THE TREATY OF WAITANGI (THE ENGLISH VERSION)
NED FLETCHER
26 MARCH 2.30 pm

>>RINGA HĀPAI: (Te reo Māori). Welcome to all of you who are registered and watching this recording in the future. Welcome to those of you who are present today for this webinar in this excellent series on Te Tiriti-based Futures and Anti-racism.

I am David Williams, a Professor Emeritus from the University of Auckland, now known in te reo Māori as Waipapa Taumata Rau, which is a much better name than Te Whare Wananga o Tāmaki Makaurau in my view.

Just confirm all of you people who are joining out there as participants that you're at the right session; this is a session on the Treaty of Waitangi English version in which the kaikōrero, the main speaker, is Dr Ned Fletcher. This will be an interactive session in the latter part, after Ned has given an introductory talk of half an hour or so, between half an hour and 40 minutes, and we'll have at least 20 minutes for questions, so please do use the chat box to pop in questions. I'll keep an eye on it as much as I can, but also we've got Ngaire Rae from the Network Waitangi at Whangarei who is helping with the questions and answers part of the session at the end, so she's the moderator on hand. So you can share your thoughts, you can put in whatever you like into the chat show, providing it's appropriate and respectful in the same way that your community code requests of you on the screen right now.

So the speaker for this session today is Dr Ned Fletcher. There's Ned appearing on the screen. He is a partner in Kayes Fletcher Walker which is a law firm operating in South Auckland in Manukau City, well what was Manukau City, and Ned is a partner in that firm, his wife, Natalie Walker, holds the Crown warrant, so Ned spends a lot of his time with a number of people in that law firm in the District Court at Manukau.

The reason he's here with us today is because he has done a PhD at the University of Auckland on the topic of the English text of the Treaty of Waitangi. And noticing the fact that a very large proportion of the discussion of the Treaty has omitted to bother with looking at that English text.

That thesis was finished a few years ago and it's very, very long, but thankfully Bridget William Books will be publishing a condensed and excellent, I'm sure, version of that thesis in a book simply labelled, I believe, The English Text of the Treaty of Waitangi and it's due to be published later this year perhaps by August 2022, so look out for that.

But there we are, I'm the ringa hāpai, the Chair. I'll come back in for the Q&A, but now I hand it over to the kaikōrero, which is Dr Ned Fletcher and I had the pleasure of being his supervisor for that PhD thesis, so we've been through this for a long time and I love the possibility that all of you people out there can hear what he's got to the say. So over to you.

>>DR FLETCHER: Thanks very much, David. I was the great beneficiary of being your student, and your support for me has continued in the promotion of the book, so thanks very much for that, I'll slip you a $10 later.

Tēnā koutou katoa. As David said, I'm going to speak today about the English text, or the English draft of the Treaty of Waitangi. That's the text that was given to Henry Williams and his son Edward to translate into Māori before being explained to the Chiefs assembled at Waitangi on 5 February 1840. So it's a topic that looks to only one side of the Treaty story, the English, British understandings of the English text.

If, as the great New Zealand judge Sir Robin Cooke, once said, a nation cannot cast adrift from its own foundations, New Zealand has seemed at times to have made a pretty good and determined effort to cast off the Treaty of Waitangi. Gnawed by rats, described as a simple nullity and neglected by lawyers for decades, the Treaty has also been disparaged by historians as incoherent and a deceit upon Māori. An influential verdict delivered by Ruth Ross in 1972 is that the Treaty was hastily and inexpertly drawn up, ambiguous and contradictory in content, chaotic in its execution, and says whatever we want it to say.

It is widely accepted that sovereignty was mistranslated as kāwanatanga and that the cession of sovereignty in the English text was incompatible with the guarantee of rangatiratanga in the Māori version. It is said that British representations, that the motive in seeking sovereignty was to protect Māori society masked in intention to promote settlement and assimilate Māori into settler society.

It has been suggested that the British government didn't believe that Māori had sovereignty to cede, but found it convenient in fending off Māori opposition and the interests of other European powers to treat with them on the basis that they did. The guarantee of property is said to have obscured the real position that Māori were not full owners with enforceable legal title in the new legal order.

Now if these assessments are right, the Treaty would be a rotten foundation for a nation. But I don't think they are. In brief, my position is that the English and Māori texts reconcile, the basis of British sovereignty was the Treaty, British intervention was to

establish government over British settlers for the protection of Māori, British settlement was to be promoted only to the extent that Māori protection wasn't compromised, Māori tribal, government and custom were to be maintained, British sovereignty was not seen as inconsistent with plurality in government and law. Māori were recognised as full owners of all their lands, whether or not occupied by them, according to custom.

So in this talk I'll break all of those elements down. First, treating for sovereignty. Obtaining a cession of sovereignty from Māori was treated by the Colonial Office as a necessary precondition for the assumption of sovereignty by Britain. This was not a matter of show. The instructions given by the Colonial Secretary, the Marquess of Normanby to the British consul, Captain William Hobson in August 1839, maintained that Māori title to the sovereignty of New Zealand is indisputable. New Zealand was acknowledged as a sovereign and independent state and the British Crown disclaimed every pretension to seize upon the islands of New Zealand unless the free and intelligent consent of the natives, expressed according to their native usages, shall be first obtained.

It was standard practice for Britain to treat with indigenous people's for sovereignty. As Normanby's predecessor, Lord Glenelg, had said in December 1837, no colony had been founded in derogation of the rights of sovereignty and property such as were possessed by the Chiefs and people of New Zealand.

When, after Hobson's departure for New Zealand, the New Zealand Company claimed that New Zealand was already British in sovereignty, James Stephen, the permanent Undersecretary of State for the colonies, wrote in a memorandum that became a Cabinet Paper, they are either being ill-informed as to the facts or very ill-disposed to make a fair statement of them. He set out the background and concluded that the proofs are overwhelming and superabundant that Great Britain has recognised New Zealand as a foreign and independent state. Stephen was the civil servant who headed the Colonial Office and the architect of British policy towards New Zealand and, in effect, the actual author of Hobson's instructions on which the Treaty was based.

At Treaty signings, Māori were told that the British Crown could exercise no civil powers in New Zealand without their consent. One of Hobson's officials, Felton Mathew, recorded in his journal on 5 February 1840, in evident reference to British recognition of the Declaration of Independence 1835, that a voluntary cession of sovereignty had been rendered necessary by the British government having some years ago formally recognised the independence of the country.

On 5 February 1840 a British colony hung in the balance. Its establishment depended, Mathew wrote, on the success of our negotiations with the Chiefs today. After the Treaty was signed, the Colonial Office maintained it was the basis of British sovereignty. As Lord John Russell, Normanby's successor, as Colonial Secretary told Hobson, it is upon the deliberate act and cession of the chiefs on behalf of the people at large that our title rests. For his part Stephen wrote it was in virtue of the Treaty so made with them and on that basis alone that her majesty's title to sovereignty in New Zealand at this moment rests.

When in 1843 the New Zealand Company said that the Treaty was a "praiseworthy device for amusing and pacifying savages", the official response was that the Colonial Secretary, who was by then Lord Stanley, was not prepared to join with the Company in setting aside the Treaty of Waitangi after obtaining the advantages guaranteed by it. The Treaty then was the foundation of all government and laws in New Zealand.

Next, reasons for British intervention. The reasons for British intervention given in the preamble of the English text of the Treaty were that Britain was anxious to protect the just rights and property of the chiefs and tribes and to secure to them the enjoyment of peace and good order. This protection was deemed necessary because of British and European settlement which had already occurred or was in prospect.

Cession of sovereignty would allow the establishment of a settled form of civil government with a view to avert the evil consequences that must result from the absence of necessary laws and institutions alike to the native population and to the Queen's subjects.

These reasons express in condensed form the explanation given in Normanby's instructions to Hobson. The instructions spelt out the belief that unless British settlers were restrained by necessary laws and institutions in New Zealand, the experience of colonisation was that Māori would not survive. The solution looked to was the establishment amongst the settlers of a settled form of civil government.

The sovereignty sought from Māori to establish such government was, if not for the whole country, at least to those districts within or adjacent to which her majesty's subjects may acquire lands or habitations. While the Colonial Office plans evolved from January 1839, as reflected in January and February drafts of the instructions which weren't eventually finalised until July and weren't formally issued until August, the underlying purpose for intervention remained constant.

So in the January draft of the instructions it was said that the British government had decided to establish a settled form of government for her subjects in New Zealand.

Hobson was to explain to Māori that the proposal for cession was in their interests so the Queen could exercise effective control over lawless British subjects. He was to use his authority for establishing and enforcing law and order amongst the British inhabitants and for protecting the natives from violence and injustice.

In the February draft of the instructions similarly, the lawless Europeans were to be subjugated to law and Māori secured against the perils in their vicinity. Colonial Office letters to the law offices and Treasury in May and June 1839 also spoke of the need to set up a system of government over British subjects living in New Zealand. A Treasury reply later expressed in a minute tabled in parliament referred to the proposal as being to establish some British authority for the government of the Queen's subjects resident in or resorting to those islands.

The Colonial Office itself used this Treasury minute to explain British policy in response to queries and also attached its correspondence with the Treasury to the eventual instructions to Hobson and Governor George Gipps in Sydney to whom Hobson was to be subordinate until New Zealand became a separate colony.

Normanby's 15 August dispatch to Gipps referred him to the 14 August instructions, which were described as having been given to Hobson on his embarkation to assume the government of the British settlements in progress in New Zealand. For his part, Gipps authorised the payment of the expenses of the new administration in New Zealand on the basis that the New Zealand government had directed the establishment of a settled form of civil government over British subjects in New Zealand.

This language was carried through into the through proclamations prepared in Sydney for Hobson to publish on his arrival in New Zealand. The proclamations read Kororāreka on 30 January 1840, described Hobson as lieutenant Governor of the British settlements in progress in New Zealand.

There is no good reason in my view to doubt that the motive for British intervention in New Zealand was to establish government over British settlers for the protection of Māori. There is also no doubt that the policy of intervention was reached reluctantly and with the feeling that it was the lesser evil than unregulated settlement.

The preference of the Colonial Office had been that Māori should not be brought into contact with Europeans, but that their social improvement should be left to be worked out by the gradual influence of Christian missions.

By December 1837, however, it was recognised that it was impossible to leave matters on such a basis because colonisation, to no small extent, is already effected in those

islands. By January 1839 the only question was between acquiescence and a lawless colonisation, and the establishment of a colony placed under the authority of law.

Normanby's instructions continued the view contained in earlier drafts that British intervention was essentially unjust and fraught with risk to Māori, which, if realised, would be injurious to Britain itself. But by then, the necessity for the interposition of the Government has become too evident to admit of any further inaction.

These repeated expressions of reluctance overcome by the necessity to protect Māori make it clear that British priority was for Māori and that intervention was not seen, as some have argued, as equally a duty owed to British settlers. Rather, British purpose was, as Glenelg told parliament in March 1838, to protect the natives of the country and the British settlers consistently with the interests of the natives.

The early drafts of the instructions painted an unfavourable picture of most British settlers in New Zealand. They were said to be, for the most part, people of disorderly habits and profligate character who were likely, if unchecked, to exterminate Māori and become the nucleus of piratical adventurers, dangerous to the peaceful commerce of all nations in the Southern Hemisphere.

Although the instructions recognise that settlers themselves would benefit from civil government and that Britain's own national wealth and power would be boosted by annexation because New Zealand offered such good prospects for successful colonisation, it is clear that these ends could be promoted only because they were believed to be reconcilable with the overwhelming object of protecting Māori.

This belief has got to be seen in the context of what was then expected. It's most unlikely that it was envisaged that the European population would reach even the 30,000 it attained by 1852, or that a form of responsible government would devolve on settlers by that time. In 1840, New Zealand was expected to be a colony of a few maritime settlements focused on whaling, timber, and some agricultural but, importantly, not pastoral farming.

The Crown's monopoly on purchase of Māori land would ensure that European settlement did not adversely impact on Māori, since only land surplus to Māori needs would be purchased and European settlements would be apart from the lands occupied by Māori.

That brings me on to property. The Colonial Office consistently treated Māori as owners of land. Normanby's instructions referred to Māori title to the soil as indisputable and instructing Hobson to negotiate a right of Crown pre-emption and in referring to the

lawful acquisitions of land already made by British subjects in New Zealand, they assumed proprietary rights capable of being alienated. There are many references in the pre-1840 Colonial Office record which acknowledge either Māori property in the soil or their proprietary rights, or the proprietary rights acquired from them by British subjects. No-one, not the New Zealand Company nor any of the witnesses to the 1838 House of Lords select committee on New Zealand took a different view.

With this background and with the heightened concern in London and New Zealand about Māori land losses, it's not surprising that the Treaty contained a guarantee of Māori proprietorship in the fullest terms. As the United States senate committee on foreign relations later said, the guarantee of full, exclusive and undisturbed possession is as clear an expression of perfect ownership as could be devised.

Additionally, the pre-emption clause of article 2 referred to Māori as proprietors. James Busby, the British resident who drafted article 2 for Hobson, later said that article 2 confirmed title to land in the fullest sense which language could convey. So a similar judgment to that of the US senate committee.

Before the Treaty was received in London, James Stephen had made it clear that, contrary to the approach taken by the United States Supreme Court in the case of Johnson v McIntosh, which the New Zealand Company was by this time invoking as representing common law doctrine, imperial law and practise did not treat Aborigines as mere possessors of the soil on sufferance of the sovereign. British law was said by Stephen to be far more humane and to require Crown purchase before Crown grant to settlers.

After the Treaty was received in London, Stephen was dismissive of the idea, again as proposed by the New Zealand Company, that reserving to Māori 1/10th of their own property out of the sales of lands could be characterised as virtuous and liberal. As he said, some writers convert a highwayman into a hero. Stephen considered that dealings with Māori over land should have embody and recognise the great cardinal principle that the lands are not ours, but theirs, that we have no title to them except such as we derive from purchase.

Given these statements, the view that the property guarantee in article 2 was declaratory of a common law doctrine of Aboriginal title, under which Māori had only rights of occupancy and use of land held under Crown ownership obtained with sovereignty, as described in Johnson v McIntosh, is untenable. The Johnson v McIntosh approach was not consistent with British imperial law or practice and English land law principles. As the Canadian legal historian Kent McNeil says, the right of occupancy was

an interest unknown to the common law, the definition of which has understandably eluded judges ever since. But for all that, Johnson v McIntosh was the approach followed in New Zealand in the case of Symonds in 1847, right through to the Ngāti Apa decision in 2003.

This brings me to what's called the wastelands question. The wastelands question, whether Māori owned unoccupied lands or whether they were domain lands of the Crown, did not arise until December 1842 when the New Zealand Company suggested that the Crown should make grants to it of unoccupied lands without first purchasing them from Māori. The controversy was to cast a long shadow, but the consistent Colonial Office response before 1846 was that the extent of Māori property could be determined only by an inquiry into Māori custom. It wasn't to be resolved by an inquiry into what lands were or weren't occupied.

In 1844 Stanley instructed Governor Fitzroy that the suggestion that Māori rights to land could be restricted to those actually occupied for cultivation was wholly irreconcilable with the large words of the Treaty of Waitangi. The Colonial Office position was never more clearly expressed than in Lord Stanley's speech to the House of Lords in July 1845. While Stanley accepted that there might be some districts wholly waste and uncultivated, although he thought they would be few in number in the North Island, with respect to the greater portions of New Zealand, he strongly maintained that the limits and rights of tribes are known and decided upon by native law and custom.

Lord Stanley told the house "that law and that custom are well understood among the natives of the islands. By them we have agreed to be bound and by them we must abide. These laws, these customs and the right arising from them on the part of the Crown, we have guaranteed when we accepted the sovereignty of the islands. And be the amount at stake smaller or larger, so far as native title is proved, be the land waste or occupied, barren or enjoyed, those rights and titles the Crown of England is bound and honoured to maintain. And the interpretation of the Treaty of Waitangi, with regard to these rights is that, except in the case of the intelligent consent of the natives, the Crown has no right to take possession of the land and, having no right to take possession of the land itself, it has no right. And so long as I am a Minister of the Crown, I shall not advise it to exercise the power of making over to another party that which it does not itself possess." They don't make speeches like that anymore.

Finally, and I guess for many most importantly, British sovereignty and tribal government. The English draft of the Treaty of Waitangi contains no explicit recognition

of Māori self-government and custom. The preamble refers to the benefits Māori, as well as British settlers, will obtain from laws and institutions. Article 3 is capable of meaning that Māori, under the Treaty, became British subjects. These circumstances are often pointed to in support of the view that with sovereignty, British government and laws superseded Māori political organisation and custom.

In the book that David's referred to I discuss how the general practice in the empire before 1840 was to accommodate native systems of government and law under British sovereignty, referring to the likes of upper Canada, West Africa and the Cape Colony.
I also make the argument that the sovereignty ceded in the Treaty was the same sovereignty declared to belong to the Confederation of United Tribes by the Declaration of Independence 1835. So I won't fully go through this, but the nub of the argument is something like this:

That the sovereignty declared to belong to the Confederation in 1835 and the sovereignty ceded in the Treaty were the functions of government translated as kāwanatanga in the Declaration of Independence necessary, again in the words of the declaration, for the dispensation of justice, the preservation of peace and good order and the regulation of trade.

Beyond these objects, the powers of the confederation did not affect tribal authority or independence. If the sovereignty ceded to the Confederation in the Declaration was the sovereignty ceded to the British Crown in the Treaty, then there's no necessary inconsistency between the cession of sovereignty or kāwanatanga in article 1 and the guarantee of te tino rangatiratanga in article 2; language which Busby did not take issue with when he received Henry Williams' Māori translation on the morning of 5 February 1840.

Indeed, only a few months after the Treaty was signed, Busby told the legislative council of New South Wales that rangatiratanga was the closest Māori equivalent to the English word independence. In a later English back-translation of the Treaty in Māori, Busby also rendered article 2 as guaranteeing full chieftainship, and to the chieftains and nations the dignities, offices and properties. Accordingly, Busby said there was no inconsistency between the English and Māori texts of the Treaty.

On this view, the Treaty continued what the declaration had begun. It provided a government capable of exercising the federal governmental power which the Chiefs had recognised to be necessary in 1835. In Busby's pre-1840 plan there was to be no

interference with the rights of the people individually or collectively except as necessary to secure the objects of confederation.

If, as seems possible, are reasonable to infer, Busby regarded the paramount authority acquired by Britain as similarly delineated by the objects of intervention. That was a view later expressed by William Martin, the former Chief Justice of New Zealand, in 1840. Martin treated sovereignty, kāwanatanga and governorship as identical and as amounting to such rights as were necessary for the government of the country and for the establishment of this new system. This governorship, he said, was a thing previously unknown to Māori, which was in some degree defined by reference to its object, of "averting the evil consequences which must result from the absence of law", a phrase taken from the preamble of the Treaty.

Martin wrote "to the new and unknown office they conceded such powers, to them unknown, as might be necessary for its due exercise. To themselves they retained what they understood full well, the tino rangatiratanga, the full chiefship and respect of all their lands."

Perhaps the most compelling evidence that the Treaty was understood to leave undisturbed intratribal government, except in the matters of law and order for which sovereignty had been ceded, is found in the explanations given at the Treaty signings or recorded in the accounts left by witnesses. Hobson reported that he had assured the Chiefs that their standing amongst their tribes would not be affected by British sovereignty. That assurance is confirmed by the Catholic missionary father Louis Catherin Servant's report that the Treaty involved the chiefs giving Hobson authority to maintain good order and protect their respective interests while preserving to them their powers. Major Thomas Bunbury, who Hobson sent around New Zealand in HMS Herald to collect signatures to the Treaty, agreed with the Ngāti Kahungungu chief Te Hapuku at the Hawke's Bay that the literal effect of the Treaty was to place the Queen above the Chiefs as they were above their tribes, but said this was only to enable the Queen to enforce the execution of justice and good government equally amongst her subjects, and that it was not the object of Her Majesty's government to lower the Chiefs in the estimation of their tribes.

Felton Mathew writing of the Treaty signing at Waitangi wrote the Chiefs, in agreeing to cede the sovereignty of their country and of throwing themselves upon the protection of the Queen, had nevertheless retained full power over their own people remaining perfectly independent.

He commented on the stipulations the Chiefs had made for the preservation of their liberty and perfect independence, and expressed the expectation that Māori might, in after centuries, become an enlightened and powerful a nation as we are ourselves. The New Zealand Gazette, the mouthpiece of the New Zealand Company, regarded the Treaty as a union or confederation between a civilised and a savage state by treaty.

Because of continuing anxiety among Māori about the protection of custom, Hobson circular letter of 27 April 1840 promised Māori that the Governor will ever strive to assure unto your customs. Similar assurance was given by his deputy Willoughby Shorthand at Kaitaia. He told the Chiefs that Hobson had been sent to protect them from lawless white men and the Queen would not interfere with the native laws nor customs.

All this suggests that the implications of the English text were understood in the same sense as the division between kāwanatanga and rangatiratanga in the Māori text. On this view, rangatiratanga refers to independence in internal affairs, leaving kāwanatanga or sovereignty, defined and limited, as William Martin maintained, by reference to its objects as applying to foreign relations, justice, peace and good order and trade.

In the Colonial Office, James Stephen did not treat plurality in government and law as inconsistent with British sovereignty. That is clear from the instructions he grew up for Normanby and Russell. Both were structured to deal separately with Māori and settlers. Māori weren't treated as objects of government in the same way as settlers. Russell's instructions were consistent with the retention by Maori tribes of their laws and institutions not inconsistent with British sovereignty. They didn't authorise interference with Māori tribal organisation and custom beyond preventing intertribal warfare, facilitating resolution of intertribal disputes, and punishing crimes that were malum in se, evil in itself, at least in areas of British settlement or cross-racial cases.

In Russell's instructions, Hobson was directed to establish and maintain friendly relations with the tribes now to be connected with us, language more indicative of alliance than of subjection. Subsequent dispatches from the Colonial Office confirmed the policy of acceptance of Māori custom. Lord Stanley made it clear to Acting Governor Shorthand in June 1843 that there is no apparent reason why the Aborigines should not be exempted from any responsibility to English law or English courts of justice as far as respects their relations and dealings with each other. Except where custom conflicted with universal laws of morality, Māori could be permitted to live among themselves according to their national laws and usages, as is the case with Aboriginal races in other British colonies.

Stephen, in December 1843, expressed impatience at the legal pedantry that subjection to British sovereignty and subjection to English law are convertible terms in matters purely inter se, including the definition of punishment of crimes. He considered that Māori should be free to live under their own law, as was the case in Ceylon, India and Canada he said.

In 1846, Stephen deprecated interference with Māori custom, writing to Undersecretary Lyttelton that it had been a great error not to follow the opinion maintained on the first foundation of the colony by Lord John Russell, and afterwards maintained by Lord Stanley, that native custom should be respected and there should be no attempt to govern Māori in their relations with each other except to prevent war and inhuman practises.

So by way of conclusion, what went wrong? The Treaty and original understandings of its effect came to be eclipsed in politics and law after 1846. That's because arguments originally put forward by the New Zealand Company came to dominate in New Zealand law and history. This is despite their having been repudiated by the Colonial Office before representative government and having been contested throughout the 19th century by those most closely involved with the Treaty and the setting up of the New Zealand legal order. So that's Busby, Willoughby Shorthand, the missionaries, and it might even be said the judicial committee of the Privy Council in cases in 1901 and 1903.

But it's my hope that these original understandings of the Treaty may yet provide a sure foundation for the nation. Thank you.

>>RINGA HĀPAI: Kia ora Ned, kia ora. That was a really good conversation from you according to quite a few people on the chat there. In fact, some people so like your voice they reckon that you should do an audio book as well as publishing the book, so there we are, there's another possibility, an audio book.

>>DR FLETCHER: I think we can get a much better reader than me.

>>RINGA HĀPAI: Secondly I saw someone that really liked that phrase about converting a highwayman into a hero. And was it applying to the New Zealand Company?

>>DR FLETCHER: Yes, about the tense.

>>RINGA HĀPAI: Yes. And various expressions, this korero was tino rawe and so on. So you've had lots of comments in the chat box. There's more than 200 of you out there that are actually watching this. There's about 1,350 that have registered for this and the recording will come up shortly, and I think moderator Ngaire has been referring to that in some of the chat comments that have gone up already and encouraging you to look at the

Facebook as well, I'm not a Facebook man myself but most of you are, so go for the Facebook.

And I'm going to ask you the question that I promised I would ask you, and then I've got at least four questions that are now sitting there that I think I can have a look at, or -- and either I'll do it or I'll ask Ngaire to say something as well so that I can concentrate on both the chat and the Q&A.

But so as you will you know, Ned, for a very, very long time most people involved in Treaty education, including Pākehā Treaty education workers and most Māori that raise Treaty issues, went along with the view expressed by Ruth Ross back in 1972 that the Treaty text in Māori and English were quite inconsistent and that in a sense the English text was a fraud on the Māori text and a fraud on Māori; and was one of the reasons why people like myself once used to say the Treaty is a fraud rather than honour the Treaty which came a bit later.

So I presented your views to a legal historians' conference in Australia, and one of the people there was Nēpia Mahuika, historian academic in Waikato University. He said "that's all very interesting to come up with these ideas, but hang it all, I mean they broke the Treaty anyway, whichever version of the Treaty it was, they broke it anyway. So does it really matter? What's your response?

>>DR FLETCHER: That's a great question, and as you say, David, given the dishonouring of the Treaty over much of the last 182 years, it's a fair enough point of view to say well I'm really not interested in our words I'm interested in our actions, or I judge their words by their actions, and by that measure we're better off without the Treaty, a nation can and should cast itself adrift of its foundations if it contributes to a notion of New Zealand exceptionalism or harmonious race relations, which is palpably false.

So I can understand that point of view. Perhaps before I sort of respond directly to it, it's probably worth making a point that if we are going to put to one side original British understandings of the Treaty, because they're so overtaken and overwhelmed by British actions, we have to realise that we would also be turning our backs on other parts of the Treaty story. So in particular, original Māori understandings of the Treaty, and there is important work still to be done, I think, on why did the Chiefs sign the Treaty, what did they think the Treaty meant, and important work still to be done on the 182 years of history of the Treaty and history of the Treaty in action. So that's, you know, the New Zealand wars, land confiscation, the native land court, the Kotahitanga movement, Māori seats,

Ngata, young Māori Party, you know, right the way through to Rogernomics and health and other social inequities that we have today.

So I was thinking about this and I sort of like to think of this question being asked of James Stephen, you know, what do you think the Treaty's place is in New Zealand in 2022? And I think he would probably say, well, the Treaty was intended as a starting point for the relationship, it was always anticipated that the relationship between Crown or colonial government and Māori tribal government and between Pākehā society and Māori society would change over time, therefore if I'm to answer that question -- this is Stephen -- about the place of the Treaty in the nation today, you'll need to catch me up on a lot of history. I retired from the Colonial Office in 1847 and I died in 1859, so what's happened since?

And I think part of the problem is I'm not sure we'd do a very good job in catching him up in 160 plus years of history, because I'm not sure we know it well enough ourselves. But if we explain it to him as inadequately as we might, and we picture him listening to it, I picture him going through moments of great sadness and anger and frustration, and yet at the end of it him being strangely uplifted. And that's because when he wrote Hobson's instructions, it was from a place of very great fear, that despite the very best of intentions and despite stealing themselves for it being hard, not least because they'd be up against rapacious, racist, land hungry settlers, he was worried that the same fate that had befallen indigenous peoples in other parts of the globe wouldn't be able to be avoided with Māori. And so Stephen, for all this terribly disappointing history between 1840 and today, would be thankful that Māori have endured. And I was thinking about --

>>RINGA HĀPAI: Ned I think I might interrupt you there because I think that's a pretty good answer. We now have quite a few questions coming in. So we'll leave the late Stephen in his grave and answer -- put some of these questions to you. So there's about 8 or 9 of them now, 10 perhaps, I'm just going to pick through two or three of them and throw them at you, I think, rather than get Ngaire to read them out.

So why did the Crown not anticipate the huge wave of British immigration to New Zealand? And I think we all need to bear in mind that in 1840 no-one knew that there was going to be a potato famine in Scotland and more particularly in Ireland in 1845, 46, and the outflow of immigration followed from that. You might like to comment on that.

Also comment on the fact, perhaps, that New Zealand was not intended to be a pastoral place, New South Wales was to be the pastoral place. So that's the huge wave.

There's some questions about the fact that -- specific questions about what does the article 3 provision of the rights of British subjects mean, and so on, and article 3 I don't think you touched on so much, so is that an area where the two texts are similar. So there will be a recording of this for those of you who want to follow it up, but let's have a crack at a couple of those questions.

>>DR FLETCHER: Yeah, beginning then with immigration, you're exactly right, David, the numbers go through the roof in the decades after 1840, especially from 1860 onwards. But to give you an idea, through to 1840 the population of all the Australasian colonies -- this is the European population -- of all the Australasian colonies was only 200,000. So if you think about what had they had, you know, 60 years of settlement in Australia and they'd only got to 200,000. And yet, within a couple of decades the population of the Australian colonies was something like 1.2 million. The numbers just go absolutely through the roof in the 1850s, particularly the 1860s, but we know that in New Zealand from 1,000, 2,000 in 1840, the European population gets to, what did I say, 30,000 by 1852, but by later that decade has eclipsed the Māori population.

So I just don't think the tidal wave of settlement could have been anticipated in 1840, indeed the New Zealand Company famously went along to a meeting at Downing Street to try to twist Lord Melbourne's arm into giving them support and Lord Melbourne not realising -- well, Lord Melbourne said anyone must be mad to want to go to New Zealand. And unfortunately he didn't realise that one of the New Zealand Company group there was intending to immigrate to New Zealand. So that meeting ended rather unhappily with the man getting quite uptight.

But it does go hand in hand with this pastoral farming point. The image of New Zealand was very much maritime settlements, focused on whaling and timber extraction, New Zealand was so heavily wooded, there was a real thought that because of the rain that we have that we could be the breadbasket for the Australian colonies, Australia at that time was importing wheat from India. Everyone thought that there was no way that the New Zealand colony could get into competition with Australia on sheep farming, because in Australia you would -- there was so much land, you just let the sheep out and away they went and you'd round them up when you need to.

>>RINGA HĀPAI: As it turned out it was the people that came in and there weren't too many shepherds to round them up. So there's a question here how long did it take for the Crown to start to exercise power over tangata whenua and override Māori authority. That's not the topic of your thesis or your book but you can answer that one if you can, and also, because

we're getting close to the end of the time, what do you think, do you envisage for your book? Will this be useful for government policy, for curriculum reform, for legislative policy, what sort of purpose do you think the book might serve? But firstly, how long did it take for the Crown to sort of just forget about some of those errant things that you've spoke about so eloquently.

>>DR FLETCHER: That's well outside my area of expertise. I mean I think it didn't help that by 1846, 1847 the wigs had come back into power in London, Stephen was retiring from the Colonial Office, and interest was starting to wane in New Zealand issues. That coincided with sort of the irresistible force of the demand for representative and then responsible government in what came to be seen as white settler colonies, but I think the rot probably started at about that point, and I think we can probably point the finger at people like George Grey.

That said, there is much good history, I think, in the 1840s and the early 1850s and the decisive break obviously comes in the later 1850s and 1860s with population increases and with the wars.

>>RINGA HĀPAI: We're just about to run out of time, I really want to ask one question though. You've not mentioned the document of discovery at all, you've put it all on the Treaty. And a lot of people talk about the doctrine of discovery these days. What about that, was that relevant to the way the Colonial Office worked do you reckon?

>>DR FLETCHER: No, I think the Colonial Office were quite clear that Cook's discovery of New Zealand had not been kept alive, the basis of British sovereignty was the Treaty, they always intended to negotiate for a cession of sovereignty. Any rights that come from discovery were, you know, really an American concept which they didn't accept. Even in respect of the South Island where they had allowed Hobson to claim British sovereignty by discovery if he found that the circumstances there necessitated it, the Colonial Office was later clear that the guarantees of the Treaty of Waitangi should extend there too. So I think it is a bit of a red herring.

>>RINGA HĀPAI: I suspect that people are going to have to go off to other sessions and so on. Are we just about at the end of our time, Ngaire and Charles? I think those of you who have asked questions, I think we can capture those questions and pass them on to Ned, and many of you have asked questions as an anonymous attendee, but if you would choose to let Ned know or through the Facebook or however you can, then I'm sure there would be a chance for some further discussion to go on.

So it just falls to me to thank you very much, Ned, and I believe that Charles should put up something which says we should thank all sorts of other lovely people who have been supporting this series on Treaty-Based Futures. It is so fantastic that there's nearly 1,400 people have registered for this session, so there's a lot of interest. These sorts of people have promoted this series of sessions and we want to thank them a great deal. I'd like to thank all of the ringawera of various sorts, technical ringawera, Ngaire as the moderator is sending lots of messages out to you. I really enjoyed the chance to flick through some of the comments in the chat. You're coming from all over the motu, from south to north and east to west, and some overseas as well. And it's been great to share the time with you, with more than 200 people live and all of those other people wanting to look at the recordings later.

So I think that's probably the way we have to finish, (te reo Māori). Let's have a bit of peace in this land based on the Treaty of Waitangi.