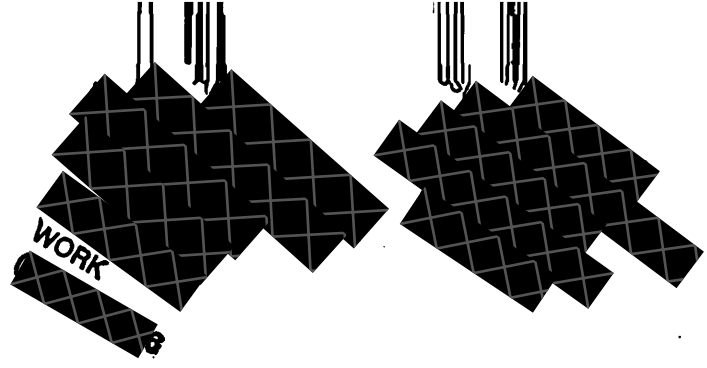

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Levin

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BICULTURAL RELEVANCE

Section One

IHI
MANAGEMENT CONSULTANTS
WELLINGTON, N.Z.

THE DRAFT NEW ZEALAND BILL OF RIGHTS

His Honour Chief Judge E.T.J. Durie

This paper considers the lessons of our history and why entrenched constitutional provisions seem necessary for the maintenance of rights against the vagaries of political whim and popular opinion, even in a democratic society. It considers that full legal recognition may be needed for the Treaty of Waitangi because of the failure to recognise common law rights in the past. Finally the paper ponders whether, for the future, Maori rights should be determined exclusively in the general Courts, and whether jurisdiction of the Waitangi Tribunal should be limited to the practical resolution of problems arising from the past.

THE LESSONS OF HISTORY

New Zealand's draft Bill of Rights would do more than affirm some basic rights and freedoms of a Euro-centric society. It would recognise the status of the native people of our society for whom group rights were more important than individual freedoms and protect their aboriginal rights acknowledged in the Treaty of Waitangi.

Historically the Treaty of Waitangi seems to have been less concerned with securing sovereignty than assuring the position of the native people. At the time settlement was as inevitable as it was unwelcomed by the British Government, and the Government was probably more concerned to protect native interests than provide for its own. In the result the Treaty had the potential to form a basis for a bi-cultural constitution. If that potential was not realised it was not through any lack of idealism on the part of the Imperial Government but through the contrary expectations of the settlers.

I do not think that it is too late to reinstate the original expectations of the Imperial Government. I think it is timely that we should. We have moved from the kindergarten of our colonial past and from the Land Wars fought in our youth. We have since experimented successfully with idealism. It is proper that in now proposing a national Bill of Rights, we should declare not just those that were meant to be fundamental to our nation's birth, but which subsequently fell by the wayside.

Yet Maori people have received word of the draft with some scepticism. There is one view that the Treaty is so sacred that it ought to stand alone. That view, if born of sentiment, is difficult to debate, but if for some reason the Bill of Rights proposal did not proceed, there would be support for the view that the Maori section of it should proceed alone. Another view is a more pragmatic one. The main question it is thought, is not whether Treaty rights ought to be recognised, for it is presumed that they should be, but whether the preponderance of public opinion will allow them to be. Does Part II of the Bill seek to reverse an inevitable verdict of history.

There is a growing international opinion that indigenous minorities have particular rights. That view has been upheld by North American courts since at least 1823. International bodies have espoused the same view more slowly.

New Zealand has ratified, in order, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention on Economic, Social and Cultural Rights , and the International Convention on the Elimination of all Forms of Racial Discrimination. In these the rights of different cultures are progressively strengthened, but reports of the United Nations Working Group on Indigenous Populations indicate an international view that indifenous minorities are entitled to rights exceeding those of non-indigenous cultural minorities. That is certainly the view of the World Council of Indigenous People, an adhoc body to promote the interests of indigenous minorities thrcughout the world.

In New Zealand we seem strangely unaffected by world opinion or the opinions of other Courts that have reached different conclusions from our own on the rights of indigenous minorities. Our courts have tended to reflect contemporary political thinking andour political thinking has followed the proponderance of local opinion. The place of the Treaty of Waitangi in the Bill of Rights may be determined even now by the balance of public prejudice, or we may find it was easier to advocate where the balance should be than to judge where it actually was.

Our history shows too well that the political and judicial consideration of Maori rights is overly susceptible to a community stance and that the Maoris as a minority deomocratic reliance on popular opinion is at best inconvenient.

New Zealand was settled during an enlightened age in British colonial history. There was enlightenment even when Captain Cook found the Maoris, (although the Maoris were not aware that they were lost). With some idealism the drafters of the United States Constitution declared all men to be equal. It was not the sexist language that first caused offence but the belief that indigenous Indians and imported blacks were not equal because they were either not citizens, or not people.

The United States Supreme Court challenged that belief as far as the Indians were concerned, by declaring Indians more than equal. It was held that the native Indians had aboriginal rights by virtue of their prior occupation of the land, rights recognised since at least 1066 when Willian the Conqueror had guaranteed to the native British rights to keep their own lands, forests, fisheries, laws, and customs for aslong as they wished but subject to his sovereign authority. It was considered these rights did not depend on treaties. The Treaties did not createthose rights but they could modify them.

In Britain, political thinking became influenced by Wilberforce and members of the Humanitarian Movement who promoted the protection of native people in the establishment of new colonies. We were settled during the Humanitarian age. The Colonial Office insisted that the rights of the native people be respected. Lord Normanby instructed Captain Hobson

> "...(the Maori) title to their soil and to the sovereignty of New Zealand is indisputable and has been solemnly recognised by the British Government..."

and Hobson was required to treat the native tribes as independent sovereign groups. Punctilious recognition of Maori aboriginal rights was required.

I do not think Captain Wakefield's description of the Treaty of Waitangi as a device to give some respectability to acquisition is correct. The English version of the Treaty is a statement of clear British policy formulated before 1840 and continued after then. Recognition of aboriginal rights was contained in British treaties in Africa, for example, in 1788,1791, 1807, 1818, 1819, 1820, 1821, 1825, 1826, and 1827. Like the Treaty of Waitangi they did little more than state Native rights as discernible at common law and up held in British colonial policy.

For a considerable time after 1840 the doctrine of aboriginal rights was maintained in New Zealand in a variety of Imperial and Colonial enactments. Four months after the Treaty the Crown's right of pre-emption was expressed in a Land Claims Ordinance the right, vested in the Crown being vested in the Crown being seen to carry a corresponding duty to protect Maoris from excessive alienation of their lands. A further Land Claims Ordinance of 1841 declared the title of the Crown to all unappropriated lands within the Colony subject to aboriginal inhabitants and was to that extent "a legislative recognition of the rights confirmed and guaranteed by the Crown by the second article of the Treaty of Waitangi". Other instructions from the Colonial Office and Imperial Acts of the British Government, including the New Zealand Constitution Act 1852 acknowledged the Maoris' right to hold land and administer their own affairs in accordance with custom.

Many of these early Acts cited the Treaty. Usually a preamble explained that the Act was based on the Treaty (as for example the Native Rights Act 1865 and the Native Lands Act of 1865). Occasionally it was referred to in operative sections. Section 8 of the Fish Protection Act 1877 assumed that the Treaty either was or could be an independent source of rights.

"Nothing in this Act obntained shall be deemed to repeal , alter or affect any of the Provisions of the Treaty of Waitangi or to take away, annul or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder".

The early decisions of the New Zealand Courts reflected the Humanitarian thinking of the contemporary official policy and the Colonial Office stance requiring the recognition of Native rights. In R v Symonds (1847) NZPCC (1840-1938) 387, the Supreme Court of Martin CJ and Chapman J drew upon the wealth of American experience

and applied the doctrine of aboriginal rights to this country. In that case Maoris had sold land to M. Later an area that included that land was ceded to the Crown and the Crown granted that land to S. It was held that the Crown grant to S prevailed over the earlier sale to M. It was considered that under the common laws affecting aboriginal rights land could be seded only to the Crown which in turn was the sole source of title. The Court ranged widely in its consideration of the origin of this law and the case is of interest, not for its limited facts but for its clear statment of the doctrine described by Chapman J as securing to the Maoris

> "All the enjoyment from their lands which they had before our intercourse and as much more as the opportunity of selling portions, useless to themselves affords"

For the purposes of this paper the case has greater interest for its clear statement that native rights arise by virtue of the common law and do not depend on treaties. Chapman J noted

> "The Treaty of Waitangi confirmed by the Charter of New Zealand does not assert either in doctrine or in practice anything new or unsettled".

This should be kept in recall because later the judicial recognition of aboriginal rights foundered upon a view that the Treaty of Waitangi had no status in law and an erroneous deduction from that that therefore there were no native rights save those expressly given by statute.

(Common law as given by the courts and statute as given by parliament)

A marked change in judicial thinking followed the Land Wars, By the 1850's the Maoris were dramatically outnumbered. More settlers needed more land and fewer Maoris were disposed to sell. With war came the New Zealand Land Settlements Act 1863 by which the lands of 'rebel' tribes were confiscated. With peace came other laws and policies for the acquisition of other native lands for rural and township settlements.

At various times Governments sought to restrain settler demands for more land but the policies of acquisition predominated. In any event it was thought or perhaps hoped the Maoris were a dying race. At this time too our judicial thinking changed. The Courts of the United States, Canada, India, Ceylon, Nigeria and the Privy Council in Britain continued to wrestle with the doctrine of aboriginal rights. In New Zealand and Australia we set aside aboriginal rights and opted to orbit on a southern axis of our own.

In New Zealand the change came with Wi Parata v The Bishop of Wellington, (1877) 3 NZJR 72. In that case the Governor had granted Maori land to a church for a school, it being said that the Maoris had agreed. After thirty years a school had not been built and the tribe claimed the land back. The Supreme Court (Prendergast CJ, Richmond J) held that they could not get it back. The Crown Grant was an act of state and a Court could not look behind the implied declaration in a Crown Grant that the native customary claim had been extinguished. It was added that the Treaty of Waitangi was also an act of state, a "simple nullity" inso far as it purported to cede sovereignty and, it was thought, any recognition of any prior claims by natives had also to be an act of state not within the purview of the Courts.

The Court of Appeal took the opportunity to uphold and extend that approach in Nireaha Tamaki v Baker (1894) NZLR 483. The difference in that case was that the land had not been Crown granted. The Maoris claimed the customary ownership of the land (their customary entitlement having been recognised in a preliminary determination of the Maori Land Court). The Crown claimed that the land had been ceded and the Commissioner of Crown Lands arranged for its disposal. The decision of the Court of Appeal of which Prendergast CJ was a member was delivered in 1894 by Richmond J. It held that the Maori claim could not even be considered, the Crown's mere assertion of ownership being sufficient to oust it. Maori rights were dependent not upon recognition of those rights by the Court but recognition by the State.

The Maoris took the matter to the Privy Council (Nireaha Tamaki v Baker (1901) (1840-1932) NZPCC 371). Their Lordships were of a decidedly different opinion . The Privy Council did not find it necessary to review at any length the doctrine of aboriginal rights as it might be applied to New Zealand. In its view it was simply "rather late in the day" to argue that the Courts could not take cognisance of any aboriginal and customary rights for such rights had been recognised in a number of statutes. It was considered that the Wi Parata view that there was no customary law of the Maoris of which the Court could take cognisance "went too far".

This began a breach between the New Zealand Courts and the Privy Council that culminated in a formal protest. In Hohepa Wi Neera v Bishop of Wellington (1902) 21 NZLR 655 Stout CJ followed Prendergast's views, despite the Privy Council decision noting simply that the Privy Council "did not seem to have been informed of the circumstances of the Colony". Wi Neera's case concerned the same land, trust and facts that were considered in Wi Parata. It happened that the same land and trust were to be considered by the Privy Council in yet

many issues but one of them was whether upon the failure of the trust, the land should return to the Crown. The Privy Council mooted whether the land should be returned to the native donors "whose claim would at any rate be superior to that of the Crown and whose interest was alternatively modified and ignored by the Solicitor-General" but the natives were not represented and that claim had not been advanced in the case under review. The Privy Council could not therefore determine the point but delivered instead a stinging attack on the New Zealand Court of Appeal, Lord Mc Naighton considering that the refusal of that Court to interfere so as to "breach the trust confided in the Crown" was not "flattering to the dignity or the independence of the highest Court in New Zealand or even to the intelligence of Parliament". He added "What has the court to do with the Executive? In rejoinder the Court of Appeal recorded an equally strongly worded protest of bench and bar (1903) NZPCC (1840-1938) 730 implying that the right of appeal to the Privy Council ought to be reviewed.

Our executive reviewed instead the law that gave rise to the difference of opinion and enacted as section 84 of the Native Lands Act 1909.

> 'save so far as otherwise expressly provided for in any other act, the native customary title to land shall not be available or enforceable as against His Majesty the King by and proceed -ings in any Court or in any matter in any debate'

That provision is still law, being now contained in section 155 of the Maori Affairs Act 1953 in slightly amended form.

The Privy Council did not retreat from its view and in Manu Kapua v Paru Haimona (1913) AC 761 Lord Haldane reiterated the common law principle that a Crown Grant did not in itself extinguish a customary claim and that native rights did not depend on legislation (although legislation could take them away).

The New Zealand Courts did not retreat from their view either but changed the basis of their reasoning from broad princiles of common law to a construction of statutory law. In Tamihana Korokai v Solicitor-General (1913) NZLR 321 the Court of Appeal held that the Maori Land Court had jurisdiction to determine a customary claim to the ownership of the bed of Lake Rotorua despite the averment of the Crown that it was Crown land. It reached that conclusion on a construction of certain statutes pointing out the many occasions on which the legislature had recited the Treaty and enacted legislation with the declared objective of giving effect to it. (Stout CJ had presided although in 1908 the claim to the lake had been largely accepted by the Stout-Ngata Commission of which he was the chairman). But the statute based approach to the Treaty was to lead the Courts to the conclusion that the Maoris had no particular rights save those expressly given by Parliament.

Stout CJ stated that view in the following year in Wanganui v Hempton (1914) NZLR 1065 SC. Without reference to the contrary determination of the Privy Council to Manu Kapua in the previous year, he declared

> "It may be, to put the case the strongest possible way for the Maoris, that the Treaty of Waitangi meant to give (an exclusive) fishing right to the Maoris, but if it meant to do so, no legislation has been passed conferring the right, and in the absence of such both Wi Parata v Bishop of Wellington and Nireaha Tamaki v Baker are authorities for saying that until given by statute no such right can be enforced".

Maori opinion was also to focus on the Treaty itself rather than the main -tenance of rights through the common law. Maori calls for the recognition of the Treaty were unequivocal from at least the 1860's. The early claims are recorded in the proceedings of a conference of native chiefs at Kohimarama in 1860 (see 1860 AJHR E-9) and of the Maori Parliament at Orakei in 1879 (AJHR sess II G8). The Maoris placed their faith in the Treaty itself. Much later when neither legislature or the Courts would recognise it, it was thought the Privy Council might. But the Privy Council had never said that the Treaty had status. Native rights were seen to stem from common law principles. The Treaty merely encapsulated those principles.

The point was clearly made in Te Heu Heu Tukino v Aotea District Maori Land Board (1941) NZLR 590. Tukino claimed that a charge on his land was contrary to the principles of the Treaty. That claim was outside the scope of the doctrine of aboriginal rights but possibly within the ambit of the Treaty. The Privy Council found it unnecessary to consider the point. In its view the Treaty was unenforceable in the Courts except to the extent that it had been incorporated into the municipal law.

As a lawyer I have no difficulty with that decision. Our Treaty was not meant to be more than a statement of legal principles that were thought to exist and which the British Government was keen to espouse. But Tukino presaged the modern problem that even were we to acknowledge those principles Maori sensibilities require formal recognition of the Treaty. It is considered not good enough that the rights should be seen to stem from the principles of common law or should be restricted to them, when there is a much more important pact between "our" chiefs and "their" Queen. Tukino it must be remembered was a Paramount chief, the soveriegn of Tuwharetoa, and he took his case to the Privy Council, which was seen by the Maoris as the Queen's personal court. Since then and also I suspect because common law rights were denied, Maori claims have centred on legislative recognition of the Treaty itself. It was no longer a

Law alone, but a question of honour. The Treaty had been sanctified. Since Tukino the Treaty has been pleaded in the Courts if only to draw arrention to its continued existence. Both common law rights and the status of the Treaty were argued in the Court of Appeal in In re the Bed of the Wanganui River (1962) NZLR 600 and in In re the Ninety Mile Beach (1963) NZLR 461 but in this context those cases merely illustrate the continuance of the statute based approach in the Courts. Maoridom sees them as illustrations of the fact that issues of crucial cultural importance cannot be allowed to die. As in many things Maori fortitude was found from proverbs, like Rangitihi - whakahirahira te upoko i takaia ki te akatea - which records the story of Rangitihi who continued to fight though his head was split by a club and was bound only by a vine. The Wanganui River Case illustrates this point. The proceedings began in the Maori Land Court in 1938, and the application of Titi Tihu. From there, the claim proceeded before the Maori Appellate Court(1944),the Supreme Court (1949), a Royal Commission (1950), the Court of Appeal (1954), the Maori Appellate Court (1959), and the Court of Appeal (1962). Titi Tihu did not get the result he wanted but although he is now over 100 years old he had not given in. He now has a pettition on the river before Parliament. Meanwhile the Treaty continues to underly the claims of subsequent generations, in Hita v Chisolm (Supreme Court Auckland 1977, on fishing for example, amd in Mihaka v Police (No I) (1980) I NZLR 453, on language.

I do not think that we can consider Part II of the Bill of Rights or even the Bill as a whole without some awareness of this history and of the feelings that underly Maori claims. The Maoris have lost most of their lands and the survival of their customary preference in the administration of their remaining lands or their affairs owes more to Maori obstinacy, (or fortitude depending on your point of view) than benign laws or sympathetic Courts. While some people may view the Bill as an exercise in legal academics, for many Maoris it raises issues that have been central to the debates within Maoridom for over a century.

For Maoris, some of the lessons of this history are the converse of what one might expect from a people who have not fared well in the Courts. In the Manakau Claim (July 1985) the Waitangi Tribunal reported that there is still a reliance in the due process of law. In a society where politicians must be conscious of the climate of public opinion, the need is seen for a strong judiciary that can withstand the vagaries of climatic change.

THE STATUS OF THE TREATY AND ITS PLACE IN THE BILL

..... As considered in the last section common law rights were displaced last century and in this century Maoris came to rely on the Treaty itself. At the same time when Parliament shifted the prior claim of the Crown with regard to land, Maoris shifted the contest from off the land to lakes, rivers, foreshores, fisheries and even language. As the Courts considered the status of the Treaty so also did academics. They discussed the status of the Treaty and International Law. Mc Hugh and Hackshaw and R. v Symonds took an alternative approach saying that the debate on the status of the Treaty on International Law is misleading, for native rights needed neither the Treaty nor legislative initiative for their existence.

For a time when the protestors claimed "the Treaty is a Fraud" I thought Maoris may have come to the same view that their rights are not dependent on the status of the Treaty. I have since learnt of the predominant view of some of the 1700 participants at the Waitangi National Hui on February 6, 1985 that the fraudulent approach was nothing but an aberration. The Treaty has been re-established as a sacred document so that nothing short of its full recognition in unadulterated form can give satisfaction or restore honour.

This approach creates difficulties. If the Treaty merely declared native rights discoverable in the common law then those rights would be capable of succinct codification in either a Bill of Rights or a statute. But the Treaty itself was in Maori and in Maori it not only goes much further than the common law position but it can mean different things to different people. It lacks the precision of a legal contract and is more in the nature of an agreement to seek arrangements along broad guidelines. In this respect it is different from Treaties with North American Indians which were concerned to make those arrangements and in doing so to modify common law rights. In the result Treaties are recognised in the United States Constitution while the Canadian Charter finds it prudent to refer not just to Treaties or to aboriginal rights in the Treaties but to aboriginal rights and the Treaties. I think our Treaty includes the aboriginal rights and then goes further. How much further has yet to be determined.

Earlier I had thought it would be best to simply codify native rights at common law. I had a penchant for Bentham's views that laws should be understandable, made known and clearly listed. But the Maori stance is understandable and in fairness I do not now think we can do less than give constitutional status to the Treaty itself The position could only be different if in the past the principles for which it stood had not been so severely put down.

The need for an independent judiciary is another lesson from the past. It is not always convenient to remember that the judges who changed the judicial stance after the land wars, Prendergast CJ, Stout CJ, and Richmond J and who came into an unseemly conflict with the Privy Council, were former politicians whose governments had promoted land confiscations and other policies for the acquisition of Maori land. It seems unfortunate that the good work that Stout CJ did as the chairman of the Stout-Ngata Commission is now obscured by the blurring of the executive and judicial roles. Today we do not think it a good idea to make judges out of politicians whose political life is spent, but the lesson og history is not just the need for a politically independent judiciary. At a time when some people are critical of the Draft Bill because rights must change to reflect changing opinions and because judges are not elected or are not seen as sufficiently in touch with public opinion, the Maori experience serves to stress the other side of the coin that the maintenance of rights depends upon a strong independent judiciary capable of withstanding both political and public pressures.

It is this other side of the coin that is seen first by a Maori minority that seeks protection from what could once again be an oppressive majority. For the same reason there is no general Maori demand to abolish appeals to the Privy Council. Some Maoris would keep the right of appeal for the same reason that some Pakehas would do away with it - because the Privy Council is removed from the weight of local opinion.

Given our current state of enlightenment it may be thought that we are unlikely to become an oppressive majority again and that Part II of the Bill is either not needed or is too late. We are more sensitive today to the needs of special interest groups. I am not so sure that that is correct. Too often, I fear, Maori rights are not identified, or are subjugated to our current courtship with multi-culturalism. At least Pacific cultures should understand the prior right of the tangata whenua or those who traditionally belong to a place. That right is occasionally apparent in the names of Pacific peoples (Vanuatu - whenuatu - the people of the land for example). I am not so sure that European settlers in Polynesia see the distinction or realise that the equation of Maori groups with other minority cultures offends both Pacific tradition as well as common law rights. Oppression through majority opinion is sometimes well intentioned.

From a historical perspective I do not see how a Bill of Rights for New Zealand could be complete without reference to the particular rights of the indigenous people nor do I see an adequate protection for Maori rights without one.

THE COURTS AND THE TREATY

There are other factors arising from other historical developments that raise the question of whether the interpretation and application of the Treaty should pass exclusively to the general Courts, and that cast doubts on the interpretative role proposed for the Waitangi Tribunal. After an auspicious beginning in 1865 the Maori Land Court achieved some popularity with Maori people because of its subsequent brief to prevent alienations contrary to equity, good conscience and native interests and for its later role in forming owner controlled incorporations and trusts. But a belief grew among Maoris that success was to be had only from a Maori Court. That in turn fed the view that separate Maori Courts were needed for Maori things to the extent that in 1980 before the Royal Commission on Maori Courts most Maoris opposed the incorporation of the Maori Land Court into an integrated judicial system administered by the Department of Justice. The Waitangi Tribunal may now have reinforced that view. Part II of the Draft Bill of Rights would change the ground rules set at the end of the last century and remove existing impediments to the judicial recognition of native rights. There is at least the prospect of some Maori success in the Courts. At a time when the Maori underperformance in law observance causes concern and there is a need to engender a better respect for the "necessary laws and institutions" of a country (as promised in the Treaty), I do not think it helpful to perpetuate the view that justice for the Maoris is only to be found in separate Courts for Maori things. Apart from the thought that there seems to be something inherently wrong in referring down to an inferior tribunal questions of interpretation as distinct from questions of fact or custom, it could be that the role proposed for the Waitangi Tribunal is conceptually wrong, or serves to entrench a view that the crime rate suggests is a view that we can no longer afford to take. If Maoris are to find some relief from this Bill should the relief be seen to come from a "Maori Court'? Some Maoris have asked me whether we can afford to trust the general courts with the interpretation of the Treaty of Waitangi. The more important question may be whether we can afford not to. I do not think it beyond the wit of any Court to interpret, on evidence, a document in another language or to apply recognised principles of law to the interpretation of bilingual treaties.

Te Tiriti o Waitangi

TEXTS AND TRANSLATIONS*

IN SUBMISSIONS to the Parliamentary Committee on Fisheries in 1971, the New Zealand Maori Council pressed 'for the recognition and observance of the Treaty of Waitangi in relation to the protection of Maori rights to their traditional sources of shellfish and fishing beds', the council's secretary stating that 'the Treaty of Waitangi was quite explicit in its promises about Maori fishing rights'.[1] More recently, the Social Credit League asked the four Maori Members of Parliament jointly to sponsor the introduction of a Bill which, 'if passed, would have the effect of ratifying non-retrospectively the land and citizenship provisions of the Treaty of Waitangi'.[2]

These are fairly typical examples of the sort of statement being made about the treaty by politicians, Maori organisations and other interested parties. The fact that the Treaty of Waitangi was an agreement in the Maori language is consistently ignored, the prime example of this being the schedule of the 1960 Waitangi Day Act. Headed 'The Treaty of Waitangi', and, according to a former Attorney General, 'included as a schedule to provide convenient access to its information',[3] this agreement in the English language is neither a translation of the Treaty of Waitangi, nor is the Treaty of Waitangi a translation of this English text. The Treaty of Waitangi did not in fact say anything at all about fishing rights. The meaning of its 'land and citizenship provisions' is a matter for interpretation.

James Edward FitzGerald remarked in a debate on the Treaty of Waitangi in the House of Representatives in 1865: 'if this document was signed in the Maori tongue, whatever the English translation might be had nothing to do with the question.' He went on to point out: 'Governor Hobson might have wished the Maoris to sign one thing, and they might have signed something totally different. Were they bound by what they signed or by what Captain

* This is a study, in more detail and with some corrections, of one of the topics discussed by the writer in a paper given at a seminar on the Treaty of Waitangi held at Victoria University at Wellington, 19-20 February 1972.

[1] *Auckland Star*, Auckland, 30 June 1971.
[2] ibid., 11 July 1972.
[3] ibid., 28 July 1971.

Hobson meant them to sign?'[4] To which one would now add the question: Was the Crown bound by what Hobson signed, or by what he assumed its meaning to be? Any attempt to interpret the provisions of the Treaty of Waitangi, or to understand what the signatories, both Hobson and the New Zealanders, thought it meant, must review the circumstances in which the agreement was drawn up, taking into account all the relevant texts.

Instructions from Lord Normanby, Secretary of State for the Colonies, dated 14 August 1839, authorized Hobson 'to treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any parts of those islands which they may be willing to place under Her Majesty's dominion'.[5] Some of the difficulties which might be encountered in gaining the confidence of New Zealanders were pointed out, but no draft terms to assist in the drawing up of such a treaty were supplied, either by the Colonial Office or by the Governor of New South Wales, under whose aegis Hobson was to act.

Hobson arrived in the Bay of Islands on 29 January 1840. James Busby, the former British Resident whose appointment ceased with Hobson's arrival, immediately went on board[6] and it was arranged that a meeting of chiefs would be called at the former Residency at Waitangi for Wednesday, 5 February.[7] Circular letters of invitation in the Maori language were printed on the mission press at Paihia early on the morning of 30 January.[8]

It has been suggested that the Treaty of Waitangi 'was specifically to retract recognition of the sovereignty of the united tribes',[9] that is, of the confederation supposedly set up by *He w[h]akaputanga o te Rangatiratanga o Nu Tireni*, Busby's so-called declaration of independence, first signed in October 1835. But the contention that, with the signing of the declaration, 'His Majesty was advised to recognise the new polity', and that Britain now accepted that the sovereignty of New Zealand 'was vested in a defined authority'[10] is

[4] NZPD (1864-6), 292.
[5] GBPP, 1840, XXXIII [238], p. 38.
[6] Felton Mathew journal letter, entry under 30 January 1840, J. Rutherford, ed., *The Founding of New Zealand*, Auckland, 1940, p. 25.
[7] Hobson to Gipps, 5-6 February 1840, GBPP, XXXIII, 560, p. 9.
[8] W. Colenso, *The Authenic and Genuine History of the Signing of the Treaty of Waitangi*, Wellington, 1890, p. 11; Colenso, 'Day and Waste Book', Alexander Turnbull Library (ATL).
[9] Ian Wards, *The Shadow of the Land*, Wellington, 1968, p. 22, n. 3.
[10] ibid., p. 14. Wards's authority for this line of argument appears to be Glenelg's despatch to Bourke of 25 May 1836. This stated: 'With reference to the Desire which the Chiefs have expressed on this Occasion to maintain a good Understanding with His Majesty's Subjects, it will be proper that they should be assured, in His Majesty's name, that He will not fail to avail Himself of every Opportunity of shewing His Goodwill, and of affording to those Chiefs such Support and Protection as may be consistent with a due Regard to the just Rights of others, and to the Interests of His Majesty's Subjects.' GBPP, 1837/8, XXI, 680, p. 159. This expression, in His Majesty's name, of goodwill to the chiefs who had signed the declaration appears to fall somewhat short of advising His Majesty 'to recognise the new polity'.

not borne out by later events. Hobson was informed by the Colonial Office that Britain acknowledged 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'.[11] There is no reference to the united (or confederated) tribes (or chiefs), either in the main body of Hobson's instructions, or in further instructions written in answer to a query from Hobson, in which he had mentioned that 'the declaration of independence of New Zealand was signed by the united chiefs of the northern island only (in fact, only of the northern part of that island)'.[12]

The Secretary of State's continued avoidance of any mention of the united or confederated chiefs or tribes, or of their declaration of independence, his qualification of the sovereignty which Britain recognized as vested in the New Zealanders, surely dispels any theory that Hobson was instructed to treat with the 'confederation'[13] for the cession of New Zealand sovereignty.

Hobson knew of the declaration of independence from his earlier visit to the Bay of Islands in 1837, when he had shown himself well aware of the hollowness of its pretensions.[14] His policy in 1840 of getting as many declaration signatories as possible to sign the treaty was no doubt wise, but it certainly was not his intention to invite only the confederated chiefs to the Waitangi meeting. He informed Gipps on the evening of 5 February that he had, immediately on his arrival at the Bay of Islands, 'circulated notices, printed in the native language, that on this day I would hold a meeting of the chiefs of the confederation, and of the high chiefs who had not yet signed the declaration of independence . . . .'[15] In fact, the printed circulars invited only the chiefs of the confederation[16] to the meet-

[11] GBPP, 1840, XXXIII [238], pp. 37-38.
[12] ibid., p. 42.
[13] *Te w[h]akaminenga o nga Hapu o Nu Tireni*, which was supposedly set up by *He w[h]akaputanga o te Rangatiratanga o Nu Tireni*, i.e. Busby's declaration of independence. This was signed initially on 28 October 1835 by 34 chiefs, nearly all from the Bay of Islands and its immediate environs. (The 35th signature was that of Eruera Pare, the *kai tuhituhi*, the writer who inscribed the document and the signatories' names.) Later signatures, totalling 18, were mainly of Hokianga and Kaitaia chiefs, two notable exceptions being Te Hapuku of Hawkes Bay and Te Wherowhero of Waikato, whose name was the last to be added, in July 1839.
[14] Hobson to Bourke, 8 August 1837, GBPP, 1837/8, XL, 122, p. 4.
[15] GBPP, 1840, XXXIII, 560, p. 9.
[16] *nga Rangatira o te Wakaminenga o Nu Tireni*—see reduced facsimile of the copy sent to Tamati Waka Nene, T. Lindsay Buick, *The Treaty of Waitangi*, New Plymouth, 1936, f.p. 112. Colenso's 'Ledger' and 'Day and Waste Book', ATL, each shows only the one printing, of 100 copies, of 'Circulars for assembling Natives at Waitangi', thus ruling out the possibility of a differently worded version having also been printed for circulation to 'the high chiefs who had not yet signed the declaration'.

ing. The invitation was issued over Busby's name,[17] and there is other evidence suggesting that he contemplated a meeting only of the confederated chiefs.[18] Busby had always exaggerated the viability of the confederation. His later claims about the Treaty of Waitangi were similarly distorted. Posterity's acceptance of Busby's claims to treaty authorship has in large part been responsible for today's chaotic misunderstanding about the Treaty of Waitangi.

The English Versions

Official despatches yield no clues about how the Treaty of Waitangi was drawn up, Hobson's report to Gipps after the first day's proceedings at Waitangi on 5 February merely noting that the meeting of chiefs had been called 'for the purpose of explaining to them the commands I have received from Her Majesty the Queen, and of laying before them the copy of a treaty which I had to propose for their consideration.'[19]

In later years, Busby more than once claimed to have had the major part in drawing up the Treaty of Waitangi. In 1858, in an Auckland newspaper, he wrote: 'As I, myself, drew that Treaty . . . .'[20] Two years later, in his attack on Sir William Martin's *The Taranaki Question*, Busby related that 'when it became necessary to draw the Treaty' Hobson was too unwell to leave the ship, so sent two of his officers to Busby with 'some notes, which they had put together as the basis of the Treaty'. Busby 'stated that I should not consider the propositions [sic] contained in those notes as calculated to accomplish the object', and offered to prepare a draft himself. 'The draft of the Treaty prepared by me', Busby claimed, 'was adopted by Capt. Hobson without any other alteration than a transposition of certain sentences, which did not in any degree affect the sense.'[21] Returning to the subject in 1865, he was even more dogmatic: 'The treaty as it now exists, with the exception of the transposition of two sentences, was accordingly drafted by him [referring to himself], and was sent to the Revd. Henry Williams the head of the Church Mission for translation.'[22]

The notes brought to him by Hobson's officers have survived and are reproduced in *Fac-similes of the . . . Treaty of Waitangi*.[23] There are two sets of these notes. The first, in Hobson's handwriting, is the draft of a preamble only. The second set of notes,

[17] *Na te Puhipi.*
[18] See Mathew's journal letter, entry for 30 January 1840: 'From Busby we learned it will not be possible to assemble the Chiefs of the "confederation" under Ten days . . .' Rutherford, p. 25.
[19] GBPP, 1840, XXXIII, 560, p. 9.
[20] *Southern Cross*, Auckland, 25 June 1858.
[21] J. Busby, *Remarks upon a Pamphlet . . .* , Auckland, 1860, pp. 3-4.
[22] J. Busby, 'Occupation of New Zealand 1833-1843', typescript, Auckland Institute and Museum Library, p. 87.
[23] Wellington, 1877; reprint 1892; new edition, 1960.

in the handwriting of J. S. Freeman,[24] Hobson's secretary, comprises the draft of a differently worded preamble and of three articles. Also reproduced in the *Fac-similes* is another set of articles, in Busby's hand. This is a fair copy of a draft, also in Busby's hand and also surviving, annotated by him: 'draft of the Articles of a Treaty with the Native chiefs submitted to Capt Hobson. 3rd Feby. 1840.'[25]

According to Henry Williams's 'Early Recollections': 'On the 4th of February, about 4 o'clock p.m., Captain Hobson came to me with the Treaty of Waitangi in English, for me to translate into Maori, saying that he would meet me in the morning at the house of the British Resident, Mr. Busby; when it must be read to the chiefs assembled at 10 o'clock.'[26] Unfortunately the English text given to Williams to translate does not appear to have survived.[27] Williams's translation was read and discussed at the first day's meeting at Waitangi and then handed over to Richard Taylor who recorded in his journal under date 5 February 1840: 'I sat up late copying the treaty on parchment and I kept the original draft for my pains.'[28] When it was suggested in the House of Representatives in 1865 that 'the original treaty was written by Mr. Taylor', Hugh Carleton, Williams's son-in-law, made it clear that only the handwriting was Taylor's: 'An alteration was made while the draft was under consideration, and Mr. Taylor volunteered to write out the whole afresh.' Colenso, also in the House, agreed that this had been so.[29]

It would appear, therefore, that the treaty text signed at the second day's meeting at Waitangi differed in at least one respect from the draft which had been considered by the chiefs during the previous day. Was the alteration one of any consequence? Was there in fact only one alteration? Were the chiefs informed of the change(s) made? Carleton's bland explanation, apparently quite acceptable to his parliamentary colleagues, leaves many questions unanswered today. But this much is clear: the drafts, in English or in Maori, were merely drafts; it is the Maori text which was signed at Waitangi on 6 February 1840, and at other places on subsequent dates, by Hobson (and/or others acting for him) and a total of 500[30] New Zealanders, which is the Treaty of Waitangi.

[24] It is not always easy to identify the handwriting of minor officials, as they seldom sign the letters they write. It seemed likely that the second set of notes in the *Fac-similes* was in Freeman's hand, many of Hobson's despatches being in the same handwriting. Definite identification became possible with the chance finding of a letter to J. J. Galloway of 5 June 1840 signed by Freeman 'for the Colonial Secretary', IA 1, 40/191, National Archives, Wellington.

[25] Ms 46, F 6, Auckland Institute and Museum Library.

[26] Hugh Carleton, *The Life of Henry Williams*, Auckland, 1877, II, 12.

[27] It is not among the Williams papers in either the Auckland Institute and Museum Library or the Alexander Turnbull Library.

[28] Journal of the Rev. Richard Taylor, Vol. 2, p. 189, typescript, Auckland Institute and Museum Library. No trace has been found of this 'original draft', i.e. Williams's translation.

[29] NZPD (1864-6), 292.

[30] Give or take one or two. See below, n. 41.

What, then, is 'the English version'? In all, Hobson forwarded five English versions to his superiors in Sydney or London.[31] The differences in wording of three of these versions are minor, of significance only because there are differences; two of the texts have a different date,[32] differ substantially in the wording of the preamble from the others, and from each other at one very critical point in the second article.[33] A comparison of all five English versions with the Maori text makes it clear that the Maori text was not a translation of any one of these English versions, nor was any of the English versions a translation of the Maori text.

The relationship of these five English versions with the draft notes printed in the *Fac-similes* was as follows: Hobson's draft became the preamble of three of the English versions,[34] the preamble of the other two versions[35] following the preamble in the Freeman draft.[36] There is no mention of forests and fisheries in one version,[37] but otherwise the articles in all five English versions are the same

[31] These were enclosures in the following despatches (except in the parentheses in (d), page references are to the English versions, not to the despatches in which they are enclosed):
(a) Hobson to Gipps, 5-6 February 1840, of which a copy was enclosed in Gipps to Secretary of State, 19 February 1840, CO 209/6, pp. 52-54, and printed in GBPP, 1840, XXXIII, 560, pp. 10-11. (CO 209 is on microfilm, National Archives, Wellington.)
(b) Hobson to Secretary of State, 40/1 of 17 February 1840, CO 209/7, pp. 13-14[v]); in the printed version, this despatch is dated 16 February. GBPP, 1841, XVII, 311, p. 10.
(c) Duplicate (dated 16 February 1840) of 40/1, G 30/1, pp. 29-32, National Archives, Wellington.
(d) Duplicate of Hobson to Secretary of State, 40/3 of 23 May 1840, G 30/1, pp. 75-78. (The original of 40/3, dated 25 May, did not enclose an English version—see CO 209/7, pp. 41-50, 55-64.)
(e) Hobson to Secretary of State, 40/7 of 15 October 1840, CO 209/7, p. 178, printed GBPP, 1841, XVII, 311, pp. 98-99, where it is headed 'Translation' and follows the Maori text, which is headed 'Treaty'. But in the original 'certified copy of the Treaty both in English and the Native Language' on CO 209/7, p. 178, the heading 'Treaty' applies to both English and Maori texts.

[32] The versions enclosed with duplicates of 40/1 and 40/3 are both dated 'on the fifth day of February'; hence the wording 'by a Treaty bearing Date the Fifth day of February' in Hobson's proclamation of sovereignty over the North Island, 21 May 1840.

[33] See below and n. 37.

[34] Those forwarded to Gipps with the report of 5-6 February 1840 and to the Colonial Office with the originals of 40/1 and 40/7.

[35] Those forwarded with the duplicates of 40/1 and 40/3.

[36] Of which the wording is as follows: 'Her most Gracious Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with deep solicitude the present State of New Zealand arising from the extensive settlement of British Subjects therein—and being desirous to avert the evil consequences which must result both to the Natives of New Zealand and to Her Subjects from the absence of all necessary Laws and Institutions has been graciously pleased to impower and authorize me William Hobson a Captain in Her Majesty's Royal Navy, Consul and Lieutenant Governor in New Zealand to invite the Confederated Chiefs to concur in the following articles and conditions.' Cf. text of the agreement signed at Waikato Heads and Manukau in mid-March and late April 1840, p. 156 below.

[37] That enclosed with the duplicate of 40/1.

and draw heavily on Busby's draft, shorn of the major part of his wordy conclusion. Busby's articles, however, were in large measure an expansion of those in Freeman's notes. Busby's claim to have 'drawn' the treaty is thus a considerable exaggeration even if applied to the various English versions. His contribution to the Maori text of the Treaty of Waitangi itself was, as we shall see, minimal.

From the very beginning, confusion has reigned over *what* was a translation of *which*. For this, Henry Williams himself was initially responsible. The English version forwarded with Hobson's first New Zealand despatch to the Secretary of State[38] was endorsed by Williams: 'I certify that the above is as Literal a translation of the Treaty of Waitangi as the Idiom of the Language will admit of.' Yet this is palpably incorrect: Williams knew better than anyone else that the Treaty of Waitangi was a translation of an English draft, not vice versa.

From the facts available it is apparent that what was given to Williams to translate about 4 p.m. on 4 February was a composite version of the draft notes of Hobson, Freeman and Busby. Whether this composite text was compiled by Hobson, or by his secretary, or was their joint effort, it cannot have been put together until after Busby's draft articles had been 'submitted to Capt. Hobson' some time on 3 February. The existence of a number of other English versions, all of them also composite versions of the same draft notes, suggests a certain element of chance, as well as of haste, in the compilation and selection of the version actually handed over for translation. That these other composite texts were afterwards forwarded at various times to Hobson's superiors, in each instance as though the text in question had official status—that is, was either a translation of the treaty, or the text from which the treaty had been translated—suggests a considerable degree of carelessness, or cynicism, in the whole process of treaty making.

Hobson does not appear to have noticed the differences in the various English texts forwarded with his despatches, or, if he did notice them, thought them of no account. If the differences were noticed in the Colonial Office, it was perhaps supposed that Hobson's despatch of 15 October 1840 set the record straight with its enclosure of 'a certified copy of the Treaty both in English and the Native Language; with the names inserted of the Chiefs and witnesses who signed it'.[39] This 'long roll of Parchment' made quite an impression in the Colonial Office,[40] but at some stage the

[38] 40/1 of 17 February 1840, CO 209/7, pp. 13-14[v].
[39] Hobson to Secretary of State, 15 October 1840, 40/7, CO 209/7, pp. 102-102[v].
[40] See James Stephen's minute of 9 March 1841 to Vernon Smith, ibid., p. 103[v].

greater portion of it, comprising a list of 512 signatures,[41] was taken off and, apparently, lost, leaving only the 'certified' Maori and English texts.[42] Set out side by side, the heading 'Treaty' applying as much to one as to the other, these were no doubt taken to be alternative texts, one a translation of the other. In fact, the Maori text was that of the Treaty of Waitangi to which, ultimately, approximately 500[43] names were appended over a period of seven months.[44] The English text, though closely resembling two of the earlier versions, differed slightly in wording here and there not only from these two but also from the English text to which thirty-nine names had been appended at Waikato and Manukau in March and April 1840.

No contemporary mention has been found of the fact that although the great majority of treaty signatories signed the Maori text of the Treaty of Waitangi, there were also these few signatures to an agreement in the English language. In the present century, most discussion ignores the fact that the Treaty of Waitangi was an agreement in the Maori language. Yet how can the English text be thought to have any validity at all? True, Hobson signed the Waikato-Manukau agreement, but on at least one point, pre-emption, he was mistaken about its actual meaning. It is impossible even to guess what the thirty-nine men of Waikato and Manukau thought the document meant. There seems to have been no copy of the Maori text at hand at the time and no record has survived of how the English text was explained to them. Even the date (or dates) in March when the Waikato names were added is unknown.

The Maori Text

The language of the Treaty of Waitangi is not indigenous Maori; it is missionary Maori, specifically Protestant missionary Maori. There is a tendency in New Zealand history to refer to 'the missionaries' when in fact only those of the Protestant missions are

[41] At this stage Hobson appears to have had in his possession the following sheets of the treaty: the Waitangi sheet with the Kaitaia signatures also attached, the two Bay of Plenty sheets, the *Herald* sheet, the Cook Strait sheet and the East Coast sheet, with a total of 484 names. If one adds the 39 names on the Waikato-Manukau agreement in the English language, the total is 523. It would thus seem that either in New Zealand or in the Colonial Office eleven names had been omitted in the processes of copying and counting, perhaps deliberately for, as 'signatures', some are indeed of very doubtful validity. The Manukau-Kawhia sheet, with 13 more names, came to hand later, and there is also a printed sheet (of the Maori text) with 5 more names, undated, making a grand total of 541 by my count, 502 (including both Te Rauparaha's signatures) being appended to the Maori text, 39 to the agreement in the English language.

[42] CO 209/7, p. 178.

[43] See n. 41 above.

[44] From the first signatures, taken at Waitangi on 6 February, to the last dated signature, at Kawhia on 3 September. The signatures on the printed sheet may have been added later still.

intended. This is a legacy of past usage. When Lord Normanby told Hobson 'you will, I trust, find powerful auxiliaries amongst the missionaries',[45] it was the English Protestant missionaries only, and of them the Anglicans in particular, whom he had in mind. To the Maori, also, the *mihinare*[46] was a member of the Protestant missions. When the first French Catholic missionaries arrived in New Zealand, clearly they were different, and so were given a different name, *pikopo*,[47] their leader being a bishop.

The 1830s had seen a great boom in Maori literacy, especially in northern New Zealand, which was both precipitated and nourished by the translations and publications of the Anglican and Wesleyan missionaries.[48] With the new skills of reading and writing came new ideas, not only about religious matters but also about manners and customs of peoples beyond the shores of New Zealand. The Maori was a great traveller, and an avid listener to travellers' tales. The translation of scriptural and liturgical texts, culminating towards the end of the decade with the printing of the entire New Testament in Maori,[49] opened up a new world to all who could read, but it was a world as strange and as liable to misinterpretation by the Maori reader as was the world of London or Port Jackson by the Maori traveller. It was in the light of his knowledge of these two worlds, the world from which the Pakeha in New Zealand had come and the world in which Christ had lived and died, that the New Zealander of 1840 had to judge the Treaty of Waitangi, a document which attempted to enunciate concepts of one of these foreign worlds in a language which, though supposedly his own, was actually the language of the Protestant translations.

In his biography of his father-in-law, Hugh Carleton subsequently wrote: 'In this translation, Mr. Williams had the assistance of his son Edward, *facile princeps*, among Maori scholars, in regard to the Ngapuhi dialect,—generally admitted, except in Waikato, to be the Attic of New Zealand.'[50] Presumably the old Etonian thought that this signified something, but in its New Zealand context this

[45] GBPP, 1840, XXXIII [238], p. 38.

[46] A transliteration of 'missionary', applied first to the Protestant (especially Anglican) missionaries, and then to their converts.

[47] A transliteration of *episcopus*, applied first to Bishop Pompallier, then to his converts.

[48] See H. W. Williams, *A Bibliography of Printed Maori*, Wellington, 1924, and *Supplement*, Wellington, 1928, also C. J. Parr, 'A Missionary Library. Printed Attempts to Instruct the Maori, 1815-1845', *Journal of the Polynesian Society*, LXX (1961), 429-49. By January 1840 the Catholic mission had only one small booklet of prayers and instruction in print, the content of which would not have affected Maori understanding of the Treaty of Waitangi text.

[49] On 30 December 1837, Colenso entered in his 'Day and Waste Book': 'Finished printing the New Testament, 5,000 copies demy 8vo., Glory be to God *alone!*' (Quoted in A. G. Bagnall and G. C. Petersen, *William Colenso*, Wellington, 1948, p. 49.) But before all these 5000 Testaments were available to *mihinare* readers, they had to be bound and this took time.

[50] Carleton, II, 12.

comment was pretentious and misleading. In 1840, Edward Williams was a green young man of twenty-one; his spoken Maori was very probably more fluent than his father's, his ignorance of English constitutional law and convention almost certainly greater. Neither father nor son was an experienced translator, but those who were—William Williams, Maunsell and Puckey among the Anglicans, Hobbs of the Wesleyans—were not at hand in the Bay. Colenso, the mission printer, far more aware than anyone else of the problems of understanding involved, was neither considered for nor consulted in the task of translation. His public intervention on the morning of 6 February, just as Hone Heke was about to add the first Maori signature to the treaty, seems to have raised no real doubts in the minds of Hobson, Busby or Williams about whether in fact the New Zealanders understood what they were doing. Yet Colenso then posed as a possibility the very objection which before long was levelled against the Protestant missionaries: 'the missionaries should explain the thing in all its bearings to the Natives, so that it should be their own very act and deed. Then, in case of a reaction taking place, the Natives could not then turn round on the missionary and say, "You advised me to sign that paper, but never told me what were the contents thereof."'[51] Of even greater significance than the fact that the Treaty of Waitangi was written in *mihinare* Maori was the monopoly which the Protestant missionaries had of interpretation and explanation. Henry Williams filled this role at a number of later meetings as well as at Waitangi itself. His son Edward was interpreter on the signature-gathering cruise of HMS *Herald.* Anglican and Wesleyan missionaries acted as interpreters at all the treaty meetings in their respective areas, with the exception of those in the eastern Bay of Plenty, conducted by a young trader, James Fedarb, on instruction from the Anglican missionaries at Tauranga, and at the second Manukau meeting when W. C. Symonds, a government official, was without missionary Hamlin's assistance as interpreter. Except at Waikato Heads in mid-March and at Manukau in late April, the Maori text of the Treaty of Waitangi itself was read and explained to the chiefs assembled at all treaty meetings.[52]

[51] Colenso, *Authentic and Genuine History,* p. 33.

[52] At Symond's first Manukau meeting on 20 March, Hamlin acted as his interpreter and three signatures were obtained on a copy of the Maori text which Symonds subsequently forwarded to the Wesleyans at Kawhia. (This is the Manukau-Kawhia sheet.) At Waikato Heads, Symonds found that Maunsell had held a meeting in mid-March and had obtained a number of signatures, which were witnessed by Maunsell and Ashwell on 11 April. These signatures were to an agreement in the English language. Symonds took this document back to Manukau with him and there obtained some more signatures to it on 26 April. On this latter occasion, Symonds was without a Maori text and without Hamlin's services as interpreter. Posterity therefore is as much in the dark about what the signatories at this second Manukau meeting thought they were signing as about those who had signed at Waikato in mid-March.

Although challenged at Waitangi, Williams seems to have had no qualms about his competence as translator, nor about his performance as interpreter: 'In this translation it was necessary to avoid all expressions of the English for which there was no expressive term in the Maori, preserving entire the spirit and tenor of the treaty,—which, though severely tested, has never yet been disturbed, notwithstanding that many in power have endeavoured to do so.'[53]

About Busby's contribution, Williams was equally positive: 'On a careful examination of the translation of the treaty by Mr. Busby, he proposed to substitute the word *whakaminenga* for *huihuinga*, which was done and approved of.'[54] So much for Busby's claim to have 'drawn the treaty'.

Preamble

The preamble of the Treaty of Waitangi appears to be a translation, with some omissions and simplifications, of Hobson's draft notes. Of particular significance is the use of *kawanatanga* to translate both 'sovereign authority' and 'government', which gives some indication of the problems facing the translators and of how adequately, or otherwise, they were overcome.

Article One

From the British Government's point of view, the chief purpose of the treaty was that the chiefs should cede their sovereignty to the Queen. In all the English versions, the Chiefs of the Confederation and the Separate and Independent Chiefs agreed to 'cede to Her Majesty, the Queen of England, absolutely and without reservation all the rights and powers of Sovereignty' which they possessed. In the Treaty of Waitangi this became: *ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu te Kawanatanga katoa o o ratou w[h]enua.* The idea of giving up forever appears to be reasonably clearly conveyed. The point at issue here, as in the preamble, is whether the concept of territorial sovereignty is adequately contained in *te kawanatanga katoa o o ratou whenua.*

At the Kohimarama Conference in 1860, translating Governor Browne's opening speech which included large chunks of 'the English version', Donald McLean translated 'all the rights and powers of sovereignty' as *nga tikanga me nga mana Kawanatanga katoa.*[55]

[53] Carleton, II, 12.

[54] loc. cit.

[55] *Te Karere Maori*, Auckland, 14 July 1860, p. 6. Note that when, near the close of the conference, McLean announced: *Na, ko te Tiriti tenei o Waitangi, kia panuitia e au* (I shall now read to you the Treaty of Waitangi), it was Williams's Maori text of the treaty itself which McLean read, without giving any explanation of the considerable differences between this and his own translation of the English version quoted earlier by the Governor. ibid., 3 August 1860, pp. 36-38.

In 1869, when the Legislative Council ordered a 'careful translation' of 'the English version',[56] T. E. Young of the Native Department translated 'all the rights and powers of sovereignty' as *nga tikanga me nga mana katoa o te Rangatiratanga.*[57] Sir Apirana Ngata's twentieth-century explanation of the treaty leaves no doubt that in his view *te mana rangatira,* chiefly authority, had been ceded to the Queen by the Treaty of Waitangi.[58] To all these experts, the Maori concept of *mana* was part of the European concept of sovereignty, but in the Treaty of Waitangi there is no mention at all of *mana.*

Writing in 1860 about the Treaty of Waitangi, Sir William Martin said: 'The rights which the Natives recognised as belonging thenceforward to the Crown were such rights as were necessary for the Government of the Country, and for the establishment of the new system. We called them "Sovereignty"; the Natives called them "*Kawanatanga,*" "Governorship."'[59]

It was not the New Zealanders who called 'this unknown thing' *kawanatanga,* it was the Protestant missionaries. It was a coined word, from *kawana,* itself a transliteration of 'governor', in which office Pontius Pilate would have been at least as well known to the New Zealander of 1840 as were the governors of the Australian colonies. The word *kawanatanga* had been in occasional use in *mihinare* translations since 1833; in the order for morning service: 'that all our doings may be ordered by the governance'—*ki tou kawanatanga;* and in 1 Corinthians 15:24: 'Then cometh the end, when he shall have delivered up the kingdom of God, even the Father;

[56] '*Ordered,* That there be laid upon the Table a copy of the English version of the Treaty of Waitangi, as printed by authority of the Governor in 1840, and a careful translation into English of the original Treaty ordered to be laid on the Table; also, if procurable, a copy of such original Draft, in English, as may have been prepared for translation by Governor Hobson, or by his authority; and that the above, together with the original Treaty and the annotated signatures thereto, already ordered, be printed in the Appendix to the Journals of this Council.' *Journals of the Legislative Council,* 1869, p. 77. No English version was printed by authority of the Governor in 1840. See below, n. 113. The English version printed in 1869 is that of the Waikato-Manukau agreement; also printed is the Maori text of the Treaty of Waitangi, Young's translations of both these texts, an extremely inaccurate list of signatures with W. B. Baker's annotations, and a note by W. Gisborne: 'The original draft (if any) is not on record in the Native Office or Colonial Secretary's Office.' *Appendix to the Journals of the Legislative Council,* 1869, pp. 67-78.

[57] ibid., p. 70.

[58] *Te Tiriti o Waitangi, He Whakamarama,* first published in 1922, reprinted n.d., with English translation by M. R. Jones, Maori Purposes Fund Board, pp. 6, 20.

[59] Sir W. Martin, *The Taranaki Question,* Auckland, 1860, pp. 9-10.

when he shall have put down all rule and all authority and power'— *Ko reira te mutunga ino oti te rangatiratanga te ho atu e ia ki te Atua te Matua; ina oti te w[h]akangaro te kawanatanga katoa, te mana katoa me te kaha.*

Had Williams applied this scriptural precedent and associated *mana* with *kawanatanga* in the translation of sovereignty, no New Zealander would have been in any doubt about what the chiefs were ceding to the Queen. There was, morover, already a precedent in a secular political context for including *mana* in the translation of sovereignty. In the Maori text of Busby's declaration of independence, 'all sovereign power and authority within the territories of the United Tribes' was translated as *ko te Kingitanga ko te mana o te w[h]enua o te w[h]akaminega.*[60] Yet when this same sovereign power and authority was to be ceded to the Queen by, among others, the very chiefs who had supposedly declared themselves possessed of it in 1835, only *te kawanatanga katoa* of their lands was specified. It is difficult not to conclude that the omission of *mana* from the text of the Treaty of Waitangi was no accidental oversight.

Article Two: Part 1

Today, most of the controversy about the Treaty of Waitangi revolves round laws relating to the taking of shellfish and similar restrictions which, in their application to Maoris, are claimed to breach the treaty. In fact, the Treaty of Waitangi mentions only *whenua* (land), *kainga* (homes), and *taonga katoa* (all [other?] possessions). It is thus a matter for interpretation whether or not the *taonga katoa* of the Treaty of Waitangi could include natural food resources in tidal areas reserved to the Crown.

The dictionary meaning of *taonga* is 'anything highly prized', and it was so used by the Protestant missionary translators. For example, the young man who was told to go and sell all he had and give to the poor, 'and thou shalt have treasure in heaven'— *a e wai taonga koe ki te rangi;* and he went away sorrowful 'for he had great possessions'—*he maha hoki ana taonga.* But it does not appear that Williams envisaged *taonga* as including fishing rights. When he was asked by Bishop Selwyn in 1847 how he had explained the treaty to the Maoris, he translated this part of the Maori text back into English as 'their lands, and all their other property of every kind and degree'.[61] As he and other interpreters at treaty meetings were working from the Maori text, it seems highly improbable that fishing rights would have been mentioned at any treaty meeting except, possibly, at Waikato Heads in mid-March 1840.

Although the translators may fairly be held responsible for the omission from the Treaty of Waitangi of any reference to *mana,* the

[60] I have not been able to establish who translated this document into Maori, but it is unlikely to have been Busby.
[61] Williams to Selwyn, 12 July 1847, Carleton, II, 156.

guaranteed to the chiefs, to the tribes, to all the people of New Zealand in 1840? In missionary Maori, *rangatiratanga* was 'kingdom': *te rangatiratanga o te Atua*—the kingdom of God; *tukua mai tou rangatiratanga*—thy kingdom come; *ehara taku rangatiratanga i tenei ao*—my kingdom is not of this world. But in a proclamation issued on 27 April 1840 in which Hobson warned the chiefs that a certain evil Pakeha had been stirring up trouble against *te rangatiratanga o te Kuini*, the word *rangatiratanga* was used to denote 'sovereignty'.[65] Was it any wonder that the New Zealanders at first supposed the Queen had guaranteed them something more than possession of their own lands? At least one chief, Nopera Panakareao of Kaitaia, soon realised his mistake. In April 1840 he had supposed that the shadow of the land would go to the Queen, 'but the substance will remain with us'.[66] By January 1841 he was already apprehensive that the substance would go to the Queen and 'the shadow only' would be the New Zealander's portion.[67] How prophetic this was of Young's 'careful translation' for the Legislative Council in 1865 of 'all the rights and powers of sovereignty' ceded to the Queen as nga tikanga me nga mana katoa o te Rangatiratanga.[68]

Article Two: Part 2

Hobson's instructions from the Secretary of State were quite explicit: the chiefs were to be induced, if possible, to contract with him 'as representing Her Majesty, that henceforward no lands shall be ceded, either gratuitously or otherwise, except to the Crown of Great Britain'.[69] In other words, the Colonial Office wanted the chiefs to grant the Queen the exclusive right of purchase. But these were not the words used by Hobson. In all the English versions the chiefs are to yield to the Queen 'the exclusive right of preemption over such lands as the proprietors thereof may be disposed to alienate, at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf'.[70]

65 No. 53 in Williams *Bibliography*. No English draft has been found of which this Maori proclamation could be a translation, unless the text given by Buick, p. 191, is the original English draft and not just an English translation of the printed Maori. Buick's source has not been located.

66 Journal of the Rev. Richard Taylor, Vol 2, p. 200, typescript.

67 ibid., p. 225.

68 See above p. 140 and n. 57.

69 GBPP, 1840, XXXIII [238], p. 38.

70 The 'certified' copy of October 1840 changed the last preposition from 'in' to 'on'. The opening words of the preamble in the 'certified' copy also differed: 'Her Majesty Queen Victoria of the United Kingdom', instead of 'Her Majesty Victoria Queen of the United Kingdom' as in two of the earlier versions and 'Her most gracious Majesty Victoria Queen of the United Kingdom' as in the other two earlier versions.

The word 'pre-emption' first appeared in J. S. Freeman's draft notes, the second article of which read: 'The United Chiefs of New Zealand yield to Her Majesty the Queen of England the exclusive right of Preemption over such waste Lands as the Tribes may feel disposed to alienate.'[71] Busby, expanding the Freeman draft articles, adopted as his own the phrase 'the exclusive right of preemption'; all the English versions followed suit.

Lord Normanby's instructions were confidential[72] and Hobson felt himself subject to 'great inconvenience and responsibility, from being deprived of the assistance and advantage of a Colonial Secretary or a Legal adviser'.[73] Whether Freeman, a second-class clerk, was responsible for introducing the word 'pre-emption', or whether he merely wrote it down to Hobson's dictation, it seems clear that Hobson thought 'the exclusive right of pre-emption' and 'the exclusive right of purchase' were synonymous. It seems equally clear that the legal and etymological meanings of the two phrases differed, notwithstanding the fact that the Colonial Office and successive New Zealand governors acted as if they did not.

The *Oxford English Dictionary* defines pre-emption as 'purchase by one person or corporation before an opportunity is offered to others; also, the right to make such a purchase'. In English law, the sovereign, through his purveyor, formerly had the right to buy household provisions in preference to other persons and at special rates; this right of pre-emption, given up in the reign of Charles II, could have no application in New Zealand. In the United States, the right of pre-emption was a right of purchase, in preference and at a nominal price, of public land by an actual occupant, on condition of his improving it.[74] This meaning of pre-emption was clearly understood by at least one member of the Select Committee of the House of Commons which enquired into the New Zealand Company and the colonization of New Zealand in 1840, and by at least one of the witnesses, also a member of the House of Commons, who appeared before that committee.[75]

In Scottish law, a clause of pre-emption was sometimes inserted in a feu-right, stipulating that, if the vassal should be inclined to sell the lands he should give the superior the first offer, or that the superior should have the lands at a certain price fixed in the clause.[76]

[71] *Fac-similes*, the second set of draft notes.
[72] Hobson to Secretary of State, 20 February 1840, 40/2, CO 209/7, p. 31[v].
[73] ibid, p. 32.
[74] OED and Webster's *New International Dictionary*. This meaning of pre-emption seems to have had some application in the Australian colonies.
[75] Mr G. W. Hope: 'I presume that the terms on which it would be proposed to deal with the present [European] possessors of land would be similar to those which are adopted in America under similar circumstances, namely, to give a right of pre-emption to those in actual possession.' Mr Hutt: 'That would be the course we should recommend.' GBPP, 1840, VII, 582, p. 126.
[76] OED.

Neither in the English versions, nor in the Treaty of Waitangi itself, was any price fixed, and it appears that only in the sense of the 'first offer' could the term 'pre-emption' have any application in the New Zealand context.[77]

How much misunderstanding and bitterness, between Maori and Pakeha, between settlers and government, might have been avoided, or at least lessened, if Sir George Gipps, as well as supplying Hobson with draft proclamations, had also sent him an English draft treaty, worded along the lines that 'the said Native Chiefs do hereby on behalf of themselves and tribes engage, not to sell or otherwise alienate any lands occupied or belonging to them, to any person whatsoever except to Her said Majesty upon such consideration as may be hereafter fixed . . . .' But if this had been translated into Maori, maybe the chiefs at Waitangi and elsewhere would have refused to sign, as Tuhawaiki and others visiting Sydney refused to sign Gipps's own treaty drawn up in these terms.[78]

There is no evidence, nor any reason to believe, that Hobson explained to Henry Williams what he (Hobson) understood the meaning of pre-emption to be. By Williams's translation, the chiefs agreed to give the Queen *te hokonga o era wahi w[h]enua e pai ai te tangata nona te w[h]enua ki te ritenga o te utu e w[h]akaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona*, which Young of the Native Department translated in 1869: 'the purchase of those pieces of land which the proprietors of the land may wish, for such payment as may be agreed upon by them and the purchaser who is now appointed by the Queen to be her purchaser'.[79]

Colenso, writing to the Church Missionary Society immediately after the Waitangi meeting, did not 'for a moment' suppose that the chiefs were 'aware that by signing the Treaty they had restrained themselves from selling their land to whomsoever they will', and cited one Hara who, though he had signed the document, had since offered land for sale. When told this was irregular, he had retorted '"What! Do you think I won't do what I like with my own?"' [80] On the other hand, there is at least one Maori letter surviving, written by Tamati Wiremu of Paihia in March 1840, complaining that Europeans wanted to induce him to sell part of his

[77] This is the legal meaning of pre-emption in New Zealand today. See Mozley and Whiteley's *Law Dictionary*, New Zealand edition, ed. G. W. Hinde, Wellington, 1964. I am grateful to Dr Warwick McKean, Faculty of Law, Victoria University of Wellington, for referring me to this work, also for summarising a number of English and American cases involving pre-emption: Manchester Ship Canal v .Manchester Racecourse Coy; Garcia v. Callender; Nix v. Allen; Dillingham v. Fisher and Doe v. Beck.

[78] Edward Sweetman, *The Unsigned New Zealand Treaty*, Melbourne, 1939, pp. 61-65; a reduced facsimile of Gipps' treaty may be seen f.p. 64.

[79] AJLC, 1869, p. 70.

[80] Colenso to the Church Missionary Society, commenced 24 January 1840, quoted in Bagnall and Petersen, pp. 93-94.

land, and asking that the governor interfere and stop the practice which he considered wrong.[81]

Whatever Hobson may have supposed the chiefs understood the Treaty of Waitangi to mean, he himself was in no doubt that the 'exclusive right of pre-emption' had been ceded to the Crown and that this in fact meant the exclusive right of purchase. He persisted in using the word 'pre-emption', as in the Land Claims Ordinance of June 1841, which 'declared, enacted and ordained . . . that the sole and absolute right of pre-emption from the said Aboriginal inhabitants, vests in and can only be exercised by Her said Majesty, Her Heirs, and Successors',[82] and in later years was reported to have said, when urged to buy up land with the least possible delay: 'there is no necessity for doing so, for having no competitors in the market we can buy it on our own terms whenever it is convenient to do so'.[83]

It is not surprising that Hobson, holding these views and being in any case without funds, bought very little land. By the time of FitzRoy's arrival, the government's refusal to purchase land from the Maoris or to let them sell to anyone else had produced a situation of crisis. Immediately, two groups of chiefs—Te Kawau, Tinana and others of Ngatiwhatua and Te Wherowhero, Kati and others of Waikato—addressed themselves to the new governor:

> At the meeting of Waitangi you pledged your Government that we should be British subjects, and that our lands should be sold to the Queen. But we understand from that part of the Treaty that Her Majesty should have the first offer; but in the event of Her Majesty not being able to bargain with us, we should then be able to bargain with any other European.[84]
>
> . . . there is another thing that makes our hearts very dark. This agreement at Waitangi said: The land was to be sold to the Queen; now, we supposed that the land was first to be offered to Her, and if Her Governor was not willing to buy, we might sell to whom we pleased; but no, it is for the Queen alone to buy; now, this is displeasing to us, for our waste lands will not be bought up by Her only, because She wants only large tracts; but the common Europeans are content with small places to sit down upon.[85]

The Europeans also addressed the governor eloquently and at great length on the subject.[86] FitzRoy was in no better situation financially than Hobson had been and it did not take long to wear him down. After only three months in the colony, he issued a

[81] IA 1, 40/45.
[82] *Ordinances of New Zealand, Session I, 1841*, Auckland, 1845, p. 9.
[83] Quoted by W. F. Porter in a letter 'To James Busby, Esq., per favor of the Southern Cross', *Southern Cross*, 6 July 1858.
[84] *Southern Cross*, 30 December 1843. This translation of the Ngatiwhatua letter is headed: 'True Copy, G. Clarke.' The original letter in Maori has not been traced.
[85] ibid. This translation of the Waikato letter is headed: 'True Copy, Thos. Forsaith.' The original letter in Maori has not been traced.
[86] S. M. D. Martin, Chairman, in *Southern Cross*, 6 January 1844.

proclamation waiving the Crown's right of pre-emption under certain conditions. Explaining his actions to the Secretary of State he wrote:

> . . . the natives have been clamorous to sell their lands. They called on the Government to buy, or let others buy; and great discontent has been caused among them by the inability of the Government to do either. But while they called on the Government to buy from them, it was at a price wholly out of the question. They said: 'Let the Government give us as much as it receives from others, or let them buy from us. By the treaty of Waitangi, we agreed to let the Queen have the first choice (the refusal) of our lands, but we never thought that we should be prevented from selling to others if the Queen would not buy.'[87]

The conditions under which direct purchase of lands could be made proving too restrictive, FitzRoy brought in new and easier regulations in October 1844, explaining to Lord Stanley:

> The natives have been repeatedly told that they gave the Queen of England 'te nokonga,'[88] the 'option of purchase,' but that they did not, in their own language, give Her Majesty the sole and exclusive right of purchase; that the words of the English treaty, 'exclusive right of pre-emption,' were not translated correctly, and have a meaning not generally understood by the natives, who never would have agreed to debar themselves from selling to private persons, if the Government, on behalf of Her Majesty, declined to purchase.[89]

The Colonial Office, like Hobson and FitzRoy, acted as though 'the exclusive right of pre-emption' were synonymous with 'the sole right of purchase', Lord Stanley informing FitzRoy that he entertained no doubt 'but that the original intention of that provision of the treaty was to enable the Crown, *as the sole purchaser,*[90] to obtain land on easy terms from the native tribes'.[91]

By the time FitzRoy's despatch of 14 October 1844 reached London, a successor had been appointed to replace him. The new governor was informed that Lord Stanley disapproved altogether of the second waiver proclamation, that 'maintaining strictly the Crown's right of pre-emption as conceded by the treaty of Waitangi' was the course preferred, and that although 'unwilling to fetter you by any positive instructions, it is my wish that, if possible, you should revert to the original plan of prohibiting all purchases direct from the natives'.[92] The Secretary of State entirely ignored the information that the New Zealanders understood they had given the Crown only the first option, and that the Maori document had not translated 'the exclusive right of pre-emption' to mean 'the sole

[87] FitzRoy to Stanley, 15 April 1844, GBPP, 1845, XXXIII, 131, p. 24.
[88] A misprint. By the treaty, the chiefs gave the Queen the *hokonga* (the spelling is now *hokona*). This means 'purchase' (buying or selling), not 'option of purchase' as suggested by FitzRoy.
[89] FitzRoy to Stanley, 14 October 1844, GBPP, 1845, XXXIII, 369, p. 20.
[90] My italics.
[91] Stanley to FitzRoy, 30 November 1844, GBPP, 1845, XXXIII, 131, p. 54.
[92] Stanley to Grey, 14 August 1845, GBPP, 1846, XXX, 337, p. 85.

and exclusive right of purchase'. It would therefore seem that in the Colonial Office the New Zealanders' understanding of the treaty they had signed with Hobson was of little account, the meaning of the document actually signed of no account whatever.

The Colonial Office view of New Zealand land tenure was simplistic in the extreme. In all seriousness, Governor Grey was informed by Lord Stanley: 'If Lord John Russell's instructions of the 28th January 1841, to define on the maps of the colony the lands of the aborigines, and my own for a registration of such lands, had been carried into effect, much of this difficulty would have been surmounted.'[93] And in a later despatch: 'When that registration shall have been effected, it will be apparent what portion of the unoccupied surface of New Zealand can justly, and, without violation of previous engagements, be considered as at the disposal of the Crown. . . .'[94] This train of thought led inevitably to Lord Grey's Waste Lands instructions of December 1846. But just before these reached New Zealand, the meaning of pre-emption as supposedly used in the Treaty of Waitangi had been argued in the New Zealand Supreme Court, in May and early June 1847, in the test case of the Queen (at the suit of Charles Hunter McIntosh) v. John Jermyn Symonds.

Bartley, counsel for the plaintiff, contended that the Treaty of Waitangi, 'from which alone the Crown's rights (whatever such rights might be) were derived', had no 'restrictive import against the natives' right of sale of their lands', the Maori text containing no word signifying 'exclusive'.

> Then, with regard to the right of pre-emption, these words mean nothing more than the right of first offer, or preference, to the Crown. Such was the etymological import of the word 'pre-emption,' and the sense which the natives attached to the corresponding word in the Treaty. If the words 'exclusive right of pre-emption' meant (as was contended for the defendant) 'exclusive right of purchase,' why was not the indisputable and unequivocal word 'purchase' used, and not 'pre-emption,' which admitted and bore a different meaning?[95]

Plaintiff's counsel assumed that 'the English version' was a translation of the Maori treaty, which undermines the validity of some of the rest of his argument, though he surely had a point when he said that if the New Zealanders were not allowed to sell their lands to the settlers and the Queen was under no obligation to buy the land they wanted to sell, 'the agreement or treaty of Waitangi according to legal principle, would be invalid for want of mutuality'.[96]

Mr Justice Chapman attempted to explain away Bartley's argument about the meaning of pre-emption:

[93] Stanley to Grey, 13 June 1845, ibid., p. 72.
[94] Stanley to Grey, 27 June 1845, ibid., p. 73.
[95] *New-Zealander*, Auckland, 8 May 1847, Supplement.
[96] ibid.

It amounts to this, that the Crown's right is loosely named; that the word pre-emption is not the one which ought to have been chosen. Be that as it may, the Court must look at the legal import of the word, not at its etymology. The word used in the treaty is not now used for the first time. If it were so, it perhaps might be contended that a limited right being expressed, the larger right is excluded. But the framers of the treaty found the word in use with a peculiar and technical meaning, and as a short expression for what would otherwise have required a many-worded explanation, they were justified by very general practice in adopting it.[97]

But this piece of gobbledygook, totally unsupported by the citation of any precedent or authority, was merely an aside, Chapman chiefly basing his judgement, as also did the Chief Justice, on the principle that the Crown was the sole source of title.[98] Chief Justice Martin put the matter thus: 'This right of the Crown, as between the Crown and its British subjects, is not derived from the Treaty of Waitangi; nor could that Treaty alter it. Whether the assent of the natives went to the full length of the principle or, (as is contended) to a part only, yet the principle itself was already established and in force between the Queen and Her British subjects.'[99] It could hardly have been said more plainly that the Treaty of Waitangi was irrelevant. Ironically, Martin was very shortly to become one of the most vigorous protestors against Lord Grey's Waste Lands instructions, on the grounds that they infringed Maori rights guaranteed by the Treaty of Waitangi.[100]

It was in the furore which the receipt of these instructions caused in New Zealand that Bishop Selwyn wrote to Archdeacon Henry Williams, with reference to the Treaty of Waitangi: 'I hereby request you to inform me in writing *what* you explained to the Natives and how they understood it.'[101] Pre-emption was then a political hot potato, less than three weeks having passed since judgement had been given in the case of the Queen v. J. J. Symonds. Williams, whose own land claims had brought him into dispute with his bishop,

97 GBPP, 1847/8, XLIII, [892], p. 66.

98 This principle was first enunciated in New Zealand in Hobson's proclamation of 30 January 1840: 'Her Majesty . . . does not deem it expedient to recognize as valid any titles to land in New Zealand which are not derived from or confirmed by Her Majesty'. GBPP, 1840, XXXIII, 560, p. 8.

99 GBPP, 1847/8, XLIII, [892], p. 69.

100 See *England and the New Zealanders*, Auckland, 1847, *passim*. The inference could perhaps be drawn, from Martin's quotations from Kent's *Commentaries*, that in the United States the government's claim of 'the right of preemption upon fair terms' in respect of Indian lands was synonymous with 'the exclusive right of purchasing such lands as the natives were willing to sell'. But Kent had pointed out (in a passage not quoted by Martin): 'The English government purchased the alliance and dependence of the Indian nations by subsidies, and purchased their lands when they were willing to sell, at a price they were willing to take . . . . The United States, who succeeded to the rights of the British crown in respect to the Indians, did the same . . . .' (James Kent, *Commentaries on American Law*, III, Lecture 51, 384.) Thus the government had become the sole purchaser of Indian lands by exercising its right of pre-emption and purchasing land when the Indians offered it for sale.

101 Selwyn to Williams, 30 June 1847, ms. 335/86, Auckland Institute and Museum Library.

refused to be drawn. His reply was a studied translation of the Maori text of the treaty back into English, in which the second clause of the second article ran: 'The chiefs wishing to sell any portion of their lands, shall give to the Queen the right of pre-emption of their lands.'[102]

During the late 1850s and early 1860s, commissioners appointed under the Land Claims Settlement Acts were attempting finally to settle the thorny problem of the old land claims, that is, claims to land purchased before 1840. Busby, one of the most vociferous and probably the most self-righteous of the old land claimants, was also the self-appointed arbiter on all matters relating to the Treaty of Waitangi, its interpretation and intentions, whenever the subject was raised in public, as happened in 1858 when the Native Territorial Rights Bill was debated in the House of Representatives. C. W. Richmond, who introduced the Bill, challenged its opponents to produce proof that 'the Natives were averse to the Crown's right of pre-emption'. Carleton quickly referred him 'to the records of the Native Office in Mr. Protector Clarke's time. He would find masses of letters there from Natives insisting upon the settlers being allowed to purchase what the Government was unable or unwilling to purchase.'[103] And in the Auckland press, W. F. Porter—with members of his family, a substantial purchaser under the waiver proclamations of 1844—maintained that the Maoris, when signing the treaty, did not understand they were giving the government the exclusive right of purchase. It was therefore the duty of the government to carry out the treaty 'faithfully and honestly, *according to the sense in which the Natives understood it*'.[104]

Busby leapt into the fray. As he himself 'drew that Treaty', he thought he 'should understand it as well as most people'. As for pre-emption,

> the word, in the English version of the Treaty, is used in the technical sense, in which it has always been used in dealing with the American Indians (and, as far as I am aware, the use of word is peculiar to such transactions),—that is, as an exclusive right to deal with them for their lands. The etymological sense of the word 'pre-emption' may be different, but it assuredly was never understood by the Natives that the Queen was only to have the first offer of the land; which would have been a mere mockery. The relinquishment of the right to sell land to any one but to agents appointed by the Queen was as absolute in the Maori version of the Treaty as one of the best Maori scholars could make it.[105]

[102] Williams to Selwyn, 12 July 1847, quoted Carleton, II, 157.
[103] NZPD (1856-8), 528. The 'records of the Native Office in Mr. Protector Clarke's time' are no longer as complete as they were in 1858. But though the 'masses of letters' cited by Carleton no longer exist, surviving registers of inward letters record numbers of letters from Maoris during the early 1840s offering their land for sale. (MA registers, National Archives, Wellington.)
[104] *Southern Cross*, 15 June 1858, Supplement.
[105] ibid., 25 June 1858.

There was no comment from Henry Williams. Porter asked the obvious question: 'why use a word *according to your interpretation* of doubtful meaning in a document of so much importance'?[106] Why indeed?

The argument about pre-emption broke out anew in May 1861 when Busby launched a new weekly, the *Aucklander*.[107] Busby's tone apparently grew shriller and his arguments wilder as the *Southern Cross's* correspondents increased their pressure on him. 'If the Waitangi Treaty did not mean what it said, may I ask what hindered it from recording what it did mean?' asked 'O' in the *Cross* of 21 May. '. . . what have we to do with the manner in which the natives of America were treated? We are bound by a solemn treaty . . . . The Editor of the "Aucklander" who drew up the treaty, has admitted that the effect of the pre-emption clause would have on their land sales was not explained to them, will he state why that was not done?' asked Porter on 7 June. 'Has the "Aucklander" never heard that a man may pay too dear for his whistle? What have you bestowed on the Maori? The name of British subject! And what price have you attached to the boon? That he shall be content never to claim the reality of it'—this was one of many sarcasms from 'O' in a long letter in the *Cross* of 11 June. And in the issue of 18 June, Porter repeated an earlier demand: 'The man who writes about others in the manner the Editor of the *Aucklander* has done, ought himself to be the soul of honour; I therefore again call upon him, for his own sake, to explain if he can why the natives were allowed to remain in ignorance of the effect the pre-emption clause (according to his interpretation of it) would have on their land sales . . . .'

Busby might claim to have 'drawn' the treaty, but explaining it 'to the natives' had been the prerogative of the Protestant missionaries, one of whom was finally stung into declaring himself, though unfortunately not openly. On 23 July 1861 Porter wrote again in the *Southern Cross:* 'The editor of the *Aucklander* not having answered my questions, a gentleman at the Bay of Islands, who had more to do with getting the treaty signed than any man in the colony, has written me a letter explaining the matter fully and clearly.' Of whom in the Bay of Islands, or in the whole country, could this have been said but Henry Williams? His letter, quoted *in extenso* by Porter, said this of the treaty meeting at Waitangi:

> . . . when it touched upon the land, the pre-emption clause had to be explained to them over and over again, and the following is the explanation that was given: *The Queen is to have the first offer of the land you may wish to sell, and in the event of its being refused by the Crown, the land is yours to sell it to whom you please.* This explanation, I most conscientiously assert was given to them, and thus they understood it; and, as you very justly remark, had any other explanation been given to them,

[106] ibid., 6 July 1858.
[107] Unfortunately the *Aucklander's* side of this controvery is not available, only a few isolated issues surviving in New Zealand libraries from this period.

the treaty never would have been signed by a chief in the Bay of Islands. I am bound, in honor, to make this statement, however at variance it may be with that made by the editor of the *Aucklander*.

I should have considered the whole body of missionaries guilty of trickery—if not treachery—to the New Zealanders, had they not fully and clearly explained to the natives the meaning of the pre-emption clause.[108]

That the pre-emption clause 'had to be explained to them over and over again' may have been the exaggeration of hindsight. Otherwise, Colenso could hardly have written as he did to the Church Missionary Society immediately after the meeting.[109] Indeed, Colenso's journal account of the Waitangi meeting suggests that it had been the land already sold, to Williams and Busby among others, which had most concerned opposition speakers at Waitangi,[110] but such records as have survived of the treaty meetings are inevitably misleading. As Mohi Tawhai is recorded as having said at the Hokianga treaty meeting, the sayings of the Pakeha float light, like the wood of the whau tree, and always remain to be seen, but the sayings of the Maori sink to the bottom like a stone.[111]

Article Three

FitzRoy wrote to Lord Stanley in October 1844:

The attention of the natives has also been repeatedly, I may say frequently and purposely, drawn to the last article of the treaty of Waitangi, by which Her Majesty 'imparts to them all the rights and privileges of British subjects;' and they have been told that while unable to sell their own land, that article is not executed, and they are no better than slaves (taurekareka) taken in war, who have not the disposal of their own lands, while occupied by the conquerors.[112]

That the European settlers were motivated by their own self-interest there can be no doubt: they wanted to buy land. But many New Zealanders were, at this period, equally as anxious to sell land. Thus to both, the government's interpretation of the second article of the Treaty of Waitangi made a nullity of the third article. Was there not more realism, maybe even more honesty, in the settlers' attitude to the Treaty of Waitangi than in that of Henry Williams?

On my return from Turanga on the 16 of Sep. 1844 I found the tribes around under considerable excitement without exception. The Treaty of

[108] No repetition of these sentiments has been found in Williams's unpublished correspondence, but the very day this letter appeared in the *Cross* he wrote to his brother William: 'Old Busby is as mad as any of them, a bitter enemy against the natives, and every one else, himself excepted, he has expressed his opinion on the subject in his own way, the way of a true son of Ishmael, whose hand is lifted up against every man, tho taken but little notice of.' ms. 335/122, Auckland Institute and Museum Library.

[109] See above p. 145 and n. 80.

[110] Colenso, *Authentic and Genuine History*, p. 18.

[111] GBPP, 1845, XXXIII, 108, p. 10.

[112] FitzRoy to Stanley, 14 October 1844, GBPP, 1845, XXXIII, 369, p. 20.

Waitangi having been declared as the origin of all the existing mischief, by which the Chiefs had given up their Rank, Rights and Privileges as chiefs with their lands and all their possessions.

To meet this Growing Evil I had Four Hundred Copies of the Waitangi Treaty struck off [113] & distributed and for many days was engaged in explaining the same, shewing to the Chiefs that this Treaty was indeed their 'Magna Charta' whereby their Lands their Rights and Privileges were secured to them. By these means & by these alone were the fears of Waka and of all the other Chiefs allayed—They admitted that the Treaty was Good.[114]

Thus wrote Williams early in 1847, and repeated the claim later in the same year: 'The full and minute explanation of the treaty, on the first symptom of disaffection, from the commencement of the colony, alone composed the excited feeling of those who have since stood forth as the allies of the Government in the late war, and caused others to remain neuter.'[115]

Did Williams really believe that the chiefs, the tribes, all the people of New Zealand had been given what the third article promised them: *nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani*—all the same rights as those given to the people of England?

Even if the treaty were all that Williams claimed it to be, it does not seem from his own account that this was something which those who had signed it could perceive for themselves. It was his 'full and minute explanation' which 'alone composed' their excited feelings. Yet he showed himself extremely reluctant to share the nature of this explanation with his fellow-Europeans.

Is not this woolly-mindedness the real crux of the Waitangi problem? Ever since the 1840s the New Zealander has been told that the Treaty of Waitangi was the Maori Magna Carta. In modern times Lord Bledisloe's prayer has been repeated each Waitangi

[113] No 52 in Williams *Bibliography*, printed by Telford on the Paihia press. Colenso's 1840 printing of the Maori text of the treaty is No 52a. No English version was printed in 1840 by Colenso. Yet in *Authentic and Genuine History*, p. 35, he stated that on 8 February he was 'very busy in the printing office with Proclamations, two treaties, &c.', but this apparent suggestion that he printed two treaty texts, English as well as Maori, is belied by his printing office records. His 'Ledger' and 'Day and Waste Book', ATL, show that the two proclamations were printed for Hobson on 30 January 1840; there is no printing office entry for 8 February in either record; both carry the following entry for 17 February: 'Compositing & printing 200 Copies of Treaty'. No English version printed by Colenso in 1840 has been found, and there is no contemporary record of his having printed any other edition than this '200 Copies of Treaty' on 17 February. That this was indeed the Maori text, W 52a, is evident from the fact that a copy was forwarded to the Colonial Office by Hobson with the duplicate of his first New Zealand despatch, see G 30/1, p. 28. For the signed copy of W 52a, mentioned in n. 41 above, see *Fac-similes*.

[114] 'Information relative to the present correspondence' [between Busby and Williams in January 1847], CN/094b, CMS microfilm, reel 61, ATL. There are several copies, in Williams's hand, one with the year of his return from Turanga incorrectly given as 1845.

[115] Williams to Grey, 1 December 1847, GBPP, 1849, XXXV, 1120, p. 7.

Day 'that the sacred compact then made in these waters may be faithfully and honourably kept for all time to come'. Yet how many of today's New Zealanders, Maori or Pakeha, ever look at the Treaty of Waitangi? To each one of us—the politician in Parliament, the *kaumatua* on the marae, *Nga Tamatoa* in the city, the teacher in the classroom, the preacher in the pulpit—the Treaty of Waitangi says whatever we want it to say. It is a symbol, of Pakeha self-righteousness, of Maori disillusionment. On the one hand, lip service is paid to its 'spirit' and 'intentions'; on the other, agitation mounts for its 'observance' and 'ratification'.

The signatories of 1840 were uncertain and divided in their understanding of its meaning; who can say now what its intentions were? Ratification is a legal and constitutional process; a treaty—if this was indeed a treaty—can surely be ratified only in the terms in which it was signed.

However good intentions may have been, a close study of events shows that the Treaty of Waitangi was hastily and inexpertly drawn up, ambiguous and contradictory in content, chaotic in its execution. To persist in postulating that this was a 'sacred compact' is sheer hypocrisy.

McLean, translating Gore Browne's opening speech at the Kohimarama Conference, called the treaty *te Kawenata o Waitangi*,[116] the covenant, the promise of Waitangi. If Waitangi 1840 held any real promise for the future, it was perhaps in Hobson's few words of halting Maori to each man as he signed: *He iwi tahi tatou*.[117] 'We are one people'.

R. M. ROSS

Weymouth

[116] *Te Karere Maori*, 14 July 1860, p. 6.
[117] Colenso, *Authentic and Genuine History*, p. 35.

Te Tiriti o Waitangi

Ko Wikitoria te Kuini o Ingarani i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira—hei kai wakarite ki nga Tangata maori o Nu Tirani—kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te wenua nei me nga motu—Na te mea hoki he tokomaha ke nga tangata o tona Iwi kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata maori ki te Pakeha e noho ture kore ana.

Na kua pai te Kuini kia tukua a hau a Wiremu Hopihono he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aianei a mua atu ki te Kuini, e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

Ko te tuatahi

Ko nga Rangatira o te wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu—te Kawanatanga katoa o o ratou wenua.

Ko te tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu—ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me a ratou taonga katoa. Otiia ko nga Rangatira o te wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te wenua—ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

Ko te tuatoru

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini—Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

[signed] W. Hobson Consul & Lieutenant Governor

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu. Ka tangohia ka wakaaetia katoatia e matou. Koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.