

April 1997

17. Andrew Stark, 'What's the Matter with Business Ethics?', *Harvard Business Review*, 71, 3 (1993), p.38.
18. John Martin, 'Public Accountability in the MMP Environment: A New Ethics Regime for the Public Service', Paper for AIC Seminar, Wellington, 12 April 1994. 10pp.
19. Duranti, 'The Odyssey'.
20. Uhr, 'Professional Ethics', pp.11-12.
21. Martin, 'The Role of the State in Administration', p.44.
22. Howard Whitton, 'The Rediscovery of Professional Ethics for Public Officials: An Australian Review', in N. Preston, ed, *Ethics for the Public Sector: Education and Training*, Annandale, New South Wales, p.58.
23. Charles Sampford, 'Institutionalising Public Sector Ethics', in N. Preston, ed, *Ethics for the Public Sector: Education and Training*, Annandale, New South Wales, 1994, p.14.
24. Martin, 'Ethos and Ethics', p.383.
25. Simon Longstaff, 'What is Ethics Education and Training?', in N. Preston, ed, *Ethics for the Public Sector: Education and Training*, Annandale, New South Wales, 1994, p.241.
26. State Services Commission, *Public Service Code of Conduct*, Wellington, 1995.
27. Gary R. Weaver, 'Corporate Codes of Ethics: Purpose, Process and Content Issues', *Business and Society*, 32, 1 (1993), pp.44-58.
28. W. E. Stead, D. L. Worrell, and J. G. Stead, 'An Integrative Model for Understanding and Managing Ethical Behavior in Business Organizations', *Journal of Business Ethics*, 9 (1990), p.238; Weaver, *ibid*, p.52.
29. Sampford, 'Institutionalising Public Sector Ethics', p.31.
30. Martin, 'Ethics in Public Service', p.111.
31. Longstaff, 'What is Ethics Education and Training?', p.243.
32. McKemish, 'Recordkeeping', p.21.
33. Another recordkeeping issue raised (by an employee of the Ombudsman's Office) is the real need for public sector agencies to identify what recordkeeping systems they have and what data these systems contain. In the electronic recordkeeping environment an agency may be more easily able to answer a request under the Official Information Act than would have been possible with paper records. The relevant information management principle is 'Identify your information' as discussed by Dagmar Parer, and Keith Parrott, 'Management Practices in the Electronic Record Environment', *Archives and Manuscripts*, 22, 1 (1994), p.117.

12/11/97

Bruce - the article 2 promised
 some time ago. 2 in line
 you'll find it of interest.
 Philip

Was There a Treaty of Waitangi; and Was it a Social Contract?

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This paper arose out of consideration of a very humble problem.¹ In 1989 I was working with the Maori claims in regard to the broadcasting reforms. I have told much of that elsewhere,² but the matter led to an investigation of the origins of the Tiriti o Waitangi, in order to understand the entitlements to the property rights of the radio frequency spectrum by the Maori and by the Crown.³

This required rereading the Tiriti. The problem, not original, is this: the official English version of the Tiriti o Waitangi says the Crown guaranteed to the Maori:

'the full, exclusive, and undisturbed possession of their lands and estates, forests, fisheries, and other properties . . .'

The Tiriti which was signed at Waitangi has the following expression at the equivalent point in its text:

'te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa.'

An early official translation of this phrase was provided by T.E. Young of the Native Department in 1869:

'full chieftainship [footnoted—'tino rangatiratanga'] of their lands, their settlements and all their other property,'⁴

while more recently Hugh Kawharu translated it to

'the unqualified exercise of their chieftainship over their lands their villages and over their treasures all.'⁵

The two expressions are obviously not the same, even if we ignore the 'forests, fisheries' in the first. 'Full, exclusive, and undisturbed possession' is a more limited concept than 'tino rangatiratanga' since even in narrow terms the latter involves much wider property rights (an important consideration in the case of the radio frequency spectrum). We might equate 'estates' with 'kainga', one meaning of which in the Williams

*Dictionary of the Maori Language*⁶ is 'field of operation, scope of work', although again the latter is a wider notion.⁷ Meanwhile 'other properties' seems a narrower concept than 'taonga katoa', since the latter could involve non-properties (such as the Maori language—and the radio frequency spectrum).

If there is any doubt about the magnitude of the difference, compare the translation of the relevant phrase from the English official text into Maori by T.E. Young in 1869:

'te tino tuturutanga o o ratou whenua o o ratou motu ngaherehere o o ratou wahi hiinga ika, o cra atu rawa e mau ana i a ratou katoa i ia tangata ranei o ratou mo te wa e hiahiatia ai e ratou ki puritia e ratou.'⁸

It could be argued that the differences are a result of a very poor translation. That does not explain the omission of forests and fisheries however, and it does not explain why the Tiriti article is everywhere more encompassing in terms of the Maori rights than the English version.⁹

The Drafting of the Treaty

Hobson arrived in New Zealand in early 1840 with a set of instructions from Lord Normanby, the British Secretary of State for the Colonies. Despite the instructions to treat with the Maori, no draft treaty was included. This surprising omission gave Hobson considerable freedom.

The resulting Tiriti has a three part structure which is also evident in the earlier drafts: there is a preamble which describes the context in which the treaty arises written from the British perspective; a central portion of the three articles; concluding with an attestation for the Maori signatories.

There are four known separate texts of a draft treaty in English (and none in Maori): one is in the handwriting of James Freeman, Hobson's secretary, which covers a preamble and three articles; a preamble in Hobson's handwriting with amendments by Busby; and two versions (a copy and a cleaner version) of the three articles and the attestation in Busby's handwriting. The texts are set out in the first four appendices in a form which facilitates comparisons.

My account of the drafting largely follows Ruth Ross's 1972 article (which is also largely followed by Claudia Orange), but there are some differences (or elaborations) of interpretation, especially as to what happened after the 4 February, when the English draft was handed to the Williamses for translation. I see two important differences before then.

First it is clear from textual comparisons, even though Ross is more ambiguous about it (and the *Facsimiles of the Treaty of Waitangi*¹⁰ presentation order is incorrect, presumably because it follows the order which Hobson left the drafts in), that the Freeman draft precedes the Hobson draft. Freeman's is shorter, and much more primitive in its characterization of the existing situation of Maori politics. Hobson's draft is a development from the Freeman draft's preamble (and Busby's draft elaborates the articles). One may hazard the following account of the relation between the drafts.

Freeman made a first draft which included a preamble, two articles (the third was a part of the preamble), and no attestation, presumably after discussions with Hobson and James Busby (and Henry Williams)¹¹. Some alterations were made directly on the text. These included some changes to words, but the most important change was to reorganize Freeman's text into a preamble and three articles (Appendix D). Even so, the text was still thought inadequate, and Hobson began his own draft. He only completed revising the preamble, being too unwell to complete the draft, and so sent his officers to Busby with some notes, which they had put together as the basis of Treaty: 'Busby stated that I should not consider the propositions contained in the notes as calculated to accomplish the objective'.¹² This occurred, according to a note attached to Busby's first draft, on 3 February. He wrote a fair copy of the first draft (which is in the Busby Papers), and gave it to Hobson. This second Busby draft is held in the National Archives.

This is the second point at which the historical evidence modifies Ross's conclusions. She plays down the role of Busby in the drafting of the treaty, although it is unclear whether she means the English language draft, or the Tiriti.¹³ A comparison of the 'final' English draft text and the preceding ones show that Busby had a considerable input into the final English draft. He modified Hobson's preamble (and it is likely he was involved in developing it), dramatically changed articles one and two, and appears to have been the sole writer of the attestation. Even the third article has a spelling correction made by Busby (Appendix IV). One might also detect in the Busby version an account of New Zealand which is more sensitive—or even favourable—to his efforts as British Resident.¹⁴ Hobson broadly agrees with this account, contradicting Ross insofar as she is referring to the English drafts. He wrote to Busby, 'I beg further to add that through your disinterested and unbiased advice, and to your personal exertions, I may chiefly ascribe the ready adherence of the chiefs and other natives to the Treaty of Waitangi . . .'¹⁵

Busby says there was no alteration of the draft he submitted to Hobson other 'than a transposition of certain sentences, which did not in any degree affect the sense.'¹⁶ It is not obvious from the available documents what change he is referring to,¹⁷ and it may well be that Busby's recall of the detail is inaccurate, as is evident in some of his accounts of the events at Waitangi.¹⁸ In the final Busby draft the word 'severally' in the second article is replaced by 'individually', possibly in Freeman's writing, there is a 'signature of the British plenipotentiary' added after the third article, there is an addition which is crossed out at the beginning of the attestation, and there are a number of marks to indicate that a substantial content of Busby's attestation was to be omitted (Appendix III).¹⁹

It is this omission, plus the claim that Busby's articles 'were in a large measure an expansion of those in Freeman's notes', which leads Ross to conclude that 'Busby's claim to have 'drawn' the treaty is thus a considerable exaggeration even if applied to the various English versions.'²⁰ However, the differences between Freeman's and Busby's versions are greater than Ross implies. Appendix IV identifies the sources of the final English version, showing the limited input from the Freeman draft. Nevertheless, it reflects the genesis document.

One further complication is that we do not know how much discussion went on between Hobson and Busby (and Henry Williams) before the Freeman draft. We do know the two met on 29 January as soon as Hobson arrived, before Freeman is likely to have drawn up the first version. They probably began discussing a treaty at an early stage and at length.

There is a hint of what the treaty might have looked like without these discussions and the Busby (and Williams?) input from the 'unsigned treaty' presented by Governor Gipps to a group of Maori in Sydney on 14 February 1840 (They refused to sign). Gipps and Hobson had presumably discussed the content of a treaty a month earlier when Hobson was in Sydney, in which case the Gipps treaty is likely to have reflected his understandings of that discussion. The unsigned treaty is a treaty of cession with a crown exclusive preemption right. It transfers sovereignty to the Crown and offers in return only the protection of the Crown with no reference to British rights and privileges.²¹ By comparison, Freeman's draft with its third article is more sensitive to Maori issues, and suggests that there had been some further input since the discussions with Gipps.

Busby notes on his first draft that it was written 3 February. He probably took his clean copy to Hobson, where it was discussed and modified (Appendices II & III). Henry Williams tells us that he was given

a draft to translate about 4pm on the 4th. (His son Edward was also involved. We do not know about their respective contributions, and for simplicity of presentation the expression 'Williams' refers to father and/or son—unless there is an indication to the contrary.) At this point there are no further texts available until that of the Tiriti signed on the 6th.

Let us surmise what happened. Presumably the final English draft, probably in Freeman's hand, was an accurate copy of Busby's articles and attestation, as amended after discussions with Hobson, together with Hobson's preamble with Busby's changes. I shall assume that Williams made as close a translation as he could of the draft he was given.

We know that on the 5th, the text in English was read to the gathering. It seems likely that this was a clean copy, rather than the two pieces in different hand writing that are in National Archives. There is no trace of it, but probably it was once in the Williams papers. Then the Williams translation in Maori was also read.²² The Maori had various concerns. The accounts of the events on the marae, especially Colenso's which is the most detailed,²³ make little direct reference to the text of the treaty presented to the Maori. We must be careful, but let us try to construct what the Maori might have said had they directly addressed the text of the treaty presented to them (noting we do not have that text). There would have been two areas of a literal translation of the Hobson-Busby draft which would have been particularly sensitive.

In the first article, and elsewhere, is the thorny issue of the translation of the term 'sovereignty'. Young in 1869, and more recently Judith Binney,²⁴ have suggested that the best term for sovereignty would be 'rangatiratanga'. This presents two problems. First, in Maori the first article would have said that the rangatira would have ceded their rangatiratanga, which would have sounded a little odd, if not inflammatory. Second, we know at some stage, and the final one, the term 'rangatiratanga' is guaranteed in the second article—and it involves a very complicated argument to transfer the term from the first article to the second. Thus I am inclined to the view that the Williams initial translation did not use the term 'rangatiratanga'. What term might they have used for sovereignty? An obvious one was 'mana', given that the two words were equated in the 1835 Declaration of Independence. This could have been even more inflammatory. Did the Williams' translation use 'kingitanga' at some stage, a term Binney is attracted to. But why would it not have been used in the final draft? And then there is the simplest possibility that the term 'kawanatanga' was used from the beginning, although it suggests that Williams had some notion of sovereignty different from the absolute sovereignty of cessions. I believe that the translation of 'sovereignty' was originally 'mana', and it was

changed to 'kawanatanga' at a later stage, although whether that was before or after the hui on 5 February I cannot say.

The second problem is whether in the second article the phrase which guaranteed the Maori possessions was sufficiently encompassing. I am not suggesting they foresaw that one day the phrase should cover the Maori language (and certainly not the radio frequency spectrum), but it seems likely that they would want guarantees over everything they possessed or had chieftainship over. Again, did the Williamses alter this in the course of the pre-hui discussion, or did they after?

These are obvious changes, but there may have been others, perhaps of a minor kind. One suspects that the Williams drafts of the Tiriti were littered with many changes as father and son (and perhaps others) struggled with the issue of translating complicated conceptual ideas into acceptable Maori—acceptable both linguistically and politically.

What we have been discussing here is how the Maori might have responded had they been confronted with an accurate version of the translation of the Hobson-Busby text. Another question is how did the text get changed in the way that it did, apparently responding to potential or actual Maori concerns? Leaving aside accident, there appear to be two main explanations. The first is that Henry Williams and others saw the potential reaction of the Maori and modified the translation in response to those perceived concerns. The second is that the Maori responses in the hui of the 5th resulted in modifications to the text.

The most comprehensive account we have of the debate is Colenso's. Compared to the six or so hours of the hui, even adjusting for the time taken in protocol and translation, Colenso's account is a very brief summary of the discussion. Moreover his report is in English, and it seems likely that Colenso was not fully conversant with the contents of the treaty being presented to the Maori. The only group with a hard copy of the text was Hobson's, so neither Colenso nor the Maori speakers could refer to a written text. Not surprisingly then, neither the Maori (nor Colenso) directly address the contents of the treaty verbally presented to them. However Colenso's version of the speeches may be readily interpreted as addressing the first article (although not the second), and it is not difficult to envisage that alterations were deemed necessary. Possibly the alterations were described as improvements to the translation, to better capture the intentions in the Hobson-Busby draft (as understood by Williams).

We know the Williams clean copy of the 5th was changed in the evening after the hui. As his son-in-law Hugh Carleton told parliament, 'an alteration was made while the draft was under consideration.'²⁵ The revised draft was then handed to Richard Taylor who copied it out onto

the parchment, which was signed on the 6th. (The grammatical and spelling errors that Biggs noted are probably transcription errors made by Taylor.²⁶) The signed Tiriti was by now a much revised translation of the text which Freeman gave the Williamses on the afternoon of 4 February.

Much of this is surmise. But it is plausible assumption, not wild conjecture. Unfortunately we do not have the documents which enable the hypothesis to be directly tested. Neither the English text the Williamses was asked to translate, nor draft translations in their handwriting have been found. Taylor mentions that he kept the copy from which he made the final version, but it is not in his papers. The remainder were once among the Williams papers, but again we do not know what happened to them.

Carleton says that there was 'an alteration', but we do not know what it was, nor whether there were more. As Ross asks 'was the alteration of any consequence? Was there in fact only one alteration?'²⁷ The most plausible answer to each question is a 'yes'. In particular Taylor describes the Williams 'clean' copy of the morning of the 5th as a 'rough' draft in the evening. The change of adjectives suggests there was more than a minor change in the text. We do not know whether Hobson appreciated there were major differences between the English draft and the actual agreement. (He may have known there were differences, but thought them unimportant on the advice of Williams.)

As a final point, the conventional story of how the Treaty of Waitangi was created describes the argument being offered to the Maori who accepted it without any significant alteration to the text. Put so bluntly such a scenario seems unlikely. Indeed, the Maori account of the signing of the Tiriti emphasizes the central importance of the debate which took place on the marae. They may take comfort from the fact that the difference between the likely Maori translation of the Hobson-Busby draft and the final Tiriti appears to be a documentary confirmation of their oral tradition.

Was There A Treaty of Waitangi?

Ruth Ross titled her 1972 paper 'Te Tiriti o Waitangi', arguing that 'this much is clear: the drafts, in English or in Maori, were merely drafts; it is the Maori text which was signed at Waitangi.'²⁸ Indeed, it was the Maori text that was signed on all other occasions, except at the Waikato Heads and the Manukau Harbour, where the actual events and understandings are a mystery.²⁹ It is this Waikato Heads text which gives rise to the English version of the Tiriti which appears in legislation and elsewhere. Thus there is a firm 'yes' to whether there was a Treaty of

Waikato Heads, but if by the Treaty of Waitangi is meant an English text of the Tiriti, there was no such document at Waitangi on 6 February.

Subsequent events reinforce this conclusion. Hobson had only the Maori version printed by William Colenso. When James Clendon, the US Consul in the Bay of Islands, reported the events at Waitangi to the US Secretary of State in a letter of 20 February, he was unable to obtain an official translation, but sent an unofficial one.³⁰

I have included the Clendon-US translation of the Tiriti as Appendix V. It is the earliest translation of the Tiriti we have. Who translated it? It is in Clendon's handwriting but he does not seem to have been the translator. Nor does he say who did the translation. It seems likely he would first have gone to one of the Williamses. Perhaps it is their translation. Of all the translations I have seen it is the one closest to the Hobson-Busby draft. It translates 'kawanatanga' into 'government', 'rangatiratanga' into 'possession', 'taonga' into 'property', but omits 'forests, fisheries'.

If it were argued that these parallels were the result of the translator referring to the Hobson-Busby draft, then consider who had access to it. Only the official party and the Williamses had copies. Since the official party was not involved in the translation (Clendon said it was not 'official'), this argument points to the translation being a Williams one. Another piece of circumstantial evidence is that we do not have the draft translation from which Clendon copied. It could be with the other missing Williams papers. If Colenso or Richard Taylor—the other possible translators³¹—had done it, they would probably have subsequently mentioned the exercise and, likely as not, given a different translation from the Hobson-Busby draft (which they are unlikely to have seen). In any case, the Clendon-US translation is not in their papers (although Taylor's are incomplete because the translation he transcribed is not there either).

The circumstantial evidence that the Clendon-US translation is by Williams is tantalizing. It is not enough for the 'beyond reasonable doubt' of a criminal court. But in our current stage of knowledge the hypothesis meets the 'balance of probabilities test' of a civil case. Suppose it is a (or the) Williams translation, made not later than a fortnight after the actual signing at Waitangi. Then more than any other document it has the claim to be 'the' Treaty of Waitangi, the English text version of the Tiriti signed at the marae. If it is, it would be ironic that this document is held in the US National Archives.

One issue is whether Henry Williams thought his translation to Maori had markedly changed the meaning of the English text he had been given. The implication of his certification of the English version,

forwarded to the Secretary of State in October 1840, was he thought he had made no major change.³² If the Clendon-US text is a Williams translation of the Tiriti then Williams could reconcile the Tiriti with the Hobson-Busby draft as his certification suggests.

For further evidence of the low status of the various English versions after the signing of the Tiriti, consider the numerous translations, typically made in the 1840s, apparently by those involved in land deals around Auckland, and closer to the Maori than the one Clendon sent to the US.³³ If everyone was translating the Tiriti, then they are implying the official version in English was non-existent, unimportant, or irrelevant. In the 1840s the general view among settlers seems to have been there was no Treaty of Waitangi.

Hobson's behaviour adds support to the lower status of the English 'version'. Ross reports on five versions which Hobson forwarded to his superiors in Sydney and London. There are differences between them. The main difference is that three have the Hobson-Busby preamble, two the Freeman one (One omits 'forests, fisheries').³⁴ A sixth version attributable to Hobson is in Clendon's letter to the Secretary of State on 7 July, where the preamble is again Freeman's (but 'forests, fisheries' are included).³⁵

What are we to make of all this? Surely it is that there was no English text of the Tiriti at the time of signing, or shortly after, that Hobson (and/or Freeman) cobbled together what they could after recognizing the lack, but that their various versions were not initially recognized by the wider community until the 1860s.

Was The Treaty of Waitangi Intended to be a Social Contract?

The problem which began this quest—the discrepancy between the rangatiratanga/possession provisions in article two of the Tiriti and the official English version—has been largely settled, at least in my mind. The differences between the two phrases are real, and arise not from faulty translation, but because the first reasonably accurate translation of the phrase in the Hobson-Busby draft was modified, perhaps as a result of demands by the Maori at the (first) hui on 5 February. The Tiriti version is what the Maori agreed to, and what Hobson signed up to, although he may not have been aware of the import of the differences between the Hobson-Busby draft and what he signed. This account involves some conjectures, but it is consistent with the evidence and involves the least implausible set of assumptions to cover the missing evidence.

The alterations were not merely mechanical drafting or translation changes. A comparison of the Freeman and Hobson/Busby drafts shows a shift in the underlying vision. Freeman's is essentially a treaty of cession, as Normanby intended, and as Gipps proposed more crudely. By the time Busby (and perhaps Williams) had finished, the vision appears to have changed to something which is beginning to look like a social contract.

This is most evident in the articles. Article one does not change a lot. Its equivalent in the Gipps treaty says that 'Queen Victoria, shall exercise absolute Sovereignty in and over the Native Chiefs, their tribes and country, in as full and ample a manner as Her said Majesty may exercise Her Sovereign authority over any of Her Majesty's Dominions and subjects, with all the rights, powers, and privileges which appertain to the exercise of Sovereign authority.'³⁶ In the Freeman draft it is reduced to 'cede to Her Majesty in full Sovereignty', which might be treated as a condensed version of the Gipps expression. Busby elaborated it to 'cede . . . absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or individual Chiefs respectively exercise or possess . . .' The phrase in the Tiriti becomes (as translated by T.E. Young) 'give up entirely to the Queen of England for ever all the government of their lands.'³⁷ The translation by Miriama Penfold and Judith Binney is ' . . . give completely to the Queen of England for ever—all the Governorship of their lands.'³⁸ The size of the change is dependent upon how one evaluates the meaning of *kawanatanga*.

We can begin to see a shift in article three. The version of the Gipps treaty offers no more than the Queen 'does hereby engage to accept the said Native Chiefs and Tribes as her Majesty's subjects, and to grant Her Royal protection to the[m] . . . , in as full and ample manner as Her Majesty is bound to afford to other of Her Majesty's subjects and Dominions.'³⁹ Freeman's drafts more consciously offer 'Her Royal Protection and imparts to them all the Rights and Privileges of British Subjects', a sentiment which is continued through the other versions.

The biggest shift is in article two which moderates article one (as does article three). The Gipps treaty offers 'the express understanding that the said Chiefs and Tribes shall retain for their own exclusive use and benefit their comfortable maintenance and residence.'⁴⁰ The Freeman draft offers nothing additional to article three. The Busby draft places obligations on the Crown to guarantee ownership of land resources, and other possessions, while the Tiriti refers to *rangatiratanga*, and an even wider set of property (or possession) rights.

Also instructive is the section from the attestation, which Hobson(?) removed, a very Hobbesian account of a country in strife which needs a sovereign to provide law and order, with its references to 'weaknesses and inability to repress dissensions', and 'the want of laws and authority to restrain and punish the evil disposed and criminal'.

Suppose one were to write a social contract in the context of Waitangi in 1840. It might consist of two or three clauses, one of which transferred some sort of governing power to a governor, and a second which preserved certain rights to those who had transferred that power. Those rights would be in two categories: general civil rights (although some modern social contract theory would tend to have the rights and privileges provisions prior to the articles)⁴¹, and specific rights which would include property rights. Add a preamble and attestation, and one has a social contract which would look like the Hobson-Busby draft or the Tiriti.

Moreover the resulting structure of the final Hobson-Busby draft is not inelegant compared with, for instance, the Gipps unsigned treaty. The contrast is sufficient to suggest that there was at least one thoughtful and creative mind devising the treaty proposal. Busby is the most likely candidate, although we must leave open the possibility that Henry Williams was influential too.

A number of people have argued that the Tiriti is (or was) in fact a social contract.⁴² There is a myth, which I recall first hearing in my adolescence, that the Tiriti was a Hobbesian social contract, something which I reported well before I had come to the conclusions discussed here.⁴³ However this is not to say the treaty was intended to be one. But could it have been?

The idea of a social contract (or 'social compact', or 'original contract') was out of fashion in the middle of the nineteenth century. David Hume's criticism that the notion was a theoretical construct and not an empirical reality seemed pretty compelling. However at Waitangi in 1840 there was a situation in which some sort of social contract could become a reality. Yet if an idea is unfashionable amongst the intellectual elite, the populist may still maintain the myth for generations—a phenomenon discussed further in the conclusion.

In any case we know that the notion of a social contract was discussed in the early part of the nineteenth century, if not among philosophers, then in sermons. Although the social contract is presented as a part of political philosophy, which it is, there is an older tradition of it in theology, deriving from the Old Testament covenant. We have a sermon of Richard Whately (who became Archbishop of Ireland)

preached in 1821 in London, in which he discusses the social contract. While it is unlikely that Busby, Freeman, Hobson or Williams heard that particular sermon, they may have heard a similar one elsewhere.

This is conjecture, but we cannot rule out the possibility that Hobson and, more importantly, Busby and Williams intended their treaty to have the elements of a social contract as an integral part of the cession. Indeed, Busby was aware of the notion of a social contract, which he advocated for New Zealand. He wrote in September 1865, recalling a time after the 1835 Declaration of Independence:

'There were not wanting however among the chiefs some who had the sagacity enough to perceive that something more was necessary than the abstract assertion of rights of a Government, and the recognition of the parties in whom these rights are vested—"It was very well" they said "for such of them as were well disposed—but how were those to be managed, who were disposed to rebel?" "Such persons would pay no attention to the laws enacted by the chiefs, and who was to compel them?" Here was an actual trial of what could be done by the 'Social Compact' and those who maintain that theory of the origin of governments rather than admit that "all power is God" and that Governments are of his ordinance might take a lesson from the primitive ideas of the New Zealanders. They—that is the more sagacious amongst them—said, in effect, that God had denied to them the blessings of a Government and Legislature, and they had themselves no power to establish such Institutions.'⁴⁴

This is the only reference to a social contract thus far found in Busby's papers.⁴⁵ It is no surprise that he was aware of the notion, since he was widely read. The focus of his last 30 years was the grievances he had with the Crown over land dealings, alas, and in this litigious process his interpretation of the Tiriti reads as if he was concerned with the Freeman draft version, with its emphasis on preemption in Article Two.

Nevertheless, even if this extract is not quite a smoking gun, on the balance of probabilities there was a conscious element of construction as a social contract in the Busby draft, given that Busby was favourably inclined to the notion.

It is even less conjectural—although I have not direct evidence—that because the treaty presented to the Maori was very evidently in the form of a social contract, the missionaries would have seized upon that interpretation, presenting it as a covenant between Crown and the Maori. The Maori appear to have readily accepted this interpretation, as down the years they have described the Tiriti as a 'covenant'.

Henry Williams may have been crucial here, although thus far I have found no direct evidence that he ever contemplated a social contract.⁴⁶

More work is required on teasing out the political theories of protestant missionaries, such as Williams, but it is tempting to assume that there was an element of the liberal social contract. Henry William's contribution, if any, might be indicated by 'kawanatanga' as his choice for 'sovereignty', rather than 'mana', 'rangatiratanga', or 'kingitanga'. This moderates the agreement in a minimalist direction. We would need to know more about Williams' political thinking before we would be confident of this hypothesis. Nevertheless, at this stage we cannot rule out that there were others than Busby who contributed towards the more liberal version of the social contract evident in the final Tiriti.

There is an interesting implication from the modifications to the various drafts. We described the Busby version as Hobbesian, and it certainly has a centralist ring to it. However as a result of the modifications the resulting social contract in the Tiriti is one of greater equality between the governor and the governed. So if the Tiriti is (or was) a social contract it is one of a liberal state where the powers of governance are the minimum necessary. Had this aspect of the Tiriti not been breached too, the path of New Zealand development would have been quite different.

Conclusions: Myths and the Treaties at Waitangi

The title of this paper asks two questions which we can now answer.

First, was there a Treaty of Waitangi? The answer is almost certainly no, if we mean that there was a document in English at the time of the signing of the Tiriti which was a parallel translation of the document that was signed. There was a Treaty of Waikato Heads which is what today we call the Treaty of Waitangi. However, the most likely candidate for the Treaty of Waitangi, the closest we have to a document which could be called a 'Treaty of Waitangi', is the translation of the Tiriti sent by James Clendon to the United States government a fortnight after the signing at Waitangi. Although we do not know for certain who did the translation, the most likely translator was a Williams.

Second, was it a 'social contract'? The answer is that the treaty which Hobson and Busby drafted had elements of a social contract, and the circumstantial evidence suggests that at least Busby intended that the treaty he was involved in drafting be a social compact. We note also that the final form of Tiriti strengthens the social contract element of the Tiriti, particularly towards a more liberal arrangement in which political power was more diverse, rather than concentrated in the sovereignty of the Crown. We cannot rule out that Henry Williams also supported this shift of emphasis (although the only circumstantial hint is the use of 'kawanatanga' in the text), and that the effect of the debate

at the first hui, and the input of other missionaries, contributed to the liberal final form.

The first conclusion is likely to be controversial because it contradicts the myth of the Treaty. Myths may be true or false. The myth of the Treaty of Waitangi is false, even though it is widely held. Despite Ross's seminal article, 18 years later in 1990 the nation celebrated the sesquicentenary of the signing of the Tiriti on the basis that there were two documents of equal historical status and validity, one in English and the other in Maori. A stronger form of this myth is that the English language Treaty is the superior or more relevant one.

This conclusion even challenges the interpretation that when a treaty is agreed in two languages, in law the version in the native language is to be preferred, so that the Maori version of the Tiriti o Waitangi is superior. But there were not two documents in different languages agreed at Waitangi. There was not a document in English that was agreed on: there was probably not even a document in the English language that could be treated as a translation of the document agreed to. Insofar as there was a document in English (the Hobson-Busby draft) it was only a draft, and there seem to have been sufficient changes in the translation to give it no more status than that at the signing. The myth of the Treaty of Waitangi is based on a misinterpretation of the historical facts.

Myths are an integral part of a community's account of their perception of themselves. Their existence tells us much about those who hold them. Especially interesting is where the myth is inconsistent with the facts, and that this is well known in the academy. For instance, the anthropologist Henry Skinner demonstrated in the 1920s that the Moriori were of Polynesian origin, but even today there are New Zealanders who believe they were Melanesian. The myth's strengths arise from the message that the Maori/Polynesians conquered the Moriori/Melanesians, and took their land, with its implication that the Pakeha/European were justified in doing the same to the Maori.

Similarly, the myth of the Treaty of Waitangi is a part of the European belief that the Maori signed away their sovereignty—that it was in essence the treaty of cession which Gipps had in mind. The vast majority of Maori signatories agreed only to the Crown's governance of the nation, and it may be that the chiefs at the Waikato Heads and Manukau who signed the English language Treaty of Waikato Heads, which is the official version of Tiriti in English, had that understanding too.⁴⁷

There is an interesting misunderstanding here. Any transfer of sovereignty—or of governance—was to the British Crown and not to

the British people. The notion of representative government was still evolving at the time. That Queen Victoria is somehow 'our Queen' may be satisfying to the holders of the myth of the Treaty of Waitangi, even though her father and husband were Germans, and her mother came from Belgium.

Moreover, had there been an ordinary treaty of cession, such as the one Gipps seems to have had in mind, with a transfer of sovereignty and little offered to the natives in return, the British Crown would have had the right to unilaterally transfer the sovereignty to another power. The Freeman draft was a little less restrictive, in that the British rights and privileges of the Maori could have been preserved by, say, offering them British passports.

The Hobson-Busby draft begins to place obligations on the Crown, by its statement about the property rights of the Maori, and the Tiriti goes a step further when it replaces sovereignty by governance, and extends property rights to those of rangatiratanga. The final agreement places enough restraints on the Crown that it could not unilaterally transfer the sovereignty of New Zealand without breaching the treaty which gave it its authority.

One could argue that the transfer of power to a local representative government was such a unilateral transfer. That belongs to another paper. The point here is that British constitutional involvement in New Zealand was founded on a much richer notion than a treaty of cession, even if this vision was largely lost within a couple of decades.

Thus the myth of the Tiriti being a social contract has an historical element of truth, even if the vision was not conscientiously pursued in later years. Its contemporary relevance is unclear. It may merely be a matter of historical accuracy, or perhaps of nostalgia for a path of constitutional development which New Zealand failed to realize. But following John Rawles' *Theory of Justice* the notion of social contracts has become fashionable again. It may be that the myth of the Tiriti as a social contract has a significant contribution to the ongoing constitutional and political development of New Zealand. Those who advocate the Tiriti being the foundation document of New Zealand are implicitly arguing that New Zealand society is founded on a social contract.

1. This is a revision of a paper to 'He Korero Tawhito, He Korero Hou: History Here and Now', NZHA Conference, Wellington, 8-11 February, 1996; an earlier version is B.H. Easton, *Contract, Covenant, Compact: The Social Foundations of New Zealand*, address to Spring Lecture Series of St Andrews Trust for the Study of Religion and Society, published in *Socialist Politics*, Issue 90/3,4.

- This project involved many people, who while not responsible for the views or errors in this paper have contributed to its development in various ways. They include Whatarangi Winiata, Piripi Walker, and Martin Dawson who were involved in the broadcasting claim; participants at the vigorous but informal lunchtime seminar at the Stout Research Centre; various librarians and archivists at the Alexander Turnbull Library, the Auckland Public Library and National Archives; Claudia Orange who has patiently responded to a curiosity which borders on pestering; Barry Rigby of the Waitangi Tribunal; Melissa Bray who looked up some material in the Hocken Library for me; and Manuka Henare who has provided me with discussion and his copious annotated record of Busby's papers. Although I never met her, I am also in debt to Ruth Ross.
2. B.H. Easton, *Working with the Maori: Consultancy, Research, Friendship*, seminar paper for NZIER, 2 August, 1995, Working Paper Economic And Social Trust On New Zealand, 95.44.
 3. B.H. Easton, *A Pakeha Economist's Perspective on the Maori Broadcasting Claim*. Commissioned by the New Zealand Maori Council, Wellington, 1989.
 4. *AJLC*, 1869:69-71, reported in C. Orange, *The Treaty of Waitangi*, Wellington, 1987, p.263.
 5. I.H. Kawharu, *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, Auckland, 1989, p.319.
 6. H.W. Williams, *Dictionary of the Maori Language*, Wellington, 7 ed, 1971.
 7. p.86. Oddly the 1971 edition of the Williams dictionary does not give a meaning of kainga as 'village', which is the common interpretation today. The implication of Bruce Biggs' *Complete English-Maori Dictionary*, Auckland 1981, is that there is no word for village in the William's dictionary which it reverses. The translation which Clendon sent to the US government translates 'kainga' as 'dwellings' (Appendix V).
 8. C. Orange, *op. cit.*, p.264.
 9. B. Biggs, 'Humpty-Dumpty and the Treaty of Waitangi', in I.H. Kawharu, *op. cit.*, graphically describes some of the translation difficulties.
 10. *Facsimiles of the Declaration of Independence and the Treaty of Waitangi*, 1877, reprinted Wellington, 1976.
 11. Henry Williams reports first visiting Hobson on 30th. L.M. Rogers *The Early Journals of Henry Williams: 1826-1840*, Christchurch, 1961, p.477.
 12. R.M. Ross, 'Te Tiriti o Waitangi: Texts and Translations', *New Zealand Journal of History*, VI, 2 p.129-57.
 13. *ibid.* p.139.
 14. The reference to 'Victoria at Waitangi' may have been Busby the property developer, with an eye to publicizing the township he was promoting.
 15. 1 Sept 1840, reported in J. Busby, *Appendix to a paper read at the Meeting of the National Association for the Promotion of Social (sic) at York on the 23 Sept 1865 and Published with their Transactions*, Busby Papers, MS 46, Box 2, F7, Auckland City Library, pp.92-3.
 16. J. Busby, *Remarks upon a Pamphlet entitled 'The Taranaki Question, by Sir William Martin'*, Auckland, 1860, pp.3-4.
 17. The most obvious case of a transposition of sentences occurs in the Freeman draft, with the shift of what is now the third article.
 18. J. Busby, *op. cit.*, 1860, p.145.
 19. Page 1 and 2 have a line down their side, as has page 4 after the place set down for the chief's signatures. Most of the rest of page 4 is crossed out. There is a large cross on page 3, immediately after the date. The implication, which subsequent

- documents support, is that everything on page 3 from the cross to the witnessing was to be deleted. The deletion does not markedly alter the sense of the draft, but eliminates unnecessary or contentious justifications.
20. R.M. Ross, *op. cit.*, p.135.
 21. E. Sweetman, *The Unsigned New Zealand Treaty*, Melbourne, 1939. A transcription of the Gipps treaty is in C. Orange *op. cit.*, pp.260-61.
 22. Hugh Carleton in *The Life of Henry Williams: Archdeacon of Waimate*, 1877, Wellington edition, 1948, p.313, reports the making of the clean copy. He is quoting a manuscript by Williams *Early Recollections*, which seems to have gone missing, as have the Williams diary after January 1840 and other relevant papers which presumably included the early draft translations.
 23. W. Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi*, Wellington, 1890.
 24. J. Binney, *Submission for the Waitangi Tribunal—Muriwhenua Land Claim*. Doc F19, 1995.
 25. *New Zealand Parliamentary Debates*, 1864-2, p.292.
 26. B. Biggs, *op. cit.*
 27. R.M. Ross, *op. cit.*, p.133.
 28. *ibid.* p.129.
 29. *ibid.* p.136.
 30. J.R. Clendon, Letter to Secretary of State, United States of America, 20 February, 1840, in Micro 2607, RG59: Despatches from US Consul in the Bay of Islands & Auckland, National Archives.
 31. Taylor was away with Hobson to the Hokianga hui at the time Clendon was writing.
 32. R.M. Ross, *op. cit.*, p.135.
 33. In Clendon's Papers in the Auckland Public Library, 1839-72, NZMS 705, Clendon House Papers, Box 1/1, there is one of the prologue and first two articles—probably the final page is lost—which is quite different from the one he sent to the US.
 34. R.M. Ross, *op. cit.*, p.134.
 35. J.R. Clendon, *op. cit.*, 3 July 1840, *op. cit.*
 36. E. Sweetman, *op. cit.*, p.64.
 37. C. Orange, *op. cit.*, p.265.
 38. J. Binney, *op. cit.*, p.5.
 39. E. Sweetman, *op. cit.*, p.64.
 40. *ibid.*
 41. As occurred in the original Freeman draft.
 42. e.g. B.H. Easton, 'For Whom the Treaty Tolls', *Listener*, February 5, 1990, p.136, and *Contract, Covenant, Compact: The Social Foundations of New Zealand*, *Op. cit.*; R.E. Ewin, 'The Treaty of Waitangi and Hobbes's Condition of Mere Nature', in G. Oddie & R. Perret (ed) *Justice, Ethics and New Zealand Society*, Auckland, 1992, pp.60-72; J. Tichy, & G. Oddie 'Is the Treaty of Waitangi a Social Contract?' in G. Oddie & R. Perret (ed) *op. cit.* pp.73-90; G. Fleming, *The Treaty as Social Contract*, paper to the New Zealand Political Studies Association, Conference, August 1995.
 43. B.H. Easton, 'For Whom the Treaty Tolls', *op. cit.*
 44. J. Busby, *op. cit.*, 1865, pp.87-88. In the margin next to the paragraph is: 'I confess it does not strike me in this light. It only appears to me that this 'Social Compact' was asking to talk and deliberate, but not to go a step further and act.'
 45. It was found by Manuka Henare.
 46. The closest, albeit very distant, discussion of what amount to Henry's political views will be found in Carleton, *op. cit.*, pp.126-128.
 47. R.M. Ross, *op. cit.*, p.138.

Appendices of Drafts of The Treaty

- I Drafts of the Preamble - Freeman's and Hobson's*
- II Drafts of the Articles - Freeman's and Busby's*
- III Drafts of the Attestation - Busby's*
- IV The Sources of the Treaty
- V The Clendon-US translation of the Tiriti.
- VI The Genesis of the Tiriti

*Notes

Most drafts come from the *Facsimiles of the Treaty of Waitangi* (1877). Busby's original draft is from his private papers. The Clendon-US translation of the Tiriti comes from Clendon, *op. cit.* 20 February, 1840. All were originally in handwriting, which is not always easy to read. Neither the capitalization of words nor the punctuation is systematic, and may not be accurately transcribed here.

~~Strikeout~~ indicates parts struck out.

Underline indicates parts inserted, either above a gap, above the part struckout (in which case the underline follows the strikeout), or in the margin.

Appendix I: Drafts of The Preamble

Freeman's Draft

Her most Gracious Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland ~~viewing~~ 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 the all necessary Laws and Institutions

Hobson's Draft

Italics indicate insertions in Busby's hand

Her Majesty Victoria Queen of the United Tribes Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just rights and Property and to secure to them the enjoyment of Peace and good Order, has deemed it necessary, in consequence of the great number of Her Majestys Subjects who have already settled in New Zealand ~~and the extension—Emigration and who are still accumulating in the Land~~ and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a Functionary properly authorized to treat with the Native Chiefs for the ~~Cession~~ ~~(?)~~ of their Sovereignty—Aborigines of New Zealand for the recognition of Her Majestys Sovereign authority over the whole or any part of those Islands which they be willing to place under her Majestys Dominion—Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result ~~&(?) Her Majesty therefore being desirous to avert the evil~~ ~~consequences which must result, both to~~ the Native Population and to Her subjects, residing in New Zealand from the absence of all the necessary Laws and Institutions necessary to restrain and Protect Her subjects Her Majesty *therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result alike to the Native Population to the Imperial Subjects from the absence of the necessary Laws*

has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy Consul, and Lieutenant Governor in New Zealand to invite the Confederated and Independent Chiefs of New Zealand to concur in the following articles and conditions.
In addition there are the articles—Appendix II.

Appendix II: Drafts of The Articles

Freeman's Draft

1st Article

The United Chiefs of New Zealand cede to Her Majesty in full Sovereignty of the whole Country contained between and the North Cape will all the Islands adjacency thereto included between the degree of Latitude and the degree of Longitude, and the degree of Latitude and the degree of longitude.

2d

The United Chiefs of New Zealand ~~concede~~ yield to Her Majesty the Queen of England the exclusive right of Preemption

and alike Institutions alike to the native population and to Her Subjects & has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy Consul, and Ltn Governor & Ltn Governor of such Parts of New Zealand as may as may be or hereafter be ceded to Her Majesty in New Zealand to invite the Confederated and Independent Chiefs of New Zealand to concur in the following Articles and Conditions—*
 (The text is headed in Hobson's writing 'Papers relating to the Treaty of Waitangi. 45/522 Original Treaty of Waitangi & other Papers relative thereto'. It is assumed these were added after February 6 1840.)
 * misplaced in text?

Busby's First Draft

1st Article

The Chiefs of the Confederation of the United Tribes of New Zealand and the ~~Individual~~ Separate and Independent Chiefs who have not become members of the Confederation ~~of the United Tribes~~ of cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

2nd Article

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and* individuals thereof the full, exclusive and undisturbed possession of their Lands and

over such waste lands as the Tribes may feel disposed to alienate

3d article

In consideration thereof Her Majesty The Queen ~~????~~ extends to the Natives of New Zealand Her Royal Protection and imparts to them all the Rights and Priviledges (sic) of British Subjects
 Note this paragraph is between the preamble and first article in the draft, but in the margin it is bracketed with the addition "3d article".

Estates, Forests Fisheries and other properties which they may collectively or severally** possess so long as it is their wish and desire to retain the same in their possession. But the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty 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.

3rd Article

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her Royal protection and imparts to them all the rights and privileges of British subjects.

The second draft has the following changes:

* and and

** severally individually.

*** Signature of the British Plenipotentiary? in Freeman's handwriting

Appendix III: Drafts of The Attestation

Busby's Original Draft

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi on the Fifth day of February in the year of our Lord one thousand eight hundred and forty—and having understood and seriously considered (the invitation of)* the gracious Queen of England: and being sensible of our own weaknesses and inability to repress differences and to defend our

Busby's Clean Copy

Now therefore we the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi ~~For and behalf of those we represent*~~ on the Fifth day of February in the [EOP2] year of our Lord one thousand eight hundred and forty X [Over byphen, an insertion indicating the text was to be deleted thereafter?] and having understood seriously considered the gracious

Country against external enemies—and feeling also the want of Laws and authority to restrain and punish the evil disposed and criminal amongst us both Natives and foreigners: and having had occasion from past experience of the benignity and good faith of Her Majesty and Her Majesty's Royal predecessors to repose entire Confidence in Her Majesty, do fully and entirely cede and yield up to Her Majesty the Sovereign, of our territories extending from the North Cape to the Northern Head of the Estuaries of the Manukau and the River Thames. and including with all the Islands adjacent thereto lying between ~~degree~~ and ~~degrees~~ of Latitude and the and degrees of Longitude. ~~In testimony whereof the ????~~ offer our signatures or Marks (And ????)* we further yield to (Her Majesty the exclusive right)** of preemption over all our Waste Lands. Accepting the principles and Rights of British subjects and relying ??? Her Majesty's Royal justice and benignity to our simple and unenlightened countrymen in witness whereof we have attached our signatures or Marks on this da

For the Independent Chiefs
And we the Separate and
Independent Chiefs of New
Zealand claiming authority over the
Tribes and Territories which are

invitation of the Queen of England: and being sensible of our own weaknesses and inability to repress (?) internal differences and to defend our Country against external enemies: and feeling also the want of Laws and authority to restrain and punish the evil disposed and criminal amongst us both Natives and foreigners: and having had occasion from past experience of the benignity and good faith of Her Majesty and Her Majesty's Royal predecessors to repose entire Confidence in Her Majesty. do fully and entirely cede and yield up to Her Majesty the Sovereign, of our territories extending from the North Cape to the Northern Head of the Estuaries of the Manukau and the River Thames, and including all the Islands adjacent thereto lying between the and the degrees of Latitude and [EOP3] the and the degrees of Longitude. And we further yield to Her Majesty the exclusive right of preemption over all our Waste Lands. Accepting the privileges of British subjects and relying ??? Her Majesty's Royal justice and benignity to our simple and unenlightened countrymen. In witness whereof we have attached hereunto our Signatures or Marks on this day of
The Mark of
The Mark of

For the Independent Chiefs
And we the Separate and
Independent Chiefs of New
Zealand claiming authority over
the Tribes and Territories which

specified after our respective names, having been made fully to understand the provisions of the foregoing treaty, accept and enter into the same in the full sense meaning and extent thereof in witness of which we have attached our signatures or marks at the dates and the places respectively specified -

* my photocopy omits these words.

are specified after our respective names, having been made fully to understand the provisions of the foregoing treaty, accept and enter into the same in the full spirit & extent of spirit meaning thereof in witness of which we have attached our signatures or marks at the dates and the places respectively specified -
EOPn = end of page n.
* insertion not in Busby's handwriting. Freeman's?

Appendix IV: The Sources of The Treaty

Treaty Of Waikato Heads

Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands—

Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects

Source (first)
Hobson's draft

*Busby's amendment
to Hobson's draft*

has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor

of such parts of New Zealand as may be or hereafter shall be ceded to Her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Article the First

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess, over their respective Territories as the sole Sovereigns thereof.

Article the Second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty 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

*Freeman's
(& Hobson's) draft*

*Busby's amendment
to Hobson's draft*

*Freeman's
(& Hobson's) draft*

*Busby's first draft
(with "individually"
replacing "severally"
as in the second
draft)*

Busby's first draft

and persons appointed by Her Majesty to treat with them in that behalf.

Article the Third

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

(Signed) W Hobson Lieutenant Governor

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi

and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof in witness of which we have attached our signatures or marks at the places and the dates respectively specified—

Done at Waitangi this Sixth day of February in the year of Our Lord one thousand eight hundred and forty.

*Freeman's draft
with Busby's
correction of the
spelling of
privileges.*

*From Busby's first
draft*

*From Busby's first
draft*

*Only Busby's draft
mentions a date
(5 February)*

Appendix V: The Translation sent by Clendon to the US

Her Majesty Victoria Queen of England in her Gracious consideration of the Chiefs and people of New Zealand and her desire to preserve to them their lands and to maintain peace and order amongst them, has been pleased to appoint an Officer to deal with them for the cession of their sovereignty of their country and the Islands adjacent to thereto(?)—and saving that many of her Majesty's subjects have already settled in the country and more constantly arriving. And that it is desirable for their protection as well as the protection of the Natives to establish a Government amongst them.

Her Majesty has accordingly been pleased to appoint me William Hobson a Captain in Her Majesty's Royal Navy to be the Governor of such parts of New Zealand as may now or hereafter be ceded to Her Majesty.

And proposes to Chiefs of the confederation of the United Tribes of New Zealand and the other chiefs to agree to the following Articles.

Article the First

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess over their respective territories as the sole Sovereigns thereof

Article the Second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes and to all the people of New Zealand the full possession of their Lands, dwellings, and all their property. But the Chiefs of the confederation Tribes and the other Chiefs grant to the Queen the exclusive right of purchasing such lands as the proprietors thereof may be disposed to sell at such prices as shall be agreed upon between them and the persons appointed by purchase from them.

Article the Third

In return for the cession of the sovereignty to the Queen of England the people of New Zealand will be protected by the Queen of England and the rights and privileges of British subjects will be granted to them.

signed William Hobson, Consul and Lieutenant Governor

Now we the Chiefs of the confederation of the United Tribes of new Zealand being gathered at Waitangi and we the other chiefs of New Zealand having understood the meaning of these Articles accept of them All.

In witness whereof our Names and Marks are affixed.

Done at Waitangi on the sixth day of February in the year of our Lord One Thousand and Eight Hundred and Forty.

The following note was appended

Item: This translation is from the Native document and [is] not a Copy of the Official document in English from which the Native one is made and although the words may be different from what they are in the Original(?) I think the sense is much the same but on the return of

Captn Hobson from the ? I shall apply officially to him for a copy and translation of the Treaty for the purposes of sending it to the Government of the United States

James R Clendon (signed)
US Consul

Appendix VI: The Genesis of The Tiriti

The following is the scenario developed in the text. Where possible, the chronology follows that in Orange (1987).

Actual or conjectured texts are labelled with two letters (and sometimes a number). On the first occasion it is mentioned the symbol is emboldened. An asterisk indicates the text is in Maori. The various texts are summarized at the end.

1839

14,15 August: Normanby's Instructions to Hobson—do not contain a draft or model treaty.

27 December: Hobson arrives in Sydney, where he stays until 18 January. He spends much time with Gipps. Presumably they discuss the contents of Normanby's instructions, and the treaty which they imply. It is conjectured that the notion of the treaty they discuss is captured in the 'unsigned treaty', which Gipps offers to some Maori on 14 February (GT).

1840

29 January: Hobson arrives in Bay of Islands. He sees Busby on this day. Over the next few days Hobson, Busby, and Freeman discuss the proposed assembly of chiefs.

30 January: Colenso prints invitation to assembly. Henry Williams visits Hobson. Hobson, Busby and Freeman (and Williams?) begin serious discussion on contents of the proposed treaty. (about) Hobson directs Freeman to prepare a draft treaty based on the previous discussions.

31 January: Hobson goes to Waimate and Hokianga.

1 February: Hobson returns from Hokianga.

2 February: Sunday. Hobson and Busby (also Freeman and Williams?) discuss Freeman's draft (FD). Make alterations on it, but decide it is still unsatisfactory. Hobson begins own draft (HD).

- 3 February: Hobson is too ill to complete draft. He sends his draft preamble, and the Freeman draft to Busby. Busby amends Hobson's draft preamble, and writes down his own articles and attestation (BD1). He then rewrites the latter into a clean copy (BD2).
- 4 February (morning): The amended preamble and Busby's clean copy are discussed by Hobson, Busby and Freeman (and Williams?). Busby's draft is amended. Freeman writes a clean copy of the composite Hobson-Busby draft (HB), probably in early afternoon.
- 4 February (from 4pm): Henry and Edward Williams are given the Hobson-Busby draft to translate. They do this in the evening (W1*). Williams prepares clean copy for hui (W2*).
- 5 February (9am - 10am): The Williams translation is looked at by Busby and Hobson. Busby suggests one amendment 'whakaminenga' for 'huihuinga'.
- 5 February (10am onwards): The Maori and others gather. Hobson reads an English text (i.e. HB). Henry Williams reads his (amended) translation of the Hobson-Busby draft (i.e. W2*). There is considerable dissatisfaction among the Maori.
- 5 February (from about 4pm): Meeting breaks up. Henry and Edward Williams further amend the text in the light of the discussion that day. The text (i.e. W2*, but now a 'rough' copy because of alterations) is given to Taylor, who writes it out on parchment (making a couple of small transcription errors) that evening. This is the Tiriti o Waitangi (TW*).
- 6 February: At the second meeting the Maori sign the Tiriti o Waitangi (TW*).
- 8-17 February: Colenso prints copy of the Tiriti (CT*).
- 9-18 February (i.e. afterwards): Clendon obtains copy of Tiriti, but is unable to obtain copy of English translation. Goes to one of the Williams (Henry?).
- 10-19 February (i.e. afterwards) Williams provides Clendon with a translation of Tiriti (W3).
- 20 February: Clendon transcribes the Williams translation which he sends to US Secretary of State (CU), with copy of Tiriti printed by Colenso.

Code	Name	Description	Drafter /Source	Writer	Dated Drafted	Date Amended	Status	Current Location
GT	Gipps' Treaty, 'Unsigned Treaty'	Treaty submitted to Maori in Sydney	Gipps?	?	< 14 Feb		Existing	Mitchell Library, Sydney.
FD	Freeman's Draft	Preamble & Articles	Dictated by Hobson?	Freeman	31 Jan?	1 Feb?	Existing	National Archives
HD	Hobson's Draft	Preamble	Hobson	Hobson	1 Feb?	3 Feb by Busby?	Existing	National Archives
BD1	Busby's First Draft	Articles & Attestation	Busby	Busby	3 Feb		Existing	Busby Papers, Auckland Institute & Museum Library.
BD2	Busby's Clean Copy	Article & Attestation	Busby	Busby	3 Feb	4 Feb (morning) by Hobson	Existing	National Archives
HB	Hobson-Busby	Clean copy of HD & BD2	HD & BD2	Freeman?	4 Feb (afternoon)		Reported	Lost—in Williams' papers?
W1*	Williams First Draft	Translation of HB Translated by the Williamses	HB	One of the Williams	4 Feb (evening)	5 Feb (morning) by Busby	Conjectured	Would be in Williams' papers
W2*	Williams Second Draft	Clean copy of W1* presented to Maori on 5 Feb	W1*	One of the Williams	5 Feb (morning)	5 Feb (evening)	Reported	Lost—in Taylor's papers.
TW*	Tiriti o Waitangi on 6 Feb	Parchment, signed	W2*	Taylor	5 Feb (evening)		Existing	National Archives
CT*	Printed Tiriti	Printed Version of Tiriti	TW*	Printed by Colenso	Between 8 & 17 Feb		Existing	Numerous locations
W3	Williams (?) Translation	Unofficial Translation of Tiriti for Clendon	TW* translation by Williams?	Williams?	After CT*		Conjectured	Likely to have been in Williams Papers
CU	Clendon-US	W3 in Clendon's handwriting	W3	Clendon	After W3, by 20 Feb		Existing	US National Archives