). The whole question of *laws*, however, is much broader than this. The matter of the *ture* had been a matter of great concern to northern Maori for twenty years and continued to be so. I have discussed this question in response to question 5 above.

*My response to suggestion that Te Tiriti (in Māori) is the "official" version of the Treaty*

68. This notion appears to follow from the thrust of Ruth Ross's 1972 article, which demonstrated the importance of Te Tiriti (the Maori text) in comparison with the English text of the Treaty. It appears to be part of a design to elevate the importance of Te Tiriti relative to The Treaty. I am aware of the contra proferentum rule, and I also believe that it is entirely justifiable to show that, given that few Maori understood English well, they would have made little sense of the Treaty read to them by Hobson in that language. Their understanding of what was proposed, and what they agreed to, was obviously shaped by the Maori translation read to them by Henry Williams and discussed with Williams and others subsequently; and by the Maori-language text of Te Tiriti, if and when they saw that text after it came off the missionary printing press on 17 February. That said, it is quite another matter to refer to all the English texts as 'draft' texts, and only Te Tiriti as the 'official' record of the agreement between the Crown and rangatira.

69. The most authoritative examinations of the drafting of The Treaty and Te Tiriti that I am aware of are those by Dr Phil Parkinson, *Preserved in the Archives of the Colony*, 2006, and Dr Don Loveridge's discussion of 'The "Littlewood" Treaty', 2006. As I understand it, there was no significant alteration on the English text after it was presented to chiefs on 5 February, apart from the date (which had been provisionally entered as 5 February) to 6 February 1840. I am not clear, therefore, why the English text of that date, copied on Hobson's instruction for sending to Governor Gipps for

forwarding to London, should still be regarded as a 'draft', and only the Maori text of Te Tiriti as 'official'. It was the actions of *officials*, on and after 6 February which made both the English *and* the Maori texts 'official'.

70. Professor Salmond's argument rests largely on the certification written on one copy of the texts sent by Gipps and signed by Williams. She has stated (p 6 footnote 4) that 'The "official" text of The Treaty (in fact a transcript of the final English Treaty but certified as a faithful translation of the Maori text of Te Tiriti by Williams) was sent by Hobson to Gipps....', thence to the Secretary of State in London (where it could be found at PRO file CO 209/7, pp. 13-15). On p.57 of her brief of evidence (not p.46 as per her footnote 4) Professor Salmond quotes William's annotation as 'I certify that the above is as literal a translation of the Treaty of Waitangi as the idiom of the language will admit of' [signed] Henry Williams'. This is puzzling. It reads very much as if it should have been added to a copy of the *Maori* text of Te Tiriti rather than to the English text. This is supported by Williams's affirmation in later years that in translating the English text into Maori, at Hobson's request, 'it was necessary to avoid all expressions of the English for which there is no expressive term in Maori, preserving entire the spirit and tenor of the treaty'.[78] This is virtually a paraphrase of his certification on the text that Hobson sent to London. Dame Claudia Orange, following Ross, observes that no trace can be found of the final English draft put together on the *Herald*, and the text from which the version sent by Hobson to Gipps was transcribed is apparently not available to us.[79] I believe that Dr Parkinson's evidence will throw more light on this matter.

71. Professor Salmond has taken William's certification as 'an acknowledgement by both Hobson and Williams that the official text of the agreement with the *rangatira* was in fact Te Tiriti in Maori' but that Williams's claim that it was a translation of Te Tiriti into English was the reverse of what had actually happened – that the English version sent to Gipps was transcribed from the now-missing English text which Williams had himself used on 4 February from which to write the Maori translation. She adds that Williams 'changed' the date from 5 February to 6 February

78 Carleton, Vol 2, p 12 and note.

79 Orange, p.39.

'thus completing the reversal'. A more simple explanation, however, is that the change of date was simply a procedural adjustment necessitated by the fact that the signing was not accomplished on 5 February as Hobson had apparently hoped, but on 6 February. In my view it implies no devious or sinister intent.

72. Professor Salmond writes (p.1):

> ... "Te Tiriti" and "The Treaty" are two very different documents, with divergent histories and implications. In my view, it is a fundamental error to blur discussion of these two texts, as is so often done.

This seems to me to be going too far. They are different texts certainly, but far from having 'divergent' histories, up to 6 February, when both became official, they were intimately connected, by the process of translation and discussion that ensued at Waitangi and elsewhere. What other people made of the two texts in the 1860s and later is another matter – it is part of the evolution of New Zealand political and constitutional history, when all earlier texts come under renewed discussion and re-interpretation, as they still do.

73. While Professor Salmond's 'historical-semantic approach' (her term) is of great value in searching for Maori understandings of Te Tiriti/The Treaty, I query her dismissive approach towards 'back-translations' of the Te Tiriti into English. She notes the 'synthesis' of a number of them by Dr Parkinson but states that 'this is of limited value'. She is also dismissive of Henry Williams's version sent to Bishop Selwyn in July 1847, which she calls a 'free running account', and does not discuss it. Dr Parkinson is best qualified to comment on the linguistic aspects of this issue but if we are trying to understand what Williams (in particular) tried to convey to the rangatira it seems to me quite cavalier to dismiss his 1847 response to Selwyn in this way. (See Williams's reply to Selwyn, Appendix C no. 12).

*My response to the use of the "satirical" accounts by Frederick Maning*

74. I am highly suspicious of anything Maning said or wrote. When researching for my PhD thesis I read most of the Maning Autograph Letters in the Auckland Public Library and Maning's correspondence with Donald McLean in the McLean papers held in the Turnbull Library. Almost all of

these date from the 1860s when Maning was trying to relate to Crown officials and during his tenure as a judge of the Maori Land Court. They reveal Maning to be an extremely waspish character who ran a constant stream of invective against Maori, whom he then regarded as grasping, dishonest and lazy. I am very critical of the excessive use of the term 'racist' in recent decades but Maning's language in his surviving letters goes a long way towards qualifying him for that description.

75. Even Maning's *Old New Zealand*, though written in a humorous vein, is indeed 'satirical' about Maori (to use Professor Salmond's term), if not downright scurrilous. Virtually every incident that Maning describes in the book shows Maori in a bad light – as aggressive, turbulent, bullying, dishonest, scheming and grasping. Even the account quoted by Professsor Salmond on pp 62-3 of her submission portrays them as interested in the governor and in signing the Treaty mainly in order to get presents of blankets, tobacco, flour, sugar and other goods; or because signing the Treaty would bring great numbers of Pakeha to New Zealand and hence more trade. The second-last paragraph concerning protection the governor might offer from large-scale foreign intrusion and loss of valued Maori lands suggests that Maori were bewildered and confused about the matter. It is all rather demeaning and, in my view, not a fair representation of the very serious concerns of the rangatira and anxious discussion among them before signing, which come through the official and missionary accounts. Similarly the account quoted by Professor Salmond on pp 69-71 about the Treaty negotiations at Mangungu and Te Horeke is mocking. Taonui allegedly 'licked' the governor's hand. Professor Salmond glosses this as 'kissing it?', but that is still ludicrous, as well as highly improbable. Again the rangatira are portrayed as only signing in expectation of payment (and in a hurry to get it over with so that they could start feasting). The fact that certain historical elements used loosely by Maning are also mentioned, seriously, by Captains Nias and Hobson (quoted by Professor Salmond p. 71) does nothing to enhance the worth of Maning's so-called satire in my view and I regret that Professor Salmond has given it any credence in a serious scholarly analysis.

76. It is worth noting that Mr David Colquhoun's scholarly article on Maning in the *DNZB* (arising from his 1984 MA thesis) shows the younger Maning to be more genuinely sympathetic to Maori, before he apparently became estranged from the Maori community, and from his children by his Te Hikatu wife, Moengaroa. Even so, Colquhoun believes it 'probable' that Maning's opposition to the Treaty 'derived at least in part from his fear that annexation would restrict speculation', (i.e. a selfish motive).[80]

77. I was asked for my response to the following views set out on page 87:

> Overall, the relationship between the *rangatira* and the Crown described in Te Tiriti, and reinforced by these explanations [those of the missionaries and officials at Treaty negotiations], was one of chiefly alliance, a balance of powers within largely autonomous spheres of action, with *ture* and the Governor's role as *kai-wakarite* probably applying to the interactions between them...The Governor would not intervene within territories that were controlled and owned by Maori, nor interfere with 'native laws and customs', but rather protect the rangatira and their people against unscrupulous, lawless whites.

78. My response to this question is largely covered in my answer in response to question 5, which sets out my principal position (drawn mainly from Blackstone's *Commentaries*) on the nature of British sovereignty and the rule of law, and how these would operate in a democratic society. Otherwise I agree with some aspects of Professor Salmond's views as quoted, but not others.

79. There are indeed indications in the statements of *rangatira* at the Treaty negotiations that they saw their relationship with the governor as 'a chiefly alliance'. Many speakers were strenuous in their opposition to the governor being 'up there' and they being 'down low, like a worm'. They would have needed considerable reassurance that this was not going to be the case. Ultimately some chiefs (such as Te Heuheu) did not sign because they still feared that they would be placed in a subordinate position by accepting the governor and the Queen. Most, however, seem to have been sufficiently reassured by the explanations of the missionaries and officials to sign Te Tiriti. I have referred earlier to the speeches of Waka Nene and Patuone

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80 *DNZB*, Vol 1, p 265.

(and to Patuone's symbolic gesture). The strong affirmation of *tino rangatiratanga* in Article 2 would have been important.

80. The expressions 'a balance of powers within largely autonomous spheres of action, with *ture* and the Governor's role as *kai-wakarite* probably applying to the interactions between them' is also a thoughtful attempt to express a rather complex relationship, still somewhat undefined in early 1840. The phrase 'balance of powers' invokes some unfortunate Eurocentric connotations of a military nature, but if it is seen in a civil context it is useful. So too the phrase 'largely autonomous' is useful, partly because it implies a certain vagueness as to the actual state of affairs, and partly because the word 'largely' implies 'not wholly'. In other words there *would* be some overlap or interaction between the governor's sphere of action and that of the rangatira. This is accurate I believe, as is Professor Salmond's elaboration that '*ture* and the Governor's role as *kai-wakarite* would probably apply to the interactions between them'. This is important because it flows on from the long years of discussion about the *ture* which the missionaries had introduced in the 1820s. Nopera Panakareao's metaphor of the governor being the 'helmsman' also fits into this pattern. The *rangatira*, it seems from his imagery, would not be left *wholly to their own devices*, for when they were 'one said "let me steer" and another said "let me steer" and we never went straight'. The *rangatira* would still have the bulk of the responsibility in managing affairs among their people but the governor would, it seems, help them 'go straight'. The constant discussion about securing 'peace', which had gone on under missionary aegis for many years, and which emerged again at the Treaty negotiations, also implied some kind of role for the governor and his officials – perhaps even his police - in helping secure peace.

81. I do not concur, however, with Professor Salmond's implication of a *territorial* division – that the governor would not intervene in territories controlled and owned by Maori. It was spelled out very clearly in the Preamble that the Queen's writ was to run in all parts of New Zealand where Crown sovereignty was recognised. (In the Maori text, 'ki nga wahikatoa o te wenua nei me nga motu'). Just when and how it would be

caused to run was as yet unclear, though there were implications that it would be introduced in cooperation with the *rangatira*, not unilaterally.

82. Those implications would most clearly have emerged in discussion about 'native laws and customs'. Hobson was under instruction that he was to promptly interdict 'the savage customs of human sacrifice and cannibalism' but until they could be brought by education 'within the pale of civilized life' Maori were to be 'carefully defended in the observance of their own customs so far as these are compatible with the universal maxims of humanity and morals'.[81] There can scarcely be any doubt that the missionaries and officials discussed this in general terms with the *rangatira* but it would probably not have caused the chiefs great concern; the suppression of warfare and violent customs had been an objective of the Christian missionaries from the outset, and the Christian Maori also talked about the goal of peace, partly because it would help them preserve their young men at a time of worrying population decline and enable them to enjoy the fruits of peaceful farming and trade. (See e.g, Appendix B, numbers 5 and 8).

83. The emphasis on the governor as protector of the rangatira and their people against lawless, unscrupulous whites is indeed valid to a large extent. That too had long been an emphasis in the missionary programme and was reflected also in the invitations by *rangatira* to the Crown in 1831 and 1835 to act as protector of the chiefs and of the infant Confederation. But I do not believe that the missionaries and officials gave any encouragement in 1840 to the view that the Crown's authority would apply *only* against lawless whites. As indicated in the preceding paragraph (e), violence and lawlessness in Maori society too was to be restrained. In signing the Treaty most rangatira seem to have accepted it, in principle at least, some role for the governor in this, but with actual application to adultery, theft, violence etc yet to be worked out.

84. The term *kai-w[h]akarite* in the Preamble, referring to the governor's intended role, would seem to need further elucidation by linguistic experts. In her historical-semantic translation Professor Salmond first translates it as

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81 Normanby to Hobson, 14 August 1839, CO 209/4, pp 269-70.

'mediator' (p. 11), which implies a kind of diplomatic role for the governor, much like that which Williams and Busby had exercised previously. Moreover, on pp 15-16 she discusses Williams's use of the term in He Whakaputanga, in reference to Busby's role as British Resident. However, in his 1847 account to Selwyn (in reply to the Bishop's request to state '*what* you explained to the natives, and how they understood it') Williams translates *kai-w[h]akarite* as 'regulator of affairs', a considerably stronger expression, implying some kind of authority.[82] Indeed Professor Salmond herself goes somewhat further when on pp 22 and 28 of her submission she defines *kai-w[h]hakarite* as 'mediator, *adjudicator*, or negotiator' (emphasis added). On p 28 she then makes very important observations on the relationship between *ture* and *kai-wakarite:*

> It seems likely from several references in Te Tiriti that *ture* and *kai-wakarite* would serve primarily to *regulate* [emphasis added] individual Maori-European relationships and transactions (in trade or disputes, for instance); and that the source of their authority would be the alliance forged between the *rangatira* and the Queen.

This is getting very close to the mark, in my view, and I note that Professor Salmond uses 'regulate', much as Williams did in his reply to Selwyn. In her previous sentence Professor Salmond has also stated. 'In Te Tiriti, however, it was not clear in which precise spheres *ture* and the *Kawana* as a *kai-wakarite* would be authorised to operate…' That too is an accurate statement I believe. It was probably too much to expect detailed attention to this issue in early 1840: the most urgent priority was to establish the Crown's authority in order to deal with uncontrolled colonisation and the land trade. The question was in fact addressed in considerable detail in Lord John Russell's December 1840 instructions to Hobson. But tardiness in giving effect to those instructions contributed to some of the difficulties which arose in subsequent years.

85. One matter which was clearly and undeniably going to come under the Crown's authority in 1840 was land transactions, including a review of pre-Treaty transactions. This was a central feature of Normanby's instructions to Hobson, and was proclaimed in Sydney by Gipps on 14 January and by

82 Carleton, Vol II, pp 153 and 156.

Hobson at Kororareka on 30 January. Indeed, the concept of bringing the pre-1840 transactions under review by the Crown had been urged by Henry Williams and other missionaries during 1838-39 and was the main reason for Williams's unpopularity with many early settlers and speculators. There can be no doubt whatever that Maori would have realised what was intended and it was probably a main reason for their accepting the governor and *Te Tiriti*. They must have realised that the investigations would extend the Crown's authority over them in a sense, because almost every pre-1840 transaction was confused, in that there was often more than one 'vendor' for each piece of land 'sold' and the boundaries commonly overlapped the territory of more than one hapu. Somebody was likely to *not* get what they had wanted out of the initial transaction although, all in all, it is fairly clear from the Treaty negotiations that most of the participating rangatira hoped that the governor would get land back for them, or prevent its being alienated. Finally, in this context, there was confusion about what was meant by the Crown's pre-emptive right of purchase, and divided opinions about it. Some rangatira wanted 'free trade' with settlers and traders (and some of those assiduously sowed the calumny that Crown pre-emption 'enslaved' Maori); others welcomed the prospect of not being continually badgered to sell their land. All in all, though, there can be little doubt that the rangatira would have grasped that the Crown's mantle lay over the land.

*Relationship between Articles Two and Three of the Treaty*

86. I was asked, in respect of the following statement at page 89 of Professor Salmond's report –

> It may be, rather, that the most fundamental contradiction in Te Tiriti lies between Articles 2 and 3 – between *tino rangatiratanga*, the right of the *rangatira* and the people of the various *hapu* to exercise autonomous control within their own domains, guaranteed in Article 2; and the promise by Queen Victoria in Article 3 to give to Maori as individuals all and exactly the same customary rights (or customs – *tikanga*) as her people in England.

– whether, in agreeing to article 3 of Te Tiriti, rangatira would have considered themselves on an equality with the Queen or the Governor? I was also asked whether this was consistent with, or in contradiction of, Article 2 of Te Tiriti/The Treaty.

87. Professor Salmond's statement raised important issues. At the outset it should be noted that the Hobson's advisers had become well aware that Maori society was complex, with property rights and other rights distributed through various levels of the society. Consequently, by Article 2 in the English text:

> Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families *and individuals* thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may *individually* or collectively possess so long as it is their wish and desire to retain the same in their possession. (Emphasis added).

88. In this respect then, Article 3 is consistent with Article 2 rather than in contradiction.

89. The concept of the Treaty rights of individuals has received relatively little attention in claims before the Tribunal, perhaps because the Maori text somewhat blurs the divisions noted in the English text via the translation 'ki nga Rangatira ki nga hapu ki nga tangata katoa'.

90. As Professor Salmond indicates, Article 3 invokes a whole range of individual rights and privileges under English law, which potentially impinged upon chiefly rights and collective family and hapu rights. Regardless of what the state did or did not do, the relationships between group and individuals were already undergoing new stresses, due to the advent of the money economy and new avenues for entrepreneurship. Chiefs worried about their 'slaves' (war captives?) becoming too independent. Maori leaders and missionaries had together been trying to frame *ture* to meet new needs. After 1840 Maori continued to show a willingness to adapt to new circumstances. In regard to acts of violence, for example, there was a growing tendency to accept that turbulent or irresponsible individuals should come under the processes and penalties of British justice rather than that whole communities should suffer the customary retribution visited on them by injured tribes injured by the acts of individuals: the surrender of Maketu to British justice in late 1841 was a dramatic example of this, although the principle was not accepted everywhere and immediately. The impact of 'individualism' was probably

most severe in regard to land rights and the land trade. I have argued in previous writings, that the potential conflict between individual and collective rights in regard to land need not have been as sharp, and damaging, as it subsequently became if the governors and settler parliaments had been more sensitive to the complexity and adaptability of Maori culture and more willing to allow Maori to make adjustments to the demands of modernity more in their own way and in their own time; instead of which they emphasised individualism and undermined the traditional reciprocity between individual and group.

91. The problem is probably focused most sharply by the right of individuals, under British law, to appeal to higher courts against the judgements and penalties of customary courts (where the latter are in fact recognised). Individual right of appeal will commonly trump custom and undermine it. This has led to efforts in many jurisdictions with a received British legal tradition, both to formally recognise custom in the law (which happened to a limited extent in New Zealand) or to limit or prohibit appeal against custom courts to the higher courts. But the latter proposal ran into difficulties in Canada and in Australia, for example, because many indigenous women argued strongly that they needed a right of appeal against violent and over-bearing men, including elders in positions of authority. The whole question is a complex one, illustrating the difficulty of finding the appropriate balance between custom and the received law, once modernity has penetrated a traditional society.

92. In more direct response to the question I doubt that Article 3 in the English text would have encouraged a sense of 'equality' with the Queen or Governor, because by the article the Queen 'grants' her 'protection' to the Maori people, and the rights and privileges of English subjects. Williams's 1847 explanation uses the expression 'imparts to', rather than 'grants';[83] both English terms imply an action from someone wealthy or powerful enough to make a grant. I note Professor Salmond's explanation of a 'tuku' (and 'tukua') as an action which establishes a relationship between giver and receiver, perhaps more along the lines of a partnership rather than subordination. It is difficult to tell, from the slender record we have, how

83 Carleton, Vol 2, p 156, quoted Appendix B, no. 12 below.

strongly that traditional sense would have obtained in relation to the English sense. But in the main, the emphasis on 'protection' ('tiakina') implies a protector with power and authority. Why would Maori, in 1831 or 1835 or 1840 want the 'protection' of someone who did not have those attributes?

93. I see consistency rather than contradiction between Articles 2 and 3. Article 2 in the English text is concerned with proprietary rights, and property rights were deemed in English law and political theory to be an integral part of the rights of Englishmen (as recognised by Article 3). It is now generally accepted that the recognition of 'tino rangatiratanga' in the Maori text goes further than property rights. Indeed, in 1847 Henry Williams translated it with the expression 'their full rights as chiefs' (as well as 'their rights of possession of their lands'). But this is not inconsistent with the rights of British subjects, because in English society too there were and are divisions of rank and station. In 1840 it was assumed that Maori rangatira would continue to exercise authority, under the *ture*, in their own communities.

**Response to Dr Mereta Kawharu's evidence**

*Place of mana whenua in the new colony*

94. I was asked whether I agreed with Dr Kawharu's view (at page 81 of her evidence) that, in a new colony, mana whenua would have no place and that only a limited form of custom would be permitted and protected, so long as it did not interfere with the establishment and assertion of sovereignty.

95. I disagree with the first of these propositions. I am not aware that the term 'mana whenua' was current in 1840 and I have seen opinions that (as a contraction of 'te mana o te whenua') it has only come into prominence in recent decades in the Treaty claims context. Be that as it may, my understanding is that, in British eyes in 1840, the establishment of 'imperium' would not, of itself, have disturbed 'dominium' or title to the soil. By my reading of Professor Paul McHugh's work that would have been the general position of international law as the British understood it at that period. Moreover, British common law included recognition of aboriginal native title, interpreted by the Supreme Court in New Zealand in 1847 as a 'burden' in the Crown's radical title. Of course this has become a highly contentious question in relation to rights in the foreshore and seabed,

but the doctrine was generally respected as far as land above high-water-mark was concerned. The hearing of claims in the Land Claims Commissions (including the testimony of rangatira), depended on this, as did the determined resistance by the missionaries and Anglican clergy, in the name of the Treaty, to Earl Grey's attempt in 1846 to regard 'waste lands' as demesne land of the Crown. The subsequent 'conversion' of native title or mana whenua into titles cognisable in New Zealand courts, under the Native Land Acts, is a different matter, but the fact that the settler parliament deemed such as process to be necessary is fairly direct evidence that, hitherto, customary title, or 'mana whenua' was recognised.

96. As to the matter of recognition of custom, it was explicit, in Normanby's instructions to Hobson that, until brought by education 'within the pale of civilised life...[Maori] must be carefully defended in the observance of their own customs'.[84] Russell's instructions to Hobson of December 1840 were even more explicit that , while customs such as cannibalism should be swiftly interdicted, others should at least be 'tolerated', if not recognised, while the influence of Christian teaching and interaction with the general community drew Maori towards a general 'amalgamation' with settler society and institutions.[85] It is perhaps a matter of opinion whether this amounted to only a 'limited' recognition of custom. My own view is that both sets of instructions recommended quite a generous recognition of custom. How far the instructions were carried out after 1840 is another and more complex question. Moreover, and very importantly, in 1840, the Maori claim to customary title to all their lands, forests and fisheries, was explicitly recognised in the Treaty and upheld against the furious attacks of the New Zealand Company and its supporters in London, and against Chapter 13 of the 1846 constitution which would have treated the 'waste' lands as demesne lands of the Crown.

97. I am not an expert in matters of constitutional law but I doubt that any of this would have affected the question of the establishment of British sovereignty.

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84 Normanby to Hobson, 14 August 1839, *BPP*, 1840 [238], p 38.

85 Russell to Hobson, 9 December 1840, CO 209/8, pp 480-7; Ward, *Show of Justice*, pp 38.

*Colonial Office planning for minimal Māori understanding of the Treaty*

98. I was asked whether I agreed with Dr Kawharu's statement (at page 82 of her evidence) that the Colonial Office was planning "only minimally to ensure Maori would properly understand the treaty and annexation process".

99. In the light of the rapidly changing situation of mid-1839, and in the light of the pressure on the British government by investors and speculators simply to take possession, or allow them to do so, I consider the statement rather harsh, at least as far as the North Island is concerned. It is true that there was a current of thinking in the Colonial Office that in a 'pre-state' society (e.g. a kinship-based society), the European distinction between 'imperium' and 'dominium' did not apply, and that having sold the bulk of their land (as Maori were, wrongly, believed to have done) they had also relinquished the imperium and that there was therefore scarcely any need to negotiate a treaty of cession with them. There was considerable pressure on the Colonial Office by entrepreneurs wanting to take that line; theorists like Dr Arnold were quoted in support of that approach, and it took some determination by ministers and officials to resist them. In the end they held to the view that because they had previously recognised Maori independence (albeit with qualifications), good faith required the Crown now to formally negotiate for a cession of sovereignty. Thus Normanby's instructions to Hobson affirmed that the Crown would not assert sovereignty 'without the free and intelligent consent of the natives expressed freely according to their established usages'. Thereafter, the details of this had to be left to the men on the spot. Normanby (via James Stephens's drafting) frankly acknowledged that some Maori might be 'unable to comprehend the exact meaning, or the probable results' of a treaty of cession, but Hobson was instructed to avail himself of the services of the missionaries and older residents in explaining the meaning of a treaty. All previous land purchases were to be investigated.

100. All of this indicates considerable thoughtfulness in the planning of Hobson's mission, and should be noted in mitigation, at least, of apparently 'minimal' preparations to ensure proper Maori understanding. Perhaps most importantly, the instructions indicate that the extension of British

institutions among Maori society was to be gradual, mainly via missionary guidance, and the *ture.* Understanding of the full import of British sovereignty was to be achieved via that process

101. As far as the South Island is concerned, the Colonial Office fairly hastily accepted Hobson's suggestion that the Maori population there was small and unsophisticated, not readily able to understand the meaning of cession, and authorised Hobson to declare British possession by right of discovery (which he subsequently did); in that sense, preparations for South Island Maori to understand the Treaty and annexation were indeed minimal. On the other hand Crown agents did in fact subsequently go to key points in the South Island to negotiate signing of the Treaty, prior to a further declaration of sovereignty by cession.

102. Whatever the limitations of Colonial Office preparations, I believe that Williams and his missionary colleagues took very seriously the responsibility put upon them, and did their best at Waitangi and in subsequent meetings to explain the main principles of Te Tiriti to Maori. It is also probably relevant to note that at least since early 1838, Williams and other missionaries had been talking with rangatira about inviting a British governor with military support into New Zealand, to keep the peace, check the land-grab and review existing transactions – a goal which remained at the core of Crown purposes in 1840. (See Appendix C, number 5)

*Colonial office position that signatures/marks sufficient whether or not Māori understood the Treaty*

103. I was asked whether I agreed with Dr Kawharu's statement (on page 82 of her evidence) that the "general Colonial Office position was that Maori signatures or marks were sufficient for the purposes of establishing imperium whether or not Maori clearly understood what was explained to them".

104. Signatures or marks by Maori to The Treaty/Te Tiriti, after meetings to try to explain its meaning, in fairly formal assemblies, were generally taken by the Colonial Office as sufficient indications *from Maori* of assent to the establishment of British imperium. It is not quite true to say that this obtained 'whether or not' Maori clearly understood what was explained to them. Normanby's instructions frankly acknowledged that some Maori

might be 'unable to comprehend the exact meaning, or the probable results' of a treaty of cession, but Hobson was instructed to avail himself of the services of the missionaries to explain the meaning of the treaty. Hobson stated on 6 February, in responding to Colenso's doubts, that he expected the missionaries to have made clear the meaning of the Treaty, and that they should continue to do so. The Colonial Office rested content with this also. There were in addition a number of actions by the British, independently of the Treaty, which contributed to the establishment of imperium. These included the proclamations by Gipps and Hobson about the land transactions, the appointment of magistrates, and the actual exercise on New Zealand soil of the governor's and the magistrates' authority (with the aid of soldiers). I have always understood that the establishment of British imperium in New Zealand was not by virtue of the Treaty alone.

*Deliberate missionary explanation / Kawanatanga had no meaning to Māori*

105. I was asked whether I agreed with Dr Kawharu's statement (on pages 104-105 of her evidence) that Hobson and the missionaries deliberately chose to explain the advantages of protection rather than governance mechanisms and processes relating to land to the rangatira. In addition, I was asked whether I agreed with Dr Kawharu's statement that the term kawanatanga had no meaning to Maori.

106. From the evidence available it can be inferred that the greatest weight or emphasis in Hobson's and the missionaries' explanations was on protection, but as set out above (e.g. paras 26.5, 27.4, 28.3, 30.5 above), they did not avoid referring to aspects of Crown authority that would embrace Maori too in promoting peace, good governance and the rule of law. Land issues would have been quite fully, indeed heatedly, discussed, from the time of Hobson's proclamation of 30 January and during and after the Treaty negotiations. How fully 'Crown pre-emption' was understood (or welcomed) by the rangatira is debateable, but the assertion of the Crown's authority in the matter must assuredly have been recognised.

107. I do not agree that the term kawanatanga had *no* meaning for Maori. Ruth Ross, Professor Salmond and others note the use of 'kawana' in translations of scripture (especially in relation to Pontius Pilate) and no doubt it arose in discussions of the actions of 'kawana' of New South Wales. I would have

to defer to linguists on the matter but my understanding is that making an abstract noun by adding the 'tanga' suffix would have been readily comprehended by Maori, who themselves contributed to evolutions in te reo Maori. Rangatira at the Treaty negotiations seemed to be very aware of the potential power of governors and wondered if it would be used against them as well as against settlers and land transactors. The full ramifications of 'kawanatanga' would probably not have been apparent because Hobson was instructed to defend Maori in the observance of their own customs (so far as they were 'compatible with the universal maxims of humanity and morals'). Nevertheless, rangatira were not slow to cooperate with magistrates and police in having thefts and other offences in the Bay of Islands and in Port Nicholson, dealt with by the courts. Paradoxically, some *British* officials were at first unsure how far the Crown's authority would operate as against tikanga and the independent authority of chiefs.[86]

*The Governor was on 'probation'*

108. I was asked whether there was any evidence of, and whether I agreed with, Dr Kawharu's statement at pages 134-135 of her evidence that the chiefs' perspective was that they gave conditional support to the Treaty: "The Governor was permitted to remain in New Zealand and fulfil his promises, but he was on probation. Signing was not the end of the matter. It was only a beginning".

109. I do not think the expression 'on probation' fits the situation very well, because it implies a kind of agreed process of review and possible termination, and this does not come through the evidence at all. In the rather theatrical proceedings which were Treaty negotiations, after often strong debate, rangatira either signed and accepted the governor or they did not.

110. There were, however, expectations about how the governor should relate to Maori. Tamati Waka Nene, for example, urged that the governor should stay to be 'a father, a judge, a peacemaker', to preserve their lands and customs and prevent them being made slaves. This was quite a strong

86 See Alan Ward, *Show of Justice*, pp 45-52; Daamen Ward, 'A Means and Measure of Civilisation; Colonial Authorities and Indigenous Law in Australasia', *History Compass*, (2003), pp 1-24; Shaunnagh Dorsett, 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 175-97.

recognition of the governor's authority: a 'judge' was not simply a 'mediator'. But the role of 'father' (presumably 'matua'?) would have involved expectations. If the governor was not a good father, a poor protector, rumblings and protests would presumably follow.

111. So I agree that, in a sense, signing was not the end of the matter, but a beginning. I see it, however, as the beginning of a *new phase* in the development of civil government rather than the beginning of a totally new project. Samuel Marsden had raised the concept of some kind of general government, ultimately embracing all iwi, from about 1820, and it was part of the goal of He Whakaputuanga. The *ture* was also a constant thread of missionary teaching, also referred to in He Whakaputunga, and considered by Christian Maori as the underpinning of peace, also much talked about. What was new in 1840 was that, whereas previous discussion had involved the possibility of the British Crown as a protector of an essentially Maori government (with missionaries and Busby as its advisers), now it was being decided to give the Queen and her appointed governor a key role in the project. Thus I think Dr Kawharu is entirely correct in seeing the Treaty negotiations and signings as inaugurating a new and very important phase. This is part of the reason why many matters were only broadly sketched out in 1840 and others only alluded to. A great deal needed to be done; most immediately this involved a review of land transactions and a new process of land purchase by the Crown, and a role for magistrates (including missionaries now designated Protectors) in settling disputes and keeping the peace.

**Response to Mr Rima Edward's evidence**

112. The affidavit of Mr Rima Edwards concerning a first draft of the Treaty (in which the chiefs were asked to cede their mana) was referred to me. I was asked whether I was aware of any evidence in support of any such draft of the Treaty. I was also asked how likely that might have happened.

113. I am not aware of any evidence that supports the proposition of a 'Tiriti Tuatahi'. It is highly unlikely that there could have been an assembly of rangatira in which such a proposition was put without some reference to it in the correspondence and reports of Williams and Busby. I have read extensively in both and have seen no such reference. Nor am I aware that

the Crown in 1839-40 had any intention of asking Maori to cede their mana. Rather, the Crown officials (and the missionaries) believed that Maori mana was under threat from uncontrolled colonisation and that the acceptance of Crown authority and civil government would help rangatira retain their lands and mana and make a more controlled engagement with colonists.

## APPENDIX A – SUMMARY OF ADDITIONAL RESEARCH

This appendix sets out a summary of additional research that I have undertaken since December 2009 and the conclusions drawn from that research.

### Introduction

1. Pressures of time inevitably limited the amount of research I could bring to bear in my report of 17 December 2009. Since then I have sought to bolster that the research by additional reading in two main sets of sources:

    1.1 Early editions of New Zealand publications not available in Newcastle or obtainable on inter-library loan but held in the Mitchell Library, Sydney. These include William Colenso's account of the signing of the Treaty, Sir William Martin's 1847 text *England and the New Zealanders,* Dandeson Coates' 1844 pamphlet *The New Zealanders and their Land* and, most importantly, Hugh Carleton's, *The Life of Henry Williams*, published in two volumes in Auckland, 1874 and 1877.

    1.2 Microfilm of Church Missionary Society records relating to New Zealand. The originals of these voluminous manuscript records, written in longhand, are held in London, and have been filmed under a Joint Copying Project of major Australasian Libraries. The Auchmuty Library of the University of Newcastle, NSW, holds a complete set of the microfilm. It seemed likely that the most fruitful for current purposes would be the letters and journals of the CMS missionaries in New Zealand during the period 1838-1840. These are to be found in Reel M205 in the University of Newcastle series. Other libraries may have used different reel numbers, however, the CMS archivists have numbered each inwards letter and also given a folio number to each page. These are cited in the excerpts from the letters quoted below in Appendix B below. Folios 106 to 705 in reel M205 include the letters and journals from early 1838 to the end of 1839; folios 1 to 641 run from late 1839 through 1840.

2. My purpose in re-reading the 1838-1840 correspondence, and Carleton/Williams 1874 and 1877, was to try to better understand the pressures and changes brought about in Tai Tokerau by the encroachment of 'western' society in the 1830s and the influence of those pressures and changes upon the negotiation of Te Tiriti in 1840. My main conclusions are set out in the following paragraphs. Documentary extracts substantiating those conclusions are set out in Appendix C.

**Missionary perceptions**

3. Virtually every missionary, every quarter or half-year, reported the prevalence of epidemic and endemic disease in the Maori communities and the continued decline of the population. 'Scrofula' and influenza are frequently mentioned, along with measles and erypsipelas. They report a strong demand from the Maori villages for missionaries to provide medicine and their half-yearly returns include lists several pages long of medicines they required sent from England. They believed that they did help reduce Maori mortality, but they also reported, with increasing pessimism, that they were not able to arrest the decline of the Maori population, even on the Christian.

4. All the missionaries report an rapidly increasing engagement by Maori with the Christian missions (Wesleyan and Catholic as well as Anglican), in the form of attendance at services and at mission schools, acceptance of Christian baptism and (on visits from the bishop in Sydney) the Anglican rite of confirmation. The CMS committee was anxious to launch new missions in districts such as the East Coast but the northern rangatira were reluctant to let their missionaries go.

5. There are many references in the correspondence (including almost the entirety of William Colenso's letters and journals) to the work of translating into Maori, and printing, the Bible (or sections of it, notably the gospels of Matthew, Mark, Luke and John, and the Psalms), the Book of Common Prayer, and a hymn book. Preparatory work had been launched by Henry Williams on his arrival in 1823, including systematic daily study of te reo Maori and on-going work on the grammar, syntax and vocabulary of the language. Over the next decade Williams also had small Maori 'primers',

prayer sheets, extracts from the gospels, Paul's epistles and suchlike printed in Sydney, for use in the mission schools, but he was often critical of the standard of printing in Sydney and the establishment of the CMS press at Paihia in 1834, with Colenso as printer, was a hugely important step. Meanwhile William Williams had undertaken the translation of the entire New Testament, with the first full print run in December 1837. Colenso then focused on printing the Maori text of Book of Common Prayer which began to be printed, in runs of several thousand at a time, from about 1839. It is evident from Hugh Carleton's comments that, all this time, the written Maori language continued to be revised and refined, with missionary and Maori jointly participating. That is, te reo Maori was not 'frozen' as at Professor Lee's 1820 efforts. Indeed the language appears to be still taking its 'classic' written form even as He Whakaputanga and Te Tiriti were being drafted. Be that as it may, the missionaries everywhere report a huge demand for the printed books, so that stocks commonly ran out soon after each printing run.

6. There is a stream of comment about the increase of livestock (cattle, sheep and horses) and of crops such as wheat, maize and peas, introduced by Marsden and still being sent over by the mission headquarters in Sydney. *Mihinare* Maori (those of the Anglican congregations) were starting to grow marketable surpluses of crops for sale to the Pakeha inhabitants of the Bay of Islands and visiting ships, but the livestock created new problems because they would break into and eat crops. The quarrels that resulted were commonly coupled by missionaries with the need for appropriate laws and judicial processes, if a 'civilized' lifestyle was to further develop.

7. Notwithstanding tribal fighting in the Rotorua and Bay of Plenty, and in the Bay of Islands itself in 1837, many Maori affirmed a desire for peace. They clearly identify this as a central tenet of the Christian message, but some say to the missionaries that while they are 'exceedingly desirous of a life of industry and quietude' they dare not become *mihinare* and forswear warfare because this would leave them vulnerable to neighbouring groups who had not done so. This too contributed to the missionaries' urging the need for 'a settled Government'.

8. From 1838 especially, many missionaries began to write that a change was coming over the country from the increasing flow of settlement, and that unless there was some kind of official intervention, the Maori people would lose control of New Zealand. The proposed colonisation by the New Zealand Association was considered as likely to be a final blow to Maori society.

9. These kinds of statements are usually coupled with assertions that Maori were 'selling land', often in large areas and recklessly of the future. There is virtually no suggestion at all in the missionaries' statements that these transactions might, in Maori eyes, have been *tuku whenua*, with the Maori 'vendors' continuing to exercise rights in the land. There sometimes mentions that two or more Pakeha were claiming to have purchased the same land from different Maori owners, or from the wrong Maori claimants and that this was giving rise to quarrels and threatened violence, again pointing to the need for 'settled government'.

10. The only practical step that the missionaries could see to safeguard Maori from the flow of colonisation was for the CMS to buy land itself and hold it in trust for Maori. Henry Williams and others set about making such purchases in 1838-9 and (near Port Nicholson) in early 1840. Williams pressed the parent society for recognition and support for their trust deed, but met with little response before Hobson's arrival and the assertion of Crown pre-emption changed the whole situation.

~~11.~~ From early 1838 the missionaries report a sequence of visits by French warships to the Bay of Islands, one of which brought the French Catholic Bishop, Pompallier, and two priests. The missionaries report the coercion of the Tahitian monarchy by Captain Dupetit-Thouars in 1838 and by Captain Laplace in 1839, and the French punitive expedition to the Chatham Islands. They fear that the French will attempt some kind of intervention in New Zealand, and consider the 'Popish Bishop' to be a likely agent for this. It is important to note that, notwithstanding the CMS missionaries' sectarian rancour and excitability, they were actually not wrong about the collaboration between the French government, the French navy and the Catholic hierarchy in France in the policy of extending French empire in the Pacific. Because Dame Professor Salmond's evidence tends

to suggest that the French threat was something of a 'beat-up' by Henry Williams to help secure Maori signatures to the Treaty, it should be noted that that specialist scholars consider the threat to have been very real. Thus Professor W P Morrell's classic text *Britain in the Pacific Islands* (Oxford 1960, pp 66-77) describes the close relations between the French government, the French navy and the Catholic church, with Monsignor Pompallier (as he then was) being very busy with the French naval captains in Tahiti, the Marquesas and Wallis and Futuna (all French possessions to this day) before coming on to the Bay of Islands in 1838. Professor Colin Newbury's text *Tahiti Nui* (Honolulu 1980) goes into even more detail. He notes (pp 96-103) that Governor Gipps 'had been worried by Du Petit-Thouars' treaty-making in Tahiti in 1838, and was presumably even more worried when Captain Laplace in the survey ship *L'Artemise*, extracted a further concession from Queen Pomare in 1839. Newbury also refers to Du Petit-Thouars' report debating the relative merits of the Marquesas and New Zealand for the intended French penal colony (which was eventually established in New Caledonia, also of course a French possession to this day). The CMS correspondence includes a letter by Bishop Broughton of Australia relating and supporting a comment from an informant in the Bay of Islands that Hobson's illness might hold up the Treaty negotiations until 'the French' make it no longer possible. (See below, Appendix B no. 21). While the diplomats of the British Foreign Office in London might allow their anxieties about French intentions towards New Zealand to be assuaged by their opposite numbers at the French foreign office, that was *not* the perception of the French among the English at the Bay of Islands or in Sydney. Finally, I have referred in my 17 December evidence (#A19, esp. pp 66-8) to the published work of Dr Peter Tremewan and Dr Peter Low of the University of Canterbury on this subject, including the evidence from French sources of Pompallier's encouragement to Captain Lavaud to persist with the plan to annex the South Island and defy Hobson's proclamation of British sovereignty there, based on discovery. Dame Anne Salmond's evidence includes a footnote reference to the texts by Tremewan and Low but she appears not to have grasped their significance.

12. All in all, from about 1835, CMS missionaries at the Bay of Islands increasingly leaned towards a greater role for the British Crown in New

Zealand, while still vigorously opposing European colonisation. But informal colonisation rapidly increased anyway, and Maori society continued to be troubled by disease, periodic tribal fighting, and tensions over new land transactions. By early 1838 Henry Williams and others considered that there was a change in the attitude of the settlers – that they were exhibiting greater self-confidence and aggressivity. On 11 January 1838, Williams wrote:

> ...unless some protection be given by the British Government, the country will be bought up, and the people pass into a kind of slavery, or be utterly extirpated. The European settlers are making rapid advances, and are beginning to hold out threats. Should any encouragement be given to the [New Zealand] Association, thousands would immediately come and overrun the country; and the natives must give way. The only protection that I can propose is, that the English Government should take charge of the country, as the Guardians of New Zealand; and that the Chiefs should be incorporated into a General Assembly, under the guidance of certain officers, with an English Governor at their head, and protected by a military force; which would be the only means of giving weight to any laws which might be established, and preserve that order and peace so much required. The natives have many years since proposed that this should be done, and have repeated their desire from time to time. (Williams to the Secretary, 11 January 1838, Carleton, *Henry Williams*, Vol 1, p 232. Carleton quotes similar letters from Davis, 26 May 1838, ibid p 235, and Maunsell, 7 August 1838, ibid, p 235)

13. At first, in 1838, Williams and his colleagues seem to have envisaged a form of protectorate under the British Crown, including a Maori legislative assembly, along the lines of the proposed Congress of He Whakaputanga. But by late 1838 and through 1839 the missionaries' letters become increasingly urgent, and increasingly pessimistic about the future for Maori. The reasons for this appear to lie in missionary perceptions of continued Maori mortality, the sudden irruption of a French threat and a rapid increase of land purchases by New South Wales speculators. When, about August 1839 the missionaries become aware that the NZ Company ships have arrived at Cook Strait and further large land purchases are under way, they become almost desperate to see British authority established, without too much regard for precise machinery, *provided that the land claims were investigated and Maori rights to uncultivated lands were upheld.*

14. It must be appreciated that, at this stage, there was almost no realisation of the considerable capacity of Maori to forcibly resist settlement and defend their lands. That did not come until the Wairau affray of 1843, the actions of Heke and Kawiti, and 'Rangihaeata's war' in the Hutt Valley 1844-5. In 1839-40 the models in humanitarian thinking, evident in Williams's letters, and in Colonial Office documents, were the dismal fate of the indigenous peoples of North and South America and Australia.

15. The advocacy of the missionaries in New Zealand clearly affected the planners in London. Their views emerge through the findings of parliamentary committees on New Zealand, through the London publications of the CMS in 1838-9 and, most importantly in the mix of idealism, pessimism and pragmatism in Colonial Office planning for New Zealand.

## APPENDIX B – EXTRACTS FROM CMS RECORDS

This appendix sets out documentary extracts from C.M.S. records in relation to the above conclusions.

The missionary letters quoted here, and Bishop Broughton's letters, are to be found in the Joint Copying Project microfilm of CMS records, Reel M205 in the University of Newcastle holdings. The missionaries' letters are all formally addressed to 'the Secretary', 'the Secretaries' or 'the Lay Secretary' of the CMS in London, namely Dandeson Coates. They are arranged here in chronological order.

1. Rev. R Davis (Corresponding Secretary), Waimate, to the Lay Secretary, London, 5 June 1838:

> The number of sick people & deaths have not yet, I fear, begun to diminish. Latterly my poor people have required my frequent attendance for medical purposes. The Chief Broughton is apparently on the point of death…[87]
>
> That something must be done, & that speedily, there can be no question, or the country will soon get into the hands of the whites…Many attempts have been made by some of the natives to dispose of land both at Mame and Kaikohi, but hitherto, with the assistance of Broughton, I have been enabled to preserve these districts intact.[88]

2. J Stack, Tauranga, report for the half-year to October 1838:

> The erysipelas, which prevailed generally throughout New Zealand, came to Tauranga, & but for the blessing of God on the use of medicine the mortality would have been fearful….[but many were very ill or died] though the apathy of the natives in not applying in time for medicine.[89]

3. William Williams, Waimate, to the Secretary, 14 November 1838:

> The pamphlets of Mr Beecham… and letters of J S Plumptree [of the NZ Association] are of great interest to us…It is obvious that the Association will endeavour to secure a good harbour, associated with as large an extent of country as they can grasp. There are few spots in the Northern island where they can effect their purposes without serious injury to the

87 p. 181, letter no. 45.

88 pp. 183-4, letter no. 45.

89 p. 311, letter no. 114. The Shorter Oxford English Dictionary defines erysipelas as 'A local febrile disease accompanied by diffused inflammation of the skin; often called St Anthony's fire, or 'the rose'.

> Natives. [Occupation of] the Thames in the centre & Port Nicholson in the south would place the whole of the broad part of the island in the hands of these adventurers.[90]

Williams goes on to urge that the CMS or the British government should purchase all the North Island harbours ahead of 'these speculators'.[91]

4. Mr J Matthews, Kaitaia, to the Secretary, 15 November 1838:

> The natives…are still on the decrease. [Our means are inadequate] to grapple with the alarming march of scrofula. The rapid increase of this disease baffles the conceptions of those who are not eye witnesses…Mr Puckey well remembers the time – twenty years ago – when perhaps not one in a hundred was to be seen with scofulous swellings. At the least, in this day, five hundred out a thousand are to be seen with the marks of scrofula. And this both in the old and the young.[92]

5. Rev. C Baker, Paihia, to the Secretary, 26 November 1838:

> Were they [the NZ Association] to succeed in their scheme New Zealand would at once fall as a nation.
>
> It however appears to me highly important that some effectual steps should be taken by the British Government or the country will fall an easy prey to some other power…You can easily conceive how desirable it is to have a settled Government for this people. There are many who are exceedingly desirous to live a life of industry & quietude, but from the circumstance of their being no protecting power, & Christians being averse to the mode of defence they were accustomed to in their former state they therefore render themselves liable to every encroachment & insult their heathen neighbours may be disposed to occasion them.
>
> …It has occurred to some of us that the French Bishop has some political object in view. We have had many French whalers and two French ships of war appear within a few months. [The French would be unlikely to get a footing in the Bay of Islands] but were they to go Southward of the Bay they might become established.[93]

6. T. Chapman, Tauranga, to the Secretary, 16 December 1838:

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90 p. 176, letter no. 43.

91 pp. 178-179, letter no. 43.

92 pp. 189-90, letter no. 48. Scofula is a tuberculous disease marked by swelling of the lymphatic glands. Matthews believed that changes in Maori diet were lowering their resistance; and the habit of wearing woollen blankets in all weathers, in comparison with traditional cloaks which shed water and breathed, left them open to chills.

93 p. 185, letter no. 46.

> Our general opinion is unfavourable to any colonization of this country, this being based upon the lamentable effects which have ever followed the location of a foreign people upon the possessions of Aborigines.[94]

7. Rev. Henry Williams, Paihia, to Secretary, 11 January 1839:

> …our fears have been much increased by the active measures of the French R.C. Bishop and priests, supported as they are by the appearance of two French Men of War. The first frigate, *L'Heroine*, M.Cecille, sailed about three months ago to revenge the seizure of a French whaler & the murder of her crew [i.e. at the Chatham Islands; the captain declined Williams's offer to send one of the missionaries as an interpreter] …The *Venus* French frigate of the largest class, 550 men, Commodore Du Petit Thouars, 1500 tons, arrived from Tahiti where she levied a fine on account of the Queen not allowing the R.C. Bishop & priests now here to remain on that island. We have reason to fear therefore that the French may have designs not yet known upon this island, & would therefore urge most strongly that the British Government should take immediate steps for the protection of the people….Seamen running away from shipping [in the Bay of Islands] fluctuate. The grog sellers are about 50. The whole white population is free from any constraint of law, which must evidently point out the fearful position of affairs here, & the necessity for immediate steps to check those evils to which we are constantly subject… [the mission stations are]…liable at any time to the depredation of any lawless hand, who might fearlessly destroy stock and property to a considerable amount.[95]

8. W G Puckey, Kaitaia, to the Secretary, 4 March 1839:

> [Puckey reported that there was great interest in the missionaries' teachings about Christianity but that the people were reluctant to 'conform to its rules' because of its prohibition on war and bloodshed.] Their excuse is that if they turn to Christianity they will not be able to rise up to fight should they be attacked by any hostile tribe … Very few of the northern natives have had anything to do with war since 1831; but it is not because the spirit of war is subdued within them. On the contrary if Noble Panakareao were an unconverted chief and proposed war, I believe hundreds would enlist under him gladly.[96]

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94 p. 307, letter no. 108.

95 pp. 301-2, letter no. 106.

96 p. 314, letter no. 100.

9. A letter from Nopera Panakareao, Kaitaia, to the Committee of the CMS, London, 5 March 1839:

> Don't take away our candlesticks [i.e. Don't move one of the Kaitaia missionaries to another district]... Now we have peace and rest. There are plenty of missionaries living at the Bay of Islands, & there are plenty of Ngapuhi Chiefs who have not yet believed; & who do nothing but sell land to the white people who come there...Here the Word of God is growing amongst those who have, as it were, been tied. The Church of God at Kaitaia is rising.[97]

10. J. King, Te Puna, to the Secretary, 5 March 1839:

> The Maori population is greatly reduced by disease & death, war & bloodshed....
>
> The most promising young men & women who were brought up and instructed in the [mission] school I am sorry to say are dead.[98]

11. Henry Williams, Paihia, to the Secretary, 7 March 1839:

> European settlers appear now to be flocking in upon us; every vessel brings a fresh supply, who may be regarded as declared enemies of the natives. They are spreading out, & a few months will show a wonderful change in the affairs of New Zealand. The natives are gradually receding. We are holding on to the land at Kawakawa as well as we can for the present, though I fear our trust deed is not of value'.[99]

12. R Davis, Waimate, to the Secretary, 22 March 1839:

> The fashionable world is introducing itself here...& colonization is fast going on;...no step [is] more likely to be better for the Maoris as the concession of the sovereignty of their country to Great Britain, retaining for themselves the possession of their lands etc...Should the country endeavour to maintain her own independence without the guardian care of Britain, she may soon lose it... Witness for instance what transpired at Tahiti, when the French frigate Venus was there.[100]

13. Bishop Broughton of Australia, to the Secretary, 28 March 1839:

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97 p 317, letter no. 101. The translation by Mathew Puckey endorsed 'This I believe to be as near as possible to the original'.

98 p. 344, letter no. 126.

99 p. 306, letter no. 107.

100 p. 351, letter no. 131.

> The great problem at present I think is how they [the Maori people] may be preserved to form a Christian nation, for such, if they be preserved, they assuredly should become. But in mournful sincerity of heart I express my own opinion that their numbers have diminished in a fearful rate since my first connexion with them, & that unless measures can be suggested the race is wearing out & will at no very remote period altogether disappear.[101]

14. Henry Williams, Paihia, to the Secretary, 22 April 1839:

> Many attempts have been made to purchase land at the Kawakawa; but as yet our trust deed has been sufficient to preserve it to the natives, though it has been ridiculed by persons of whom we might have hoped better. To me it is a matter of great satisfaction that the Missionaries have the land they have; as I believe the natives many yet have to seek shelter among our families. By every vessel from the Colony [NSW] are arrivals of persons in quest of land, & I fear that in less than a year from this emigration to this country will become general.[102]

15. William Williams, Waimate, to Secretary, 28 August 1839:

> The tide of emigration to New Zealand has already set in. Every fortnight or week brings a new arrival. Many are here whose object is to buy up the country. We learn by the Sydney papers that purchases have been made in Cook Straits, one for &500 by a Mr James, another of 30 square miles by a Mr Walker. The natives here know better the value of land: still it is pretty certain that but unless purchases are made as a reserve for the natives they will soon have no place to call their own.[103]

16. William Williams, Waimate, to Secretary, 12 November 1839:

> The inhabitants of New South Wales have not awaited the arrival of the [NZ]Association, but influenced partly by a long drought and threatened famine in New Holland great numbers are come to buy land. The only course which appears to promise certainty for the natives – [is] that of buying up tracts of land for them on behalf of the Society. If this can be effected the settlers can pour down as much as they please.[104]

17. William Williams, Paihia, to the Secretary, 18 November 1839:

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101 pp. 390-1, letter no. 148.

102 p. 347, letter no. 127.

103 p. 529, letter no. 203.

104 p. 559, letter no. 7 Letters bearing late 1839 dates appear to have been numbered among the 1840 letters, i.e. at the date they arrived in London.

> [Notes that a French vessel, *L'Artemise*, Captain Laplace, was surveying the coast]. Nothing definite has been heard except a report through natives, which we believe to be correct of some expressions made by the French Roman Catholic Bishop. This took place about four months ago, & inquiry was made by the British Resident & doubtless information sent to the government at home. The expressions were these - the English have no right to New Zealand, the French having first discovered it & that bye & bye the French will come and take possession of the country.[105]

18. George Clarke, Waimate, to Secretary, 20 January 1840:

> Wherever we travelled in New Zealand the native community are more or less disturbed by the numbers of Europeans seeking to buy land. There are vessels coasting the Bay of Plenty apparently with no other object than purchasing land... and I do fear that notwithstanding what has been said to them [Maori] as to its ultimate consequences they are so infatuated with the prospect of a little present gain that before this reaches you the greater part of the Eastern Coast will be in the possession of British and other subjects.[106]

19. James Hamlin, half-yearly report 28 January 1840:

> Various reports have reached us respecting the purchases made by the *Tory*...One report states that the whole of the island to the southward of the East Cape direct across to Taranake or Mount Egmont is purchased. If this is the case what is to become of the remaining part of the Taranake Natives, also that large body of Natives at Wanganui...and some tribes in the interior, with those on the coast on both sides.[107]

20. Henry Williams, Paihia, to Secretary, 23 January 1840:

> [Williams became aware during his visit to Port Nicholson in late 1839 early 1840 of the extent of the NZ Company's purchase in Cook Strait.]
>
> I arrived in Cook's Strait as the purchases of Port Nicholson and Queen Charlotte Sound were complete [sic] from the Natives. I could not learn that any more had taken place by Colonel Wakefield. I therefore purchased two tracts for the sole benefit of the Natives, one to the southward of Port Nicholson, the other is the river Wanganui with the country North and South for some distance. I very much regret no instruction has been given on this subject [by the parent committee in London] either upon the question of purchase

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105 p. 629, letter no. 26.

106 p. 2, letter no.58.

107 p. 618, letter no. 18.

> from the Natives or on the form of purchase. We have several difficulties. First in whose name is a deed is to be drawn & secondly how to admit of a lawful sale of a portion of this land to any European whom it might be wished should reside within a given distance of the Natives for the benefit of trading. In many districts the Natives are altogether bought up. In a few months we shall see the nature of some of these purchases & the good people of England shall be wiser with regard to the nature of their sites of New Zealand estates. Whether on the tops of mountains or in the midst of swamps.[108]

None of the missionaries reporting these purchases gives the slightest indication that they might have been *tuku whenua*. They were aware that the 'purchases' had been made from the wrong parties or from too few rightowners, and that the boundaries were erratic to say the least. But they nevertheless believe that the Maori 'vendors' have lost control of the transacted land.

21. Bishop Broughton, Sydney, to the Secretary, 27 March 1840:

> [Broughton notes that he has received a report from the Bay of Islands regarding Hobson's illness and noting the impediment to his duties] '...especially that most important urgent one of finishing the treaty made with the native chiefs before the French shall make it no longer possible'...[Broughton continues] The allusion made by my correspondent to French interposition & influence deserves the attention of the Society upon religious grounds, as in a political point of view...there is an intimate and well understood union between the civil & ecclesiastical powers in the establishment of a Roman Catholic mission under a French Bishop & clergy to disengage the minds of the natives from the English in return for the support from the French state.[109]

22. Henry Williams, Paihia, to the Secretary, 13 February 1840:

> In the last fortnight we have been under considerable excitement from the arrival of Captain Hobson as Governor of New Zealand. The kindness shown by His Excellency is very great & we have had much gratitude. All the gentlemen accompanying him seem to be sterling characters. I have every hope that protection will be afforded to these poor natives, so much required. Most of the chiefs have signed the treaty in this neighbourhood. I am about to accompany the Governor to Cook's Strait for the purpose of seeing the Chiefs of that part of the country. The Popish Bishop has been endeavouring to

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108 p. 702, letter no. 48.

109 p. 687 letter no. 78.

poison the minds of the Natives but has not succeeded. Many of the Chiefs hung back for some time being told that they would be sent to break stones as the convicts of Port Jackson & to labour as they do. The Europeans at Hokianga have declared that no law shall regulate them. This of course is but a momentary expression of feeling. I fear the Governor may experience opposition from the Popish Bishop in various parts of the country.[110]

23. R. Davis, Waimate, to the Secretary, 8 February 1840:

Yesterday [sic] the Treaty has been signed by all the chiefs in the Bay of Islands. It will be a time long to be remembered. The meeting with the chiefs commenced on the th inst. [sic] Never was a savage nation placed under circumstances so favourable. The New Zealanders are highly favoured....The inundation of immigrants & the manner in which land has been purchased were indicative of destruction to the Native Tribes. Under such circumstances the only chance which appeared for them was that we should buy up some tracts of country on which they may live. A few weeks ago while at the Kaikohe with my people I heard that a fine tract of country near the Waimate has been set apart for sale. I returned home immediately with a determination to make the purchase at all risks... The report, however, did not prove true at the time, but it would ere long have taken place had not the present measures been brought about. Now we are delivered from cares of that nature as the natives are no longer allowed to sell their land to private individuals but to the Government. This is a very judicious arrangement. Had this step not been taken much difficulty would have still arisen as the calls for land would have increased with the number of immigrants....None of the Chiefs belonging to our Congregations withheld their signatures to the Treaty. They acknowledged that they were not thoroughly acquainted with its nature but at the same time having implicit confidence in our judgement on the subject they signed it at our recommendation, whereas the few chiefs who had received popery and were living at Kororareka & in its vicinity came to reject the Governor, to vomit forth abuse against the missionaries that they were [illegible: influenced?] by other heads than their own was very evident, & which in the sequel proven to be true.[111] [Davis refers to statements by Rewa and Te Kemara that Bishop Pompallier had advised them not to sign the Treaty].

24. James Kemp, Kerikeri, to the Secretary, 11 February 1840:

The number of Europeans who have come & are continually coming to this land is considered by all as evidently pointing

110 p. 706, letter 50.

111 p. 15, letter no 60.

> out & calling loudly on the British government that British laws should be established in New Zealand. I think it is generally considered that between two evils the least is chosen, & not a better step could under existing circumstances be accepted than what is now in progress.[112]

25. R. Maunsell, Waikato Heads, to the Secretary, Waikato Heads, 30 March 1840:

> I have lately received from [the Governor's] Secretary a deed [the English text of the Treaty] to which he requests me to obtain the signatures of the Chiefs of Waikato amongst whom we reside. [Maunsell summarises the terms of the English text and continues…] Considering the present circumstances of this people, their weakness, their want of Government, & the dangers from without with which they are threatened, one cannot but hail with thankfulness such an arrangement, & persuade his people to accede to it even though involving the sacrifice of two points to which human nature, & particularly a Native's, strongly cleaves, viz., independence & the right of disposing of his land as he pleases.
>
> It is stated in the preamble that one of the chief objects of the present Governor will be to establish 'a settled form of civil government', while it is not stated that the concurrence of the chiefs will be required beyond the preliminary act of assenting to the Sovereign power of the Queen; neither, also, are these rights defined which it is stated her Majesty is anxious to protect for the Native chiefs. Under these circumstances we cannot but feel our critical situation, by having urged our people to assent to that document, inasmuch as we shall be responsible in their eyes for all the evil consequences that may follow.[113]
>
> [Maunsell secured the signatures of 34 chiefs, and sent the copy of the Treaty back to Hobson with a letter stressing that the missionaries' good faith was heavily committed in the process and that he expected the Crown to act honourably and in good faith].

26. James Shepherd, Wangaroa, to Secretary, 12 June 1840:

> The Natives look at the soldiers with a jealous eye…[but] The greatest excitement seems now to be nearly over they seem now to believe that no danger is to be apprehended from the Governor being in their land…but their land is for the most part in the hands of others, Europeans. Vast tracts of land have been purchased by Europeans these twelve months past,

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112 p. 101, letter no. 94.

113 pp. 308-9, letter no. 155.

> thousands, tens of thousands of acres have been purchased by single individuals.[114]

27. Rev. R. Taylor, Wanganui, to the Secretary, 23 September 1840:

> We have received a letter from the Governor acknowledging that, without our aid, he could not have hoped for success, that was very apparent, you will see the great reason the Natives received the Governor was because we stood by his side, & they had faith in their leaders to believe that we would not wilfully lead them astray. I fear we shall see little readiness on the part of the Governor to acknowledge the debt he owes us.[115]

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114 p. 125, letter no. 119.

115 p. 305, letter not numbered.

## APPENDIX C – EXTRACTS FROM CARLETON, *THE LIFE OF HENRY WILLIAMS*

This appendix sets out extracts from Hugh Carleton, *The Life of Henry Williams, Archdeacon of Waimate,* Vol 1 (Auckland 1874) and Vol 2 (Auckland 1877). Carleton was married to Williams's daughter Lydia, knew the family intimately, and compiled a biography replete with Williams's correspondence, which he or Lydia had presumably taken over on the Archdeacon's death in 1867.

1. Carleton wrote as some length on the study of te reo Maori under Henry Williams's leadership. His comments are relevant because of the criticisms made of Williams's alleged poor translation of the Treaty into Māori:

> The next object was the acquisition of the language…in a scholar-like fashion, ascertaining the rules by which it is governed, compiling a dictionary, and fitting themselves to undertake a translation of the Holy Scriptures. For this purpose regular meetings were organised at which notes and suggestions were exchanged, and formal rules of construction were deduced…In 1823 day-schools were established, and Sunday-schools for the children. [116]

2. Henry Williams to E W Marsh, 12 July 1826:

> We meet generally from nine to twelve each day, studying the language, generally translating the Scriptures. We make considerable progress and it greatly facilitates our intercourse with the people. [117]

3. Carleton refers to the printing of Christian literature in Maori in 1833 and compliments 'the elder missionaries' on the work of translation. He continues:

> …those translators had to deduce and frame the rules which constitute a grammar; to fix an everchanging language; to make choices among dialects, to compile a dictionary, etc…how much was pure, and how much was alien – in plain English 'slang'… It is not intended to imply that the translation of those days reached perfection in a bound. Revision after revision took place, other labourer coming into the field, until the natives came to take the same pride and delight in it, for the very beauty of the language – pure and idiomatic Maori, that an

116 Carleton, Vol 1 p 32.

117 Carleton, Vol 1, p 53.

> Englishman does in the authorized version of his own church.[118]

In Vol 1, Appendix D, p. xi, Carleton lists the printing of parts of the Bible and the Book of Common Prayer in Sydney in 1832-3, of the complete New Testament (William Williams's translation) at Paihia in 1837 and the Old Testament (largely Maunsell's translation) in the 1840s. The evolution, and fixing, of written Maori was, in effect, concurrent with the drafting of He Whakaputanga and Te Tiriti.

4. In 1831 the French survey ship *La Favorite* visited the Bay of Islands, giving rise to a the petition from northern rangatira for protection from the British Crown. The French captain met with Marianne Williams and local rangatira including David Taiwhanga. He frankly disclosed the connection between the French government, the French navy and the Catholic church. Carleton records:

> The captain informed Mrs Williams that he was to have brought out, by direction of the French Government, a Roman Catholic bishop to New Zealand; but that the revolution in Paris (the days of July [1830]) had caused an abandonment of their intention.[119]

5. H. Williams journal, 7 March 1833. During a rendezvous at Whakatiwai:

> In the evening Patuone presented two pigs. He expressed great concern at not having any children. He complained that the missionaries had large families, but they had none. It certainly is a mystery to them how we became so numerous, and they so few.[120]

6. In a letter to the Secretary of CMS dated 11 January 1838 Henry Williams wrote on behalf of the missionary committee in the north:

> ...unless some protection be given by the British Government, the country will be bought up, and the people pass into a kind of slavery, or be utterly extirpated. The European settlers are making rapid advances, and are beginning to hold out threats. Should any encouragement be given to the [New Zealand] Association, thousands would immediately come and overrun the whole country; and the natives must give way. *The only protection that I can propose is, that the English Government should take*

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118 Carleton, Vol 1, pp 137-8.

119 Carleton, Vol 1, p 93.

120 Carleton, Vol 1, p 147.

> *charge of the country, as the Guardians of New Zealand* [emphasis in original]; and that the Chiefs should be incorporated into a General Assembly, under the guidance of certain officers, with an English Governor at their head, and protected by a military force; which would be the only means of giving weight to any laws which might be established, and preserve that order and peace so much required. The natives have many years since proposed that this should be done, and have repeated their desire from time to time.[121]

7. George Clarke (future Chief Protector), responding to a letter from the Secretary of the CMS dated 6 July 1837, expressed the view that the New Zealand Association's plans for colonisation:

> ...must terminate in the total ruin of the people, as a nation, if entered upon as proposed, though so recently received under the nominal protection of Great Britain. As yet there is no shadow of Government in this country; each tribe, and each individual of each tribe, acts independently of every one; hence those acts of violence which are committed with impunity, and the sale of land...without considering future consequences. [In this situation] the Association will be able to buy up the whole island, & consequently claim a right of sovereignty, to prescribe laws to all within their dominions, setting at defiance any means by which might be afterwards entered upon for the protection of this people...The missionaries have tried to find some means whereby the might be preserved ... to the rightful owners, and sale be made more difficult or less general; but have not succeeded. The Natives had in some instances, proposed to give their land in trust to the Missionaries, to preserve it from being sold by any single chief, or purchased for a nominal value. [He refers to two such tracts at Kawakawa] [122]

8. Richard Davis to the Secretary, 26 May 1838, complaining that the British Government's intentions were unclear:

> That something ought to be done, there can be no doubt; or we shall soon get about us a lawless band, who will possess sufficient force to take possession of the country, whenever they think proper...*If the country is to be colonized let it done by the British government.* [123]

9. Henry Williams wrote to Dandeson Coates, Lay Secretary, London, 18 June 1838:

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121 Carleton, Vol 1, pp. 231-2.

122 Carleton Vol 1, p 232.

123 Carleton, Vol 1, p 235.

> I hope our letter to you [of 11 January 1838], relative to our views respecting the proceedings of the New Zealand Association, will arrive in sufficient time to be of use to you in preventing so great an evil to this people as the establishment of such a Company in this land. In that letter you will see our general opinion; and as Europeans of different nations are frequently arriving among us, it is highly important that no time should be lost for the preservation of the tribes around us. The natives frequently enquire what course to take, and are evidently alarmed at the present movement. [Williams then alludes to Coates's pamphlet of 3 January 1838 to Lord Glenelg which had suggested that the situation in New Zealand was not as dire as Busby and others had recently suggested. Williams continues:] Your observations (p.16, 'knowing as I do &c,' were perfectly correct at a certain period of the Mission but for some years past, in consequence of the general influx of Europeans, we have had great difficulties in restraining the Natives from disposing of their lands.[124]

10. Robert Maunsell to the Secretary, 7 August 1838, regarding the NZ Association's proposals to colonise NZ via a chartered company:

> We certainly do look with apprehension on such a project, and have little doubt but that it will result in the extermination of the aborigines, and not without loss to the settlers. Their idea of settling quiet[ly] in this land, with an armed force and such extensive powers, is quite ridiculous…[A] few scattered settlers is so different from that of a band of fortune-hunters, who organize that influence into a system, and support it by power.'[125]

11. The Bishop of Australia (Broughton), to Williams, 10 January 1840:

> Upon the fullest consideration my judgment inclines me very strongly to recommend to you, and through you to all other members of the mission, that your influence should be exercised among the chiefs attached to you, to induce them to make the desired surrender of sovereignty to Her Majesty.[126]

I am not sure when this letter reached Williams, but probably it was brought from Sydney on the same ship that conveyed Hobson and his staff. Williams noted that:

> the immediate consequence of establishing the British dominion will be the settlement of titles to land according to the principles of law

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124 Carleton, Vol 1, p 233.

125 Carleton, Vol 1, p 235.

126 Carleton, Vol 2, p 7.

> and equity…[including] judicial investigation of the landed properties transmitted to the [Church Missionary] Society'. [127]

12. On visiting Port Nicholson in January 1840 Williams became aware of the NZ Company's claims to have purchased vast areas of New Zealand, either side of Cook Strait. He returned to Port Nicholson in April 1840, in the course of taking the Treaty to Maori communities in the Straits, and later recalled:

> On this visit I saw in the Bank at Wellington a map of New Zealand, about six feet in length, and was told by the authorities of the New Zealand Company that the coloured portion was the property of the New Zealand Company, from the 38th to the 40th parallel of latitude. [128]

Williams inquired whether there had been any meetings by the Company agents with Maori at Wanganui, Taupo, Kawhia, Rotorua, Turanga, Ahuriri etc, knowing that there had been none.[129]

13. Earl Grey's 1846 charter for NZ, including a chapter 13 which proposed that land not actually occupied by Maori should be registered as Crown demesne. The proposal reached Auckland in June 1847, whereupon the Anglican clergy, led by Bishop Selwyn, immediately and unanimously protested against it. Selwyn wrote to Henry Williams on 30 June 1847 stating that he intended to defend the Treaty, including the Article 2 guarantee, which he understood to include 'waste' lands. He asked Williams to inform him *'what* you explained to the natives, and how they understood it' (emphasis in original). Williams replied:

> I confined myself to the terms of the treaty.
>
> That the Queen had kind wishes towards the chiefs and people of New Zealand.
>
> And was desirous to protect them in their rights as chiefs, and rights of property.
>
> That the Queen was desirous that a lasting peace and good understanding should be preserved with them.

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127 Ibid.

128 Carleton, Vol 2, p 16.

129 Ibid, p 17.

> That the Queen had thought it desirable to send a Chief as a regulator of affairs with the natives of New Zealand.
>
> That the native chiefs should admit the Government of the Queen throughout the country, from the circumstance that numbers of her subjects are residing in the country, and are coming hither from Europe and New South Wales.
>
> That the Queen is desirous to establish a settled government, to prevent evil occuring to the natives and Europeans who are now residing in New Zealand without law.
>
> That the Queen therefore proposes to the chiefs the following articles.
>
> Firstly, - The chiefs shall surrender to the Queen for ever the Government of the country, for the preservation of order and peace.
>
> Secondly, - the Queen of England confirms and guarantees to the chiefs and tribes, and to each individual native, their full rights as chiefs, their rights of possession of their lands, and all their property of every kind and degree.
>
> The chiefs wishing to sell any portion of their land, shall give the Queen the right of pre-emption of their lands.
>
> Thirdly, - That the Queen, in consideration of the above, will protect the natives of New Zealand, and will impart to them all the rights and privileges of British subjects. [130]

Williams added that Hobson instructed him:

> 'not to allow any one to sign the treaty till he fully understood it, to which instruction I did most strictly attend. I explained the Treaty clause by clause at the signing of the same, and again to all the natives in this part of the Island previously to the destruction of Kororareka.' [131]

14. Meeting at Paihia on 16 December 1841, the 'chiefs of Ngapuhi' decided to surrender Maketu to the government for trial on the charge of murder of Mrs Robertson and others. They wrote to the Governor 'Maketu's work is his alone' and continued, in terms which express a sense of a still-developing reciprocal relationship:

> Sir, Governor, let your regard be great for us, the children of Queen Victoria…Now this is the word of the book: 'Love one another'. This is a good word. Shew us the greatness of your

130 Carleton, Vol 2, p 156.

131 Ibid.

regard to us and our children, and we shall turn without exception to Victoria to be her children. But if not, what shall we do? Governor, we are sitting in ignorance; we have no thoughts; you are our parent. Do you write a book [pukapuka, i.e. letter?] to us, a book to raise us up, who are sitting in darkness, in the woods or elsewhere. We have no mischievous disposition towards the Europeans. [132]

132 Carleton, Vol 2, pp 42-3.

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