

**"PRESERVED IN THE ARCHIVES  
OF THE COLONY":**

**THE ENGLISH DRAFTS OF THE  
TREATY OF WAITANGI**

**by**

**Dr Phil Parkinson**



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### ***Editorial Note***

The present study of the preparation of the English and Māori texts of the Treaty of Waitangi and of the subsequent interpretation of those texts from 1840 to the present day draws on several new sources, as well as a forensic re-examination of evidence which appeared long after the investigations by Ruth Ross in the 1970s. The need for such a study became more apparent in the 1990s as the result of the discovery of the so-called "Littlewood Document" in 1992, a manuscript which has become an ongoing source of political controversy.

This *Cahier Special* is a complement to the VUWLR monograph by Phil Parkinson: "The Māori Language and its Expression in New Zealand Law" and "Two Essays on the Use of Te Reo Māori in Government and in Parliament" (VUWLR/NZACL, Wellington, 2001).

### ***Acknowledgements***

This study of the English drafts of the Treaty of Waitangi and the translation of that document was a by-product of work on early printed texts in Māori, associated with *Books in Māori 1815-1900*, published in 2004. This work was supported by a variety of agencies that facilitate research and made materials available for study, notably the Alexander Turnbull Library, Archives New Zealand, Auckland Central City Library and the Auckland Museum Library, and I thank them for permissions to quote from documents in their possession. I should also like to thank several individuals who read and commented on drafts of the work: Margaret Calder, Trevor Cobeldick, Thoron Hollard, Claudia Orange, and Philip Rainer. I thank the New Zealand Association for Comparative Law and the *Révue Juridique Polynésienne*, for again supporting a study of significant legal texts concerned with law and the Māori language.

Dr Phil Parkinson

(Librarian, Research Centre, Alexander Turnbull Library)

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1 Gordon Brown, the trader of Sydney, was active in the timber trade at Mahurangi in the Hauraki Gulf ca 1835 and later at Mercury Bay.

# INTRODUCTION

While there has been much commentary on the history of the signing of the Treaty of Waitangi and some of the other foundation documents of New Zealand, little attention has been paid to the physical and scribal history of the documents, either as manuscripts or as printed texts.<sup>1</sup> Most commentators have contented themselves with reference to the printed official texts, in the Great Britain Parliamentary Papers, in which the original texts were transcribed. Only Ruth Ross has attempted to identify the scribes responsible, with some success, but without a conclusion. When the so-called 'Littlewood document' was located in 1992, and suspected to be a possible draft of the Treaty of Waitangi, expert consultants were confounded, and the document has remained a focus of controversy.<sup>2</sup>

After the present work had been accepted by the publisher, Martin Doutré's work *The Littlewood Treaty, the true English text of the Treaty of Waitangi, found* was published in 2005. The present work, which has been in preparation since 1996, provides both an opportunity to rebut Doutré's central assertion that the Littlewood document is a draft of the English text of the Treaty of Waitangi, and also the opportunity to incorporate references to specimens of handwriting, usefully illustrated in Doutré's work. Doutré (drawing on assertions earlier made by Ross Baker of the One New Zealand Foundation), insists that the Littlewood document – which he persistently calls 'The Littlewood Treaty' – is "in fact the final English draft of the Treaty of Waitangi" (see footnote to the title-page of his book).<sup>3</sup> In fact, however, the Littlewood document is no kind of draft of the Treaty, but, rather, merely a translation of the Māori text into English, made by James Busby for James

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1 See for examples: C Orange, *Treaty of Waitangi* (1987), M Simpson, *Ngā tohu o te Tiriti: making a mark* (1990), M Simpson, *Ngā whārangi o te Tiriti: a facsimile of the Treaty of Waitangi* (1990), R Ross, 'Te Tiriti o Waitangi; texts and translations' *New Zealand Journal of History* vol 6 no 2 (October 1972) pp 129-157, D F McKenzie, *Oral culture, literacy & print in early New Zealand: the Treaty of Waitangi* (1985), B Biggs, 'Humpty-Dumpty and the Treaty of Waitangi' in *Waitangi Māori and Pākehā perspectives of the Treaty of Waitangi* (1989), B Easton "Was there a Treaty of Waitangi, and was it a social contract?" *Archifacts*, April 1997 pp 21-49 and H H Turton, (ed) *Fac-similes of the Declaration of Independence and the Treaty of Waitangi* (1877) and the reprints (1892, etc). The printing history of the Treaty is described in P Parkinson and P Griffith, *Books in Māori 1815-1900 ngā tānga reo Māori* (2004) entries 83, 215 and 256 and footnote 1 to Chapter 8, herein.

2 Most recently with Ian Wishart, "Waitangi Treaty bombshell - The end of the golden gravy train" *Investigate*, (December 2003): 26-36 and ensuing correspondence in the February 2004 issue, pp 7-10.

3 Martin Doutré is best known for his beliefs about 'Celtic' influences in New Zealand, explained in his book *Ancient Celtic New Zealand* (1999), but discredited by historians and archaeologists (see K R Howe, *The quest for origins: who first discovered and settled the Pacific islands* (2003): "Doutré is a self-styled 'archaeo-astronomer' who argues that certain configurations of stones in the New Zealand landscape are remnants of mathematically advanced astronomical devices built by ancient Celts who had links with the builders of Stonehenge and the Great Pyramid" (p 148).

Reddy Clendon, between 17 February and 20 February 1840, and using Clendon's own paper stock (for evidential details see Chapter 7, herein). But, although Doutré's evidence is mistaken, historians are indebted to him for his persistence in tracking down and making readily available illustrations of documents that other historians have either overlooked or found inconclusive. Of particular value has been his drawing attention to a letter book of Commodore Charles Wilkes of the United States Exploring Expedition, now located in Kansas, and evidence establishing a genuine and direct connection between James Clendon and Henry Littlewood, dating from 1856. And that he has made illustrations of the documents available, so that others can make their own judgements about who to believe, assists them to weigh up the evidence for themselves.

In 1914 when Robert McNab published the second volume of his *Historical Records of New Zealand* he wrote:<sup>4</sup>

There is in New Zealand no Department of Archives, nor are there any officers with the duty imposed on them of collecting, arranging and publishing material regarding the infant days of the Dominion. The writer's connection with the work is purely honorary.

Michael Bassett's history of the Department of Internal Affairs, the successor to the office of the Colonial Secretary, says nothing at all about the early history of the 'archives of the colony' and Bassett seems unaware that Lieutenant-Governor Hobson had personally established them, by the appointment of a 'Registrar of Records', as early as 7 March 1840.<sup>5</sup>

The subsequent near-destruction of the documents – when fire consumed the government buildings at Official Bay in 1842 – and their subsequent damage by hungry rats in the 1880s, as well as well-intentioned but inept attempts at physical conservation in the early years of the 20<sup>th</sup> century, are notorious.<sup>6</sup> Yet, despite these disasters, most of the archives – including the drafts of the Treaty and the signed copies, and the correspondence relating thereto – were still intact, when some of them were photolithographed in 1877, for Henry H Turton's *Fac-similes*.

In his *Historical sources and archives in New Zealand* (1929), G H Scholefield gave an account of the rediscovery of the ruined Treaty sheets, stating "I am informed by Mr James McDonald that the original sheets were discovered in the basement of the Government Buildings by Dr. Hocken and taken charge of by the Department of Internal Affairs".<sup>7</sup> But as Bassett pointed out, officials

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4 R McNab, *Historical Records of New Zealand* (1908-1914) vol 2 pp ii-iv. "The documents reproduced with few exceptions, relate to the period before the Treaty of Waitangi, because the Editor in his private research is confining himself to that period."

5 M Bassett, *The mother of all departments* (1997) pp 61-62.

6 For a listing of other losses see 'Out of the ashes' in Archives New Zealand's online newsletter *Kia whakakautoro – Out Reach*, Summer 2001.

7 G H Scholefield, *Historical sources and archives in New Zealand* (1929) p 6. The earliest mention of the location and state of the documents between 1877 and 1908 is a rumoured article about Hocken in the

sought to save face by keeping quiet about the very existence of the documents. There were further losses around the 1950s. Almost all of the letters – sent from the missionaries to Hobson, when they returned the signed copies of the Treaty – still intact in April 1957, were missing by May 1982, although at least photographic copies survived in the Alexander Turnbull Library.<sup>8</sup> Historical investigation of early colonial archives and their provenance had never been a high priority at an under-resourced National Archives, now called Archives New Zealand. Neglect of New Zealand's archival history, and of the documents themselves, has been longstanding, and a formally separate institution for the 'record of government' did not appear until 2000.<sup>9</sup> With the passage of a new Public Records Bill into law on 14 April 2005, replacing the Archives Act, 1957, it may be hoped that 'preserved in the archives of New Zealand' will not be a vain assertion in future.

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*Otago Daily Times* for 11 August 1909 referred to and quoted by E H McCormick in *The fascinating folly* (1961). Unfortunately, no such article is actually in the newspaper of that date.

8 "Official correspondence relating to the signing of the Treaty of Waitangi, 25 March 1840 – 10 June 1842". Alexander Turnbull Library (hereinafter ATL) qMS-1603, which includes a copy of the Archives New Zealand descriptive list for IA 9/11.

9 See eg B Easton "Who owns the past?" in *Archifacts* April 1995: 1-8; I Wards, "New Zealand archives and records in retrospect" in *Archifacts* October 1996: 31-43; E Bolger "The proposed Archives Bill: the way forward or back to the future?" in *Archifacts* October 1997: 43-52.



# CHAPTER 1

## 'THE ARCHIVES OF THE COLONY'

It has long been a source of concern to archivists, bibliographers and historians that many of the key constitutional documents of New Zealand (both the manuscripts and the works printed in New Zealand) appeared not to have survived, and information about their fate has been difficult to document.<sup>1</sup> Yet, in his review of archive keeping in New Zealand, Ian Wards pointed out that, on Hobson's appointment<sup>2</sup>

Obviously enough, in a process fraught with uncertainty, a careful record of every action must be kept and Lord Palmerston at the Foreign Office instructed his new consul to 'ensure the careful preservations of the archives of the consulate.' As a second thought in a separate letter, the consul elect, Captain Hobson, was directed, because his appointment was intimately connected with the colonial policy of Great Britain, to obey instructions from and report to, the Colonial office.'

As Wards also remarks, however, "effective initiative at government level ended with Lord Palmerston: successive colonial governments were content to appoint clerks" who created archives but did little to ensure their preservation.<sup>3</sup> Five documents by Hobson himself testify, nevertheless, to the existence of "the archives of the Colony" in the first year of its establishment. In the first of these, Hobson noted that Willoughby Shortland had been appointed as Acting Colonial Secretary and "Registrar of Records" on 7 March 1840.<sup>4</sup> A short holograph remark in Hobson's hand on another document in June provides further evidence of the Governor's concern for the archives of the Colony: "The Colonial Secretary must have the Iron Chest in preference [to the Acting Treasurer F. W. Perry who had requisitioned it] for the security of the Public Records. Let a requisition be sent to Sydney for two others for general service. WH"<sup>5</sup>

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1 M Stevens, (et al) "A chronology of archives keeping in New Zealand to 1900" *New Zealand Archivist* 3 no 1 (Autumn/March 1992) pp 5-10. Further updated revisions, edited by D Retter, appeared in *New Zealand Archivist* v 7 no 2 (Winter/June 1996) and v 14 no 1 (Autumn/March 2003).

2 I Wards "New Zealand archives and records in retrospect" in *Archifacts* October 1996: p 32, (quoting Palmerston to Hobson, 13 August 1839, from R McNab, *Historical Records of New Zealand* (1908) v 1 pp 748-749).

3 I Wards (*ibidem*) p 32.

4 A notice of the officials appointed in the Hobson administration, (issued by James S Freeman and dated 9 June 1840) was published in the *New Zealand Advertiser* no 11 (19 June 1840) p 1.

5 Archives New Zealand, IA 1, 40/201 (13-15 June 1840) concerning requisitions for Perry, the Acting Treasurer.

The phrase "preserved in the archives of the colony" was echoed in July, when the Colonial Secretary of New South Wales informed Hobson that a copy of the letters patent of 1836 erecting the See of Australia was being forwarded to him "for the purpose of being published in New Zealand".<sup>6</sup>

His Excellency the Lieutenant Governor directs it to be notified that the Islands of New Zealand being now included within the Territory of New South Wales, a copy of the Letters Patent under the Privy Seal of His Late Majesty King William the fourth, dated the eighteenth day of January in the sixth year of His Reign – erecting all the Territories and Islands comprised within or dependent upon New South Wales Van Diemen's Land and Western Australia into a Bishop's See or Diocese, styled the Bishoprick of Australia, has been, in conformity with the decision of the Executive Council of New South Wales, as approved by His Excellency Sir George Gipps, Governor and Captain General of that Colony, transmitted to this Government: and that the full Power and Authority of the Right Reverend the Lord Bishop of the said Diocese is extended to these Islands. And the said copy of the said Letters Patent has accordingly been duly registered and lodged in the Archives of this Colony. By His Excellency's Command, for the Colonial Secretary, Ja. Stuart Freeman

Next, in writing to the Secretary of State for the Colonies on 15 October 1840 (his despatch No. 35), Hobson enclosed copies of ten documents relating to the Treaty of Waitangi and to the proclamation of sovereignty over New Zealand. In his covering letter he wrote:<sup>7</sup>

I have received ample and full reports from all the gentlemen whom I commissioned to treat with the native chiefs for their adherence to the treaty of Waitangi; and [I have the honour] to inclose to your Lordship copies of those reports, together with 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, with the exception of some chiefs whose names are affixed to a copy of the treaty entrusted to Mr Whiteley, as reported in enclosure No 5, by Captain Symonds, which has not yet reached me. The originals of these documents are preserved among the archives of the colony.

Finally, in a further despatch (No 7/41, dated 26 May 1841), Hobson reported that Symonds copy of the Treaty had been received and that "this copy of the treaty, together with those forwarded in the above-mentioned despatches, now constitute the complete series, the original of which are preserved among the archives of the colony".<sup>8</sup> As it was usual to send duplicate or triplicate copies

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6 Archives New Zealand, IA 1, 40/225. The letters patent are now separated and shelved at SEP-769. Freeman had been appointed as Acting Colonial Secretary on 29 May, on account of the absence at Port Nicholson of Shortland.

7 GBPP 1841 (311) Vol XVII reprinted in Irish University Press Series of British Parliamentary Papers: "Correspondence and other papers relating to New Zealand 1835-42", pp 119-270 (but see especially pp 220-240). These are the IA 9/11 documents, now missing.

8 Printed in GBPP 1842 (569) pp 110-111. The "Symonds/Whiteley" copy was sent by Whiteley to Rev John Hobbs at Mangungu, Hokianga, who wrote to Willoughby Shortland on 5 April 1841: "I have the honour of

of important government communications (to ensure against loss of ships at sea), it might be expected that drafts and final copies of documents such as the Treaty of Waitangi would survive in more than one copy. One fat volume at Archives New Zealand (G series 30/1) does, indeed, contain duplicate despatches, repatriated to New Zealand in the early 20<sup>th</sup> century, around the time of the revival of interest in the founding of the colony as it approached its centenary.<sup>9</sup> But their survival appears almost accidental, for the master copies – which should have remained in New Zealand – cannot now be located.

It is curious that no specimen of the critical "final draft" of the Treaty of Waitangi (ie the English text given by Hobson to Henry Williams, so that it could be translated) has remained in the 'archives of the colony'. Surely the document given to Henry Williams must have been a duplicate copy, derived from an original reference copy? Given the sorry record of archival preservation in New Zealand, however, it might well be anticipated that such a critical document would have been lost or forgotten. For many reasons, in fact, not just convenience, historians and others have tended to rely more on the printed despatches in the British parliamentary papers, than upon the documents preserved in Archives New Zealand. In this present examination of the documentary evidence, it is concluded that although both the actual document sent to Henry Williams, as well as the official reference copy, are lost, nevertheless the "final draft" *text* has indeed survived. In fact, not less than three subsequent transcripts of that missing reference copy have survived to the present day. These transcript copies are documented below, with evidence of their provenance. Their identification has been based on forensic examination of the handwriting and the use of the principle of filiation, the derivation of one text from another by descent. The use of filiation has enabled the sequence of textual amendment to be established in considerable detail. The same method demonstrates that the so-called "official text" of the Treaty is in fact identical to the final English draft, except for the date. But the Treaty text in Māori (which is the *real* Treaty) is not a translation of the so-called "official text" as is usually assumed.

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forwarding to you for His Excellency the Governor a Treaty which I have just received from the Rev. John Whiteley of Kawhia who wishes me to apologise for his having kept it longer than he would have wished in order to procure the signatures of the most influential Chiefs of that part of the country whose minds have been misguided by persons unfriendly to Her Majesty's Government." Hobson annotated this letter "A copy of the enclosed treaty is to be prepared for transmission to England – the original to be placed amongst the archives of the Colony WH 7 May" A further note in James Freeman's hand states "Copy sent to Govt. House 25 May 1841 Jas F" and then "Accordingly May 22nd 1840 [sic] GC PA [George Clarke, Protector of Aborigines] Hobbs's letter was acknowledged on 10 June.

9 These copies were supposedly returned to New Zealand in 1909 when T M Hocken arranged for the return of the duplicate despatches from the Public Record Office.

In the present study, consideration is also given to the early printing history of the Treaty, which has been little studied in the past.<sup>10</sup> The Telford reprint of 1845 is often mistaken for the Colenso printing of 1840, as, for example, in the displays at the Treaty grounds.<sup>11</sup> In 1987 Brian Easton gave an account of the drafting of the Treaty but also overlooked William Colenso's involvement in its printing.<sup>12</sup> Rachel Salmond examined the records of the Colonial Secretary's office "during a thorough search for documents relating to printing in New Zealand generated between January 1840 and December 1848 and now held at New Zealand National Archives".<sup>13</sup> She observes that: "The services of a printer had been essential for Hobson and his administrators during the first year of colonial government. Colenso had provided with skill and efficiency some of these services. His presence in the colony meant that the printing of documents could be carried out quickly and conveniently."<sup>14</sup> That is true, but the disciplinary dissociation of manuscript from printed materials results in further lacunae in our knowledge of the Treaty history, which the present study attempts to resolve. Neither Easton nor Salmond examined the Colenso papers associated with official printing in 1840 (most of which are in the Alexander Turnbull Library).<sup>15</sup> Colenso was briefly a de facto 'government printer' (and translator) but did not bear such a title and his involvement ended in December 1840.

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10 D H McKenzie, *Oral culture literacy and print in New Zealand: the Treaty of Waitangi* (1989) pp 32-33 acknowledges that his account of the relationship of the texts is 'based wholly upon Ross' (note 76). But he says rather little about the printing history of the Treaty itself, and does not even mention the extant proof copy signed by Colenso himself (in ATL fMS-Papers-2227).

11 The mistake originated with H W Williams, *A bibliography of printed Maori* (1924) p 16 entry 52 and entry 52a in the Supplement (1928). The error was corrected in Ross op cit, 1972 note 113 and in A G Bagnall's *New Zealand National Bibliography* (1980) no 5607, with plate facing p 1008.

12 B Easton "Was there a Treaty of Waitangi; and was it a social contract?" *Archifacts* April 1987: 21-49.

13 R Salmond, *Government Printing in New Zealand 1840 to 1843* (1995), pp ix-x.

14 Above n 13, 8.

15 ATL fMS-Papers-2227. This compilation comprises 13 items, some printed and some in manuscript, including, inter alia, the manuscript and printed versions of the proclamation regarding pre-1840 land purchases of 30 January 1840, the manuscript and first printing of the proclamation of sovereignty, 21 May 1840, correspondence between the governor and chiefs translated by Colenso, the press proof of the Treaty of Waitangi and papers relating to the first official Gazette, the *Gazette Extraordinary*.

## CHAPTER 2

# THE SCRIBES OF THE GOVERNOR

The most extensive previous examination of the 1840 documents associated with the Treaty of Waitangi was that of Ruth Ross, who gave a generally accurate account of the genesis of the Treaty in English and in Māori (see Introduction, footnote 1). She pointed out that the identification of handwriting of officials is seldom straightforward, particularly as clerks often prepared documents for the signatures of their superiors; it is often the case that one person prepared a text, but a more junior person made the copies. To guard against unproven ascriptions, I have examined with particular care a wide range of the surviving original public documents located in the series of New Zealand Governor's papers and despatches at Archives New Zealand (Archives Group G), in the New Zealand Colonial Secretary's papers (Archives Group IA), in the New Zealand Governor's inward despatches to the Colonial Office, to the New Zealand Lieutenant-Governor's despatches to the Governor of New South Wales, and to the NSW Colonial Secretary as well as the latter's despatches to the Colonial Office, (most of which are now at the Public Record Office, London). Also examined were other despatches from Hobson to Gipps which are still in New South Wales.<sup>1</sup> Some privately owned authentic documents have also been examined, to assist in confirming the identity of the various scribes. Public papers at the Alexander Turnbull Library, the Auckland Central City Library and the Auckland Museum Library have also been examined.

It is helpful to review, at this point, the sets of Hobson's despatches. In theory, one set was sent to Gipps and followed by a duplicate in a second vessel, while another was sent direct to London for the Secretary of State, Normanby, also with a duplicate in a second vessel. Hobson reported direct to Gipps, but he also had authority to refer matters to the Colonial Office directly. But this arrangement was not always followed and the 'duplicates' do not always reflect the content of the 'originals'. Not all letters or despatches by Hobson to Gipps were forwarded on to Normanby, particularly those dealing with minor administrative matters. The critical despatches sent to Gipps in the vessel *Samuel Winter* on 8 February (40/8, dated 5 and 6 February, enclosing a text of the Treaty in English), were subsequently forwarded from Gipps to Normanby on 19 February, and were printed. The copy supplied to the printer, probably, was not kept after the printing.<sup>2</sup> The 'duplicate' despatch dated 17 February (with rather different contents, 7 letters with 5 enclosures) was sent in

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1 State Records New South Wales, series CGS 905 "Main series of letters received, 1841, New Zealand 1840-41".

2 In the GBPP series of Colonial office papers, printed texts often substitute for the originals.

the vessel *Martha* on 20 February and received on 14 March.<sup>3</sup> This is still in Sydney, but it is incomplete, lacking both 40/6 and 40/8 and their four enclosures, despite the listing of these in the 'list of copies transmitted herewith'.<sup>4</sup> Their whereabouts is unknown, but they may have been sent on to London. The extant copy of 40/8 at PRO CO 209/7, 7-12, 13-15 – on the basis of the dating – would appear to be part of the *Martha* copy of the despatch, rather than that sent in the *Samuel Winter*. The absence of the authenticating attestation of Henry Williams in the despatch sent on the *Samuel Winter* – printed in GBPP 1840 (560) – suggests that it was not present in the manuscript sent by that ship.

Some of this material (transcript copies of Hobson to Gipps 40/6 and 40/8) survives elsewhere, within the duplicate despatch 40/1 sent to Normanby, in the *Achilles* on 16 February, (Archives New Zealand G 30 /1 pp. 5-31).<sup>5</sup> But this material presents other anomalies. 40/1 from Hobson to Normanby is a three-page letter in Freeman's hand with Hobson's signature but the scribe who prepared the three enclosures with it is less certain. Enclosure 1 is a transcript of Hobson to Gipps 40/6, dated 4 February, enclosure 2 is a copy of Hobson to Gipps 40/8 dated 5 February and enclosure 3 is a copy of Hobson to Gipps 40/13, dated 17 February, this last of which was not sent in either the *Samuel Winter* or the *Martha*. Hobson to Normanby 40/2, also dated 17 February, is in Freeman's hand with Hobson's signature, and comprises a long letter without enclosures "Reporting progress made in the acquisition of sovereignty".<sup>6</sup> Most alarmingly the English 'official' text of the Treaty of Waitangi as given in the printed *Samuel Winter* despatch (GBPP 1840 (560) p. 10) and the extant manuscript written by Freeman (PRO 209/7, 7-12,13-14) are very different from that in the 'duplicate' in the *Achilles* despatch to Normanby. The scribe has, in fact, copied the wrong document, using a *draft* of the Treaty of Waitangi rather than the *official text*, as was intended (see Appendix, document 4). Freeman, who was responsible for the documents, and may personally have prepared all of them, appears not to have noticed the error.

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3 The *Samuel Winter* and the *Martha* despatches include 40/5, 40/6, 40/7, 40/8, 40/9, 40/10 and 40/11, but one of the lists of contents ("Enclosures herewith") attributes two enclosures to 40/6 and three enclosures to 40/7 while the other "List of copies of letters transmitted herewith" attributes three enclosures to 40/6 and two enclosures to 40/7. The "List" attributes one enclosure to 40/8, while the other indicates no enclosures in 40/8. There was in fact one enclosure in 40/8, this being the authenticated fair copy of the Treaty in English, now at PRO CO 209/7, 13-15 and which is presumably the *Martha* copy. Despatches 40/12 to 40/15 were all sent on the *Martha* on 20 February. The next batch of despatches (40/16-40/18) were sent in the *Herald* after 10 March.

4 State Records, New South Wales, Colonial Secretary CGS 905, Main series of letters received, 1841, New Zealand 1840-41, [4/2540].

5 Letter 40/6 is also missing from this series but it and the two printed proclamations that had accompanied it are in PRO CO 209/7, 23-24.

6 Archives New Zealand G 30 / 1, 40-55.

William Hobson's handwriting is large, untidy, and is easily recognised. He did not usually write his own despatches, having been equipped with clerks for that purpose (principally James Stuart Freeman, the Chief Clerk and private secretary). Hobson was particularly reliant upon his scribes because, on 1 March 1840, only a month after taking office, he was disabled by a stroke which left him temporarily unable to write. While he gradually recovered, he was still suffering the effects of the stroke at the end of the year.<sup>7</sup> The sickbed diary and other documents, such as signatures and drafts of letters, assist us to trace the progress of his recovery. The scribes and other officials in Hobson's party are considered in turn.

### ***I GEORGE COOPER***

Hobson had few officials in whom he had any confidence, but Cooper, the most senior official, was the worst of them. Hobson had asked for a rather extensive staff complement in a letter to Gipps (13 January 1840). He wanted 11 officials, 4 sergeants, 10 clerks, 12 mounted police and 30 mechanics, a total of 67.<sup>8</sup> Instead he received just four officials; George Cooper as Treasurer, Felton Mathew as Surveyor General, Willoughby Shortland as Chief Magistrate and James Stuart Freeman as Chief Clerk. There was no provision for a Colonial Secretary, but Cooper was calling himself 'Acting Colonial Secretary' by 17 February.<sup>9</sup> After an acrimonious dispute with Hobson and Shortland, however, Cooper left the Bay of Islands on 11 March in the *Herald* (Capt. Nias) destined for Sydney – he was later forced to apologise to Hobson and Shortland, after they complained to Gipps.<sup>10</sup> Cooper did not return to New Zealand until 28 June and so was effectively unable to have much influence on either the business of signature gathering for the Treaty of Waitangi or for the proclamation of sovereignty in late May.<sup>11</sup> Although he countersigned Hobson's proclamations of

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7 Compare holograph documents nos 1 (30 January 1840), 3 (ca 13 May 1840), 7 (24 December 1840), all in ATL fMS-Papers-2227, and also his sickbed diary of April 1840, W. Hobson, "Diary kept by William Hobson while recovering from a paralytic stroke, with other family documents and letters to and from Maori chiefs" 1833-1934 ATL fMS-097, both in the Alexander Turnbull Library.

8 Archives New Zealand, G 36 1, pp 8-9.

9 An excellent example of Cooper's holograph and signature is found in his note to Hobson of 16 January 1840, when leaving Sydney "Treasurer respecting money to be shipped on board the Herald" (Archives New Zealand, IA 1 40/11). His counter signature appears on the original of two copies of Hobson's second proclamation of 30 January 1840.

10 G Gipps to W Hobson, 8 May 1840, in ATL-qMS-0843: On 4 April Hobson requested that Cooper be removed from his situation as Treasurer but Gipps "having severely animadverted on his breach of duty in quitting it without your permission" but had sent him back "from not having any competent person to supersede him or act in his place". Cooper was already booked to sail in a few days "the receipt of your letter has therefore much embarrassed me" but he considered it best that Cooper go back and make a grovelling apology.

11 The disgrace was repeated in 1841-42 when Cooper was deeply involved in financial irregularities, especially land-sharking, for which he was eventually dismissed. See the criticisms of Cooper by S. McD. Martin, *New Zealand in a series of letters* (1845).

30 January 1840 he appears to have had little to do with the drafting or copying of the Treaty of Waitangi, and nothing to do with the proclamations of sovereignty in May 1840.

## **II WILLOUGHBY SHORTLAND**

With Cooper's precipitate departure on 12 March, the first personnel crisis in the administration, the 'Acting Colonial Secretary' post was given to Shortland, who ran the whole establishment (with Freeman to assist him) while Hobson recovered from his stroke. This period lasted from 1 March to late April, when Hobson resumed some duties. Shortland had been appointed Chief Magistrate at the Bay of Islands on 8 February at the same time as the settlers James Reddy Clendon and Gilbert Mair, appointed to assist him. None of them was legally qualified. Clendon, at this time, was also United States Consul at the Bay of Islands (appointed 1839).<sup>12</sup>

William Colenso also acted as an unofficial translator for Hobson and for Shortland from time to time, for example preparing letters to be sent to Te Tirarau and Nopera Panakareao.<sup>13</sup> But Colenso held no official position, and was effectively a de facto government printer for only a year. With the next crisis, in mid-May, caused by what was interpreted by Shortland as a seditious and treasonable defiance of the Queen's and her Lieutenant Governor's authority, Shortland was forced to remove to Wellington for several months (he left the Bay on 25 May, and he reached Port Nicholson on 2 June). At this point Freeman took the post of Acting Colonial Secretary, with another and more junior clerk, Samuel Edward Grimstone, to assist him.<sup>14</sup>

## **III JAMES STUART FREEMAN**

The handwriting of James Stuart Freeman, Hobson's Chief Clerk (who was also Hobson's Private Secretary), is usually quite distinctive and is prominent in his letter book (at Archives New Zealand G 36/ 1). Freeman attended to the preparation of the private correspondence and the despatches sent direct to the Secretary of State for the Colonies.<sup>15</sup> He was also responsible for the transcribed letters from Hobson to Gipps, located at State Records New South Wales, some of

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12 Writing to Gipps on 8 February, Hobson said that it was "highly essential that a representative of Government be stationed" at Kororāreka, and hired a house for him there for "his personal accommodation, with the understanding that it shall be used as a temporary courthouse". He asked Gipps for a Clerk of the Bench, and seven constables at the same time. (letter 40/10 in State Records NSW, Colonial Secretary CGS 905 [4/2540]).

13 ATL fMS-Papers-2227-06 (letter to Te Tirarau), and ATL fMS-Papers-2227-04 (to Nopera Panakareao). The latter (the draft English translation) and the reply dated 13 May "Letter to Noble from the Governor" (in Māori) are also transcribed in ATL MS-0585 pp 74-77.

14 Grimstone was originally to have been in Hobson's party but was left behind at Sydney to organise matters there, before coming to New Zealand in March.

15 Such as the 40/8 Hobson to Gipps of 5 February in PRO CO 207/7, 7-12, 13-14.

which bear his cipher as well as Hobson's initials.<sup>16</sup> But as he was an accomplished penman, he did vary the style of his script on occasion. Some of the documents sent to Governor Gipps in February 1840, however, whether in English or in Māori, were apparently penned by another scribe, who sometimes had his texts authenticated with the initials of Freeman. Freeman was briefly Acting Colonial Secretary of New Zealand in the period May to September 1840, while Shortland was at Port Nicholson. Freeman appears to have been a bad lot and his career was terminated in scandal in early 1844.<sup>17</sup>

#### IV HENRY TACY KEMP

A missionary's son, born in 1818, Kemp was active as the office interpreter from April 1840, but evidence is lacking to demonstrate his involvement in any capacity in February. He was moved to assist George Clarke (Protector of Aborigines), when that position and the sub-protectors' posts were established.<sup>18</sup> He was the only member of Shortland's office staff to write in Māori. Some Māori texts were included in Hobson's despatch 40/8 dated 15 October 1840, and there is a single Henry Kemp manuscript, in Māori with an English translation, dated 8 September 1840, now in the Public Record Office.<sup>19</sup> Kemp later had a distinguished career on the civil service, and was notable as Native Secretary, and as the translator of 'improving' literature in Māori (such as *Robinson Crusoe* and *Pilgrims Progress*) for Grey during his first governorship.

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16 State Records, New South Wales Colonial Secretary CGS 905, Main series of letters received, 1841, New Zealand 1840-41, [4/2540].

17 Although, with a risk of libel hanging over him, Samuel McDonald Martin is not specific about Freeman's character he is severe: "Through the strong recommendation of [Bishop Broughton] a person of the name of Freeman, a clerk in the Secretary's Office, a most disreputable and dissolute character was all but inflicted on the Colony as Colonial Secretary. His character was so notoriously bad, that despite the pious recommendation of his former teacher, Bishop Broughton, and the sympathy and interest created in his behalf by the Auckland Episcopal parson, Mr Churton, the Governor [FitzRoy] was obliged in less than two days to abandon the *moral* protégé of the parsons, whose *beaming* eyes were so insensible to the crimes of their friends." (italics in the original, S McD Martin, *New Zealand in a series of letters* (1845) letter xi, p 215.

18 George Clarke to Colonial Secretary, 5 November 1840, Archives New Zealand, MA 4, 58 (letter book 1840-44): "The increasing correspondence . . . obliges me to apply for a person duly qualified to undertake the management of the writing and translation of native letters . . . being personally acquainted with Mr Henry Kemp, who now holds the appointment of interpreter to HM Government, and who has a good knowledge of the language and customs of the natives of New Zealand I beg to recommend him as a fit and proper person to hold that office" (letter 40/10 p 10).

19 Archives New Zealand, G 30/1 pp 275-279 is the English text of the circular letter to the chiefs of Ngāti Awa dated 7 August 1840, printed in GBPP 1840 (311) p 116 and the translation into Māori is at G 30/1 pp 280-285 (printed in GBPP 1840 (311) p 116; a similar letter was sent to Ngāti Whakaue. None of these letters seem to have been printed separately for circulation in New Zealand; it seems that various letters were addressed to individual chiefs or to hapū.

## V *SAMUEL EDWARD GRIMSTONE*

Hobson's third class clerk was Grimstone, who had initially been left behind in Sydney. He arrived in New Zealand on 17 March on the *Westminster*.<sup>20</sup> At first a clerk at Russell, later at Auckland, and later still, at Wellington in 1844, he became a registrar of deeds, and later the Secretary to the Southern Division (later New Munster) at Wellington.<sup>21</sup> He remained in the government service until 1861, holding a variety of posts and rose to the rank of Lieutenant in the Militia. But he also became a corrupt official; in 1861 he embezzled £22 from the New Zealand Society, and fled to Australia.<sup>22</sup>

Both Freeman and Grimstone were accomplished penman. Their letter books, especially Archives New Zealand G 36/ 1, (the Governor's private secretary's letter book) and Archives New Zealand IA 4, 1 (the Colonial Secretary's 'Miscellaneous Feb 1840 to 1843' letter book) can be used to assist identification of their writing. It always needs to be remembered, however, that letters they contain are normally transcripts.<sup>23</sup> In some instances the script of Freeman and that of Grimstone are very similar – compare transcripts in Freeman's letterbook (Archives New Zealand, G 36/ 1).

## VI *JAMES BUSBY*

The ex-British Resident, James Busby, was a prolific and prolix correspondent. He was largely superfluous to the infant government, although he volunteered his services to assist the smooth transmission of authority. In the week he arrived in New Zealand, Hobson had asked that messages be sent to chiefs at Kaipara and Kaitaia (Te Tirarau and Nopera Panakareao respectively), probably at Busby's suggestion.<sup>24</sup> The involvement of Busby in the drawing up of the Treaty is documented in Busby's own words, but he is an untrustworthy witness, with scores to settle against the officials of New South Wales, and by nature a self-promoter. Nevertheless, Busby did assist Hobson at the changeover of authority, organised the printing of proclamations and circulars at the end of January, and did make an important contribution to the preparation of the drafts of the Treaty, two of which are demonstrably in his handwriting.

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20 He was married at Sydney on 16 January, before he departed for New Zealand on 4 March (see Hobson to Gipps, 6 April 1840 "No. 40/21" in Archives New Zealand, G 36/1 p 60).

21 A resume of his public service, from 1837 onward, is given in his petition to the Provincial Council at Wellington, when his position as Chief Clerk to the Superintendent of the Province of New Munster was abolished in August 1853. See Message no 7 in *Votes and proceedings of the House of Representatives, Session II, 1854* (Auckland, 1855).

22 See New Zealand Society. Papers. ATL MS-Papers-0121.

23 In some cases (such as the early letters in IA 4, 1) the extant letter book is probably a compilation of transcripts of copies of loose letters, made some months after the originals (or copies) were written by Freeman.

24 J Busby to W Colenso "Friday Morning [29 January 1840]" in W Colenso papers ATL MS-Papers-4622.

Late in February 1840 Busby transferred his papers to Hobson.<sup>25</sup> At the same time he transferred the original manuscript of the Declaration of Independence.<sup>26</sup> He then left New Zealand. Two volumes of his papers remained at Archives New Zealand (series BR 1/1 and BR 1/2) but the second of these is now also missing.<sup>27</sup> Busby's printed file copy of the Declaration of Independence, bearing his annotations, as well as his file copy of the invitation to the chiefs to assemble at Waitangi on 5 February, are filed together in the Alexander Turnbull Library, as part of Sir Donald McLean's papers.<sup>28</sup> Busby's correspondence with William Colenso over the printing of the invitation to the chiefs to meet Hobson, already referred to, has also survived.<sup>29</sup>

## VII WILLIAM COLENZO

The Church Mission's printer, William Colenso, was contacted by Busby on 29 January – immediately on Hobson's arrival – so that formal proclamations could be printed announcing Hobson's assumption of office, and so that a printed invitation to the chiefs of the 'Confederation' to meet with the 'Kawana' could be circulated.<sup>30</sup> All three printed documents were issued on the next day, 30 January. Colenso was called on again to print the Treaty in Māori (17 February) and subsequently a circular in Māori relating to poundage fees (30 March), a circular letter from the governor (24 April), as well as English and Māori texts of a proclamation about military supplies (2 May), and finally, on 21 May, proclamations of British sovereignty.<sup>31</sup>

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25 Archives New Zealand, IA 1, 40/36, "James Busby, British Resident transferring all books, papers to Lieutenant Governor" (now missing).

26 Archives New Zealand, IA 1, 40/42 "James Busby original Declaration of Independence of the Native Chiefs" now in Constitution Room, Archives New Zealand. Cooper to Busby, 17 and 20 February acknowledges this material (IA 4, 1/277 p. 2): "the enclosures referred to therein, namely the original of the Declaration of Independence and the deed of confiscation of the land of Reti to His Late Majesty. His Excellency the Lt Governor desires me to inform you that the deed of Reti will be submitted for consideration; but that it was understood you had peremptorily refused to accept the confiscation which he had offered for the indignity offered to the British Representative."

27 According to notes in the series list at Archives New Zealand, these inward letters were found in a flooded cellar in 1890 (or perhaps 1896) and recorded at Internal Affairs in 1913. They were transferred back to National Archives between ca 1926 and 1946. They were listed in detail but the second volume was noticed to be missing in 1982.

28 ATL MS-Papers-0032-1009-01.

29 "Letter from James Busby and other papers 1835-1840" in ATL f-76-048.

30 Busby, James [Printed circular, annotated:] "Circular assembling the Chiefs to meet Captain Hobson on his arrival." In "Printed Maori material" [1835-1876] ATL MS-Papers-0032-1009 (in McLean papers, MS-Papers-0032)

31 "Proclamations and other papers relating to treaty of Waitangi" 1840 ATL fMS-Papers-2227. The proclamations in English are described in Bagnall's *New Zealand National Bibliography* v 1, entries 4037, 4039, \*\*4040, and 4041, and in the Addenda (p. 1166, \*\*4041a). Those marked \*\* (and a further one) were

With the appearance of a commercial newspaper, the *New Zealand Advertiser and Bay of Islands Gazette*, in June, Colenso's services as the government's printer were no longer required. But when that paper was stopped in December, he was called on to print a single issue of a *Gazette Extraordinary*, at Hobson's request. The mission secretary, Richard Davis, stopped the appearance of any more issues of the gazette, by claiming that the "holy purposes of the press" (religious texts) must take priority over further printing for the government.<sup>32</sup>

It would appear that this was to avoid the mission press being used to print and publish land claims notices, which had formed the greater part of the contents in the sole *Gazette Extraordinary*. Such announcements were then printed in Sydney, or in the *New Zealand Government Gazette* of G A Eagar, when that appeared in 1841.<sup>33</sup> Colenso also became an informal translator for officials (Shortland and Hobson) in the early months of 1840, and seems to have been involved in the translation and interpretation of land claims hearings as well.<sup>34</sup> He was present at the meeting at Waitangi on 5 and 6 February and wrote the most detailed contemporary account of the proceedings, although this was not published until 1890.<sup>35</sup>

### VIII HENRY WILLIAMS

Although the Rev Henry Williams was not really one of the Governor's 'scribes' – but primarily his translator – his role in the preparation and copying of the drafts of the Treaty was considerable, as shown in Chapters 4 and 5. He had arrived in New Zealand in 1823 and soon became the senior missionary at the Church Missionary Society station at Paihia. Although he was never looked upon as a skilled translator of scripture (he was not fluent in Greek, unlike his brother William) he was

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then not located, but have been traced subsequently. They will be described in more detail in a separate work.

- 32 W Colenso, [Letter to Governor Hobson, 30 December 1840]. A photocopy of the holograph draft is in W Colenso, "Papers" 1840-1882. ATL MS-Papers-0675
- 33 See the series of "Extracts from supplements to NSW Government Gazette, land claims referred to Commission" printed by the New South Wales Government Printer John Row, who was appointed to that position on 1 March 1841. These cover the period from 16 March to 27 April. They are headed "New Zealand, Colonial Secretary's Office, Sydney". They start with case 28, previous cases having appeared in the *Gazette Extraordinary*. After April there was a break and the notices resumed in Auckland in July, with John Moore as printer of the *New Zealand Government Gazette*. This file is at Archives New Zealand OLC 5/3 "Acts, notices, reports".
- 34 See W Colenso, [Specimen of land notices for projected Land Claims Commission, 1840, marked by Colenso "No 4".] in G C Petersen, "Papers relating to a biography of William Colenso" folder 13 "Printed material" 1840-1901, ATL 80-038-13
- 35 W Colenso, "Memoranda of the arrival of Lieut. Govr Hobson in New Zealand; and of the subsequent assembling of the Native Chiefs at Waitangi . . ." 1840. ATL MS-Papers-1611. This was published as *The authentic and genuine history of the signing of the Treaty of Waitangi, New Zealand, February 5 and 6 1840; [ . . . ] with copies of the Treaty in English and Maori, and of three early proclamations respecting the founding of the colony.* (Wellington, Government Printer, 1890).

certainly fluent in missionary Māori, and had previously translated the Declaration of Independence for Busby in 1835. But it was his availability on the spot (William Williams and Robert Maunsell were far away) and his mana as the head of the mission which resulted in his being the translator of the Treaty.



## CHAPTER 3

# THE DRAFTS OF THE TREATY

Although Ruth Ross made an effort to identify the writing of these officials, and her identifications of scribal hands have generally been accurate, she was not able to identify all the scribes or to establish the sequence of the writing of all the relevant documents. Ross observes that "Official despatches yield no clues about how the Treaty of Waitangi was drawn up" but crucial information also occurs in non-official sources.<sup>1</sup> The evidence concerning the drafting of the Treaty of Waitangi comprises both extant original documents (holographs) and subsequent transcripts of those holographs. Ross is correct that:<sup>2</sup>

The notes brought to him [Busby] by Hobson's officers [Cooper and Freeman] have survived and are reproduced in *Fac-similes of the . . . Treaty of Waitangi*. 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, in the handwriting of J. S. Freeman, Hobson's Secretary, comprises the draft of a differently worded preamble and of three articles.

I concur with Ruth Ross in these identifications, but the order in which they were written is a subject for further discussion. Which was written first? The paper stocks provide no answers.<sup>3</sup> A study of the filiation of the draft texts, has been much more revealing. These texts are presented, in the order of their composition in the Appendix, as documents 1-6. Hobson's holograph sheet fits late in this sequence, not at the start of it, as other researchers seem to have assumed. The start of the sequence is Freeman's sheet, not Hobson's.

Ross was exercised over the identification of Freeman's writing: "it is not always easy to identify the handwriting of minor officials, as they seldom sign the letters they write. It had 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',

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1 R Ross "Te Tiriti of Waitangi" *New Zealand Journal of History* v 6 no 2 (1972) p 132 and footnotes 20-22.

2 Above n 1. This is, indeed, in Hobson's own writing.

3 Hobson's holograph preamble is a single full sheet of foolscap with the watermark "J Simmons 1838" and Freeman's is another single full sheet of foolscap, but with the watermark "Dewdney & Co 1838". Busby's second draft of the articles of the Treaty is also a single full sheet of foolscap but with the watermark "J & J Town Turkey Mill 1838" and so all three sheets are from different paper stocks. It is apparent that officials used any paper available and the watermarks are of no significance, for writing paper from several different stocks was used throughout the period.

IA 1, 40/191, National Archives Wellington."<sup>4</sup> This identification of Freeman as the scribe of the "second set of notes" rests on slender evidence – four words and a signature – but I have no doubt that it is correct.<sup>5</sup> Fortunately, however, many other examples of documents written and also signed by Freeman exist.<sup>6</sup> Both original holographs and subsequent transcripts have evidential value, so long as their filiation is correctly understood, and this is where conventional 'historical evidence' – largely focussed on the *text* (what the words say), rather than the *scripts* (the evidence of penmanship), has let historians down.

The concept of filiation is also useful when the scribal responsibility for the various transcriptions of the Māori text of the Treaty is examined. The original Waitangi sheet (i.e. the document signed on 6 February 1840) is known to be in Richard Taylor's writing. It postdates all the drafts, and it provides the anchor for the subsequent Māori language copies of the Treaty, some dozen of which were prepared for signatures March to April, in various hands, presumably under Shortland's general oversight, soon after Hobson appointed Shortland as Acting Colonial Secretary on 7 March.<sup>7</sup> Some of these derivative filiated copies are by Freeman. As with the later documents concerning Galloway's leave application, it is minor annotations in their hands, such as cipher initials and authentication notes which prove who prepared the documents.<sup>8</sup>

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4 R Ross, above n 1, 133.

5 Galloway's holograph letter of 5 June is to the (Acting) Colonial Secretary, at this time Freeman (Shortland had earlier sailed to Port Nicholson). Freeman thought that Galloway had resigned. The draft response to Galloway, on the same day, is in the hand of Grimstone but is signed by Freeman. The response was submitted to Hobson for approval but Hobson commented "Mr Galloway has not resigned – I permit him to proceed to Sydney in accordance with the medical recommendation. Let him remain on the books until the end of this month. WH". On the next day Felton Mathew added a further letter, also initialled by Hobson, giving the Governor's approval, but noting "it is inconsistent with regulations and would be a bad precedent to grant passage money. WH" On 17 June the letter written by Grimstone was cancelled. The only text actually in Freeman's writing is "for the Colonial Secretary, Ja Stuart Freeman".

6 See, for a good example, Archives New Zealand G 36/1 e.g. Hobson to Gipps 40/8, 5-6 February, pp 16-20.

7 Shortland's patent as Colonial Secretary was only issued on 3 May 1841, no warrant of *dedimus potestatem* having been drawn up for him to act with that authority. This patent and other official documents including Hobson's appointment are in Shortland's papers in the Hocken Library, DUHO-MS-0052. These papers include the official and unofficial correspondence between Shortland and Hobson, some of it written by Freeman as Acting Colonial Secretary in Shortland's absence 27 April to 6 May, during his visit to Kaitiāia. (Colonel Thomas Bunbury's troops arrived on the *Buffalo* on 16 April, and Nias and the *Herald* arrived back at the Bay of Islands on 23 April.)

8 Māori texts of the Treaty now identified as penned by Henry Williams are at Archives New Zealand G 30 /1 pp 25-27, and in Clendon's papers at Auckland Public Library. Both copies were authenticated by Freeman, the former with his cipher and the latter with his 'true copy' annotation and signature. Associated with these are Clendon's letter of 18 March requesting a copy of the Treaty (Colonial Secretary's inward letter 40/61, original now missing) with verso annotations of Freeman and Kemp: "Answered H. Kemp, Interpreter". But this does not establish that the Māori text was copied at that date. When Hobson's despatch no 3 (40/3 to

The 'Government Notice' signed "By His Excellency's Command, for the Colonial Secretary J. Stuart Freeman, Colonial Secretary's Office Russell New Zealand 15 July 1840" (initialled and signed by Hobson on that date) is another good example.<sup>9</sup> The Private Secretary's letter-book at Archives New Zealand (G 36/1 'Extra book of Governor's letters 24 Jan. 1840 – 14 May 1842') is largely in Freeman's hand. This chapter now seeks to establish the correct chronological sequence of the source documents for the Treaty, using such evidence and methods.

### ***I HOBSON'S DRAFT SHEET (ARCHIVES NEW ZEALAND, IA 9/10)***

Hobson's holograph text commences "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 [. . .]" (see Appendix, document 5). This holograph was extensively revised by Hobson himself – various passages have been struck out and others substituted – but it is solely a preamble, and the text breaks off after the words "to concur in the following articles and conditions – ". It has usually been assumed that this preamble was written before the other documents, but I suggest, below, that it was not written until 5 February. The reference to 'the following articles and conditions', by itself, shows that it was written *after* the contributions of both Freeman and Busby. Two further clues are in the removal of 'most gracious' and the use of 'regarding with Her Royal Favour' in place of Freeman's 'viewing with deep solicitude'.

### ***II FREEMAN'S DRAFT SHEET (ARCHIVES NEW ZEALAND, IA 9/10)***

Prepared by Freeman on the *Herald*, this text (see Appendix, document 1) commences with the paragraph:

Her most Gracious Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland viewing 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 empower 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.

Three more paragraphs contain (1) what was to become the third article of the Treaty ("In consideration whereof Her Majesty The Queen extends to the Natives of New Zealand Her Royal Protection and imparts to them all the Rights and Privileges of British Subjects"); then (2) what was to become part the first article (starting "The United Chiefs of New Zealand cede to Her Majesty in

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Secretary of State) was prepared in May 1840 by Grimstone, some pages were marked with his cipher (SEG) and others were marked with Freeman's (JSF) – see G 30 / 1 p 81 (JSF) and 101-103 (both SEG).

9 J S Freeman to W Colenso, 30 November 1840, ATL-MS-Papers-4622.

full sovereignty the whole country" – specifying the latitude and longitude); and, then (3) a rather short clause about pre-emption: (in full this is: "The United Chiefs of New Zealand concede to Her Majesty the Queen of England the exclusive right of pre-emption over such lands as the tribes may feel disposed to alienate").

The draft has various small emendations, probably by Hobson and Freeman, renumbering the articles and altering a few words. In this draft nothing whatsoever is said about chiefly property.<sup>10</sup> In my view, the Freeman sheet is the earliest draft of the Treaty, and was prepared well before either the Hobson holograph preamble or Busby's articles. It was certainly this text which Freeman delivered to Busby for his contribution, because Busby cannibalised the original Freeman reference to "all the rights and privileges of British Subjects". Freeman's sheet was most probably written on 31 January, the day after Hobson formally landed and assumed office. It has long been known that that the notes (written on the passage of the *Herald* and reproduced in *Fac-similes*) were delivered to Busby about 31 January.<sup>11</sup>

### **III BUSBY'S FIRST DRAFT OF THE TREATY, 3 FEBRUARY 1840**

The manuscript 'draft of the Articles of a Treaty with the Native Chiefs submitted to Capt. Hobson 3rd Feby, 1840' (transcribed in the Appendix as document 2) is in the Busby papers at the Auckland Museum Library.<sup>12</sup> It was illustrated by Ramsden in *Busby of Waitangi* (1942) and was "discovered by his grand-daughter Miss Agnes Busby, of Tokomaru Bay, New Zealand, among family papers in 1933".<sup>13</sup> This is the first Busby draft of the Treaty of Waitangi, and comprises three articles only, without a preamble. Busby wrote of the drafting:<sup>14</sup>

When it became necessary to draw the Treaty, Captain Hobson was so unwell as to be unable to leave his ship. He sent the gentleman who was to be appointed Colonial Treasurer [Cooper] and the Chief Clerk [Freeman] to me, with some notes, which they had put together as the basis of the Treaty, to ask my advice respecting them. I stated that I should not consider the propositions contained in those notes as calculated to accomplish the object, but offered to prepare the draft of a Treaty for Captain Hobson's consideration. To this they replied that this was precisely what Captain Hobson desired. The draft of the Treaty prepared by me was adopted by Captain Hobson without any other alteration other than a transposition of certain sentences which did not in any degree affect the sense.

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10 It is most likely that the reference in Appendix document 5 to "just rights and property" was actually derived from Busby, after his draft of the articles was passed to Hobson.

11 See *Fac-similes of the Declaration of Independence and Treaty of Waitangi* (1877) p 5.

12 AR MS 46 F 6.

13 Ramsden, *Busby of Waitangi* (1942) facing p 142.

14 H H Turton (ed) *Facsimiles of the Declaration of Independence and the Treaty of Waitangi* (1877) p 5; AJHR 1861 E—2 p 67.

It is probable that Busby was given a duplicate of the surviving Freeman holograph, but Busby's statement is disingenuous; far from merely transposing 'certain sentences' Busby started – almost from scratch – with three articles, one about the cession of sovereignty from the 'United Tribes' and the independent tribes, a new one about preserving chiefly property, subject to the principle of pre-emption, and one (almost word for word echoing that of the Freeman notes) about the extension of royal protection. He used no preamble. The Freeman draft mentions "the Confederated Chiefs" but does not refer the "United Tribes", instead referring to "the United Chiefs of New Zealand" as the sovereigns who were ceding sovereignty to the Queen.<sup>15</sup> Hobson, as Ross remarks, "had shown himself well aware of the hollowness of its [the Declaration's] pretensions" in 1837 and the Instructions of the Secretary of State (as Ross says) "continued avoidance of any mention of the united or confederated chiefs or tribes" should have dispelled "any theory that Hobson was instructed to treat with the 'confederation' for the cession of New Zealand sovereignty".<sup>16</sup>

Busby's original contribution was the second of the three articles, concerning the protection of property – the matter not hinted at by Freeman in the notes supplied to him. The draft notes by Freeman (presumably with input from Hobson) are concerned almost entirely with the establishment of British Sovereignty. They lay great stress on the benignity of British intentions. Busby, on the other hand, acknowledges the cession "absolutely and without reservation" of "all the rights and powers of sovereignty", rather than "the full sovereignty of the whole country" (intended by Freeman, in a geographical sense). There is a prolix explanatory clause, Busby's own composition, beginning "Now we therefore the Chiefs of the United Tribes of New Zealand being assembled at Waitangi [. . .] and having understood and seriously considered the gracious invitation of Her Majesty the Queen of England and being sensible of our own weakness and inability to repress internal dissension" and going on to refer to the desirability of the establishment of civil Government. And finally there is a qualified yielding of sovereignty, over lands as far south as Manukau and the Thames only, not over the whole country.

As we might well expect, Busby is only really concerned with the territories of the chiefs who had been party to the Declaration of Independence of 1835 – those who had been invited to meet with Hobson ("He Rangatira hoki koe no taua Wakaminenga tahi" – for thou art also a chief of the Confederation). Hobson's intentions, however, were wider than that select group. Hence it is not the sovereignty of the whole of New Zealand that Busby is concerned with, but only "the sovereignty of our territories extending from the North Cape to the Northern shores of the Estuaries of Manukau and the River Thames" (ie the Waitemata and Hauraki Gulf). The southern chiefs, few of whom had any connection with the Confederation, did not fit into this plan. They would be dealt with separately.

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15 For further information on Busby's 'dogmatic' misrepresentations as to his role see Ross, above n 1, 132-133.

16 Ross, above n 1, 131.

It seems to have occurred to Busby, at the last moment, that "the exclusive right of pre-emption over all our waste lands" should be added, to complement the narrower provision of the second article, but the words used here are an adaptation of "the exclusive right of pre-emption over such waste lands as the tribes may feel disposed to alienate" and are clearly adapted from the words of the Freeman notes. In this Busby draft, oddly enough, Hobson is not even mentioned. Busby's task appears to have been to make the three articles more palatable to the chiefs (especially as concerns the retention of their traditional property) and supply the geographical details which would facilitate the cession of such portions of the country as might be obtained by cession (hence the mention of "territories extending from the North Cape" to Manukau and the Thames).

Perhaps Busby felt that he did not need to supply a preamble explaining Hobson's role, assuming that Hobson himself would attend to it. In the case of the 1835 Declaration he gave no preamble either, although a preamble is usual in a legal document such as a treaty. The prolix explanatory clause, however, does pick up a hint of the benign intentions emphasised in Freeman's preamble. The reference to "territories extending from the North Cape to the Northern Shores of the Estuaries of Manukau and the River Thames" hints at the intended progressive extension of sovereignty, once a foothold was established. Busby made several alterations to the first draft, changing "chiefs of the United Tribes" to "chiefs of the Confederation of United Tribes" in two places, but these are minor corrections. Busby does not explain the notion of "pre-emption", which he had taken from Freeman's draft. Retaining this draft, he produced a second draft for Hobson's consideration, presumably on 4 February.

#### ***IV BUSBY'S SECOND DRAFT***

The undated second Busby holograph draft (which is at Archives New Zealand, reproduced in *Fac-similies*) begins in the same way as his first draft (see Appendix document 3 for the transcript). Like the first version, this draft lacks both title and preamble. It contains several trivial emendations, probably added by Hobson on its receipt (for example the substitution of the word "individually" in place of Busby's "severally" appears to be in Hobson's hand). One paragraph on the third page (beginning "And we further yield") was scrawled through (presumably by Hobson, on receipt). It reiterated the reference to the exclusive right of pre-emption (although it specifically refers to waste lands). After the attestation section ("In witness whereof we have attached hereunto our signatures or marks"), intended to name the 'confederated' chiefs, members of the 'w[h]akaminenga', a final paragraph provides for future adherence by the non-confederated chiefs: "And we the separate and Independent chiefs of New Zealand claiming authority over the tribes and territories which are specified after our respective names". Busby still intends to distinguish the 'confederated' chiefs from the individual sovereign chiefs had not been parties to the Declaration of Independence.

The two Busby drafts, however, are quite similar in their ideas, and it is fair to say that this second draft is a fair copy of the other, with some emendations. In the second draft, after the third article, where Hobson's signature ought to be, is "Signature of the British plenipotentiary?" written

in Busby's hand. This looks like a late amendment, as if whether to use the terms 'Consul' or 'Lieutenant-Governor' was still in doubt. Hobson's name is not mentioned here either.

The major changes to the text of the Treaty occurred after Busby's second draft, giving the lie to Busby's claim that he was responsible for the text, aside from mere transpositions. Hobson and his officials first incorporated a preamble (copied from Freeman's notes, ie document 1) and modified Busby's draft to remove much of the prolix attestation clause and geographical specifications. The three articles supplied by Busby, however, were accepted without alteration, including Busby's innovation in the second article. Freeman, the private secretary, was presumably responsible for making a fair copy of the revised document. After Busby's "Now therefore we the chiefs" and the date of their meeting, 5 February, Hobson and Freeman deleted everything after the words "and having understood". At this point a large X has been added to Busby's manuscript, to signal a deletion. Here Hobson cut some forty lines of the text, in which Busby presumed to speak on behalf of the chiefs ("... And being sensible of our own weakness and inability to repress internal dissensions and to defend our country from external enemies ... And having had occasion from past experience of the benignity and good faith of Her Majesty and of Her Majesty's Royal Predecessors" (a reference to the letter of thirteen chiefs to William IV on 1831). All this was, in fact unnecessary, and it was dropped.

After such extensive alterations to Busby's submitted draft, the amended text had to be recopied by the officials – probably by Freeman – to produce the new draft of the Treaty so that this could be translated by Henry Williams. For Busby to assert that the revisions to the text he had supplied were mere transpositions ("without any other alteration than a transposition of certain sentences which did not in any degree affect the sense") is simply not true. Ruth Ross remarked that "Busby's claim to have 'drawn' the Treaty is thus a considerable exaggeration even if allied to the various English versions. His contribution to the Maori text of the Treaty of Waitangi was, as we shall see, minimal." It is clear that Busby was almost solely responsible for the English text of the second article, but he had little effective input into the other two articles.

As most of his attestation clause was rejected by Hobson, and as Busby had no role at all in "drawing" the preamble, his influence was actually rather minor. His contribution to the Māori text as it emerged on 5 February is questionable too, as it hinges on just one word, the preference for 'wakaminenga' ('confederation' or 'assembly') over the alternative 'huihuinga'. It appears that he was consulted as a courtesy, but that, given long-standing official dissatisfaction with his performance as British Resident, he was far less influential than he later pretended.

#### ***V THE OFFICIALS' REVISED (THIRD) ENGLISH DRAFT OF THE TREATY***

The now greatly altered text became the 'third draft' to be delivered to Henry Williams by Hobson himself. The original document given to Williams (and probably written out by Freeman), has been 'lost', as has the file copy which must have been retained for official reference. Hobson himself took one copy to Henry Williams for translation on the afternoon of 4 February. Three

transcripts of this text do survive. Two of these are currently in Archives New Zealand and the other copy is now in Washington. All bear the date 5 February, the actual date of the meeting at Waitangi, rather than 6 February, the date of the day on which the Treaty was first signed. For the variations between the three transcripts see Appendix document 4. The textual discrepancies all appear to be scribal errors, rather than differences of official intention.

The earliest of the three extant transcripts, and is at Archives New Zealand G 30/1 pp. 29-32. This despatch (Hobson to the Secretary of State, Normanby, with enclosures intact) is numbered 40/1 in the typed list which begins the volume, the documents being batched according to the availability of ships to carry them.<sup>17</sup> The first despatch (sent 16 February and received at the Colonial office on 28 September 1840) commences with a letter to Normanby dated 16 February and is in the writing of James Stuart Freeman 'Chief Clerk' and is signed by Hobson. The documents to accompany it, however, are enclosures addressed to Governor Gipps.<sup>18</sup> These documents appear to be original duplicates despatched on the vessel *Martha*, forwarded on by Gipps, as the *Martha* copy of 40/8 is missing from the papers in New South Wales.

The question then arises as to who penned this document, for it is not in the usual script of Freeman. It is not authenticated by a cipher or signature. A careful comparison of the writing, however, and particularly characteristics of the formation of upswept capitals on R and N (Royal Navy and Roiara Nawi) in the preamble shows that the same scribe produced the English text at G 30/1 pages 29-32, and the Māori text almost immediately before it at pages 25-27. The writer was Henry Williams himself, but it appears that this text was sent by mistake, the intention being to have sent the 'official text' rather than the Freeman draft.

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17 Despatch details are recorded (usually) in the letter book Archives New Zealand G 36/ 1. Despatches 4 and 5 are missing from the G 30/ 1 volume. The duplicate despatches were acquired as part of the now dispersed "National Historical Collection" organised by Scholefield.

18 They begin with despatch to Gipps (numbered 40/13 and dated 17 February, the date of the printing of the Treaty) and this despatch is entirely in Freeman's writing (pp 5-15), matching the text of Hobson to Gipps 40/13 in Archives New Zealand G 36/ 1 pp 23-28 (which is in Freeman's hand). Next follows a long despatch to Gipps ("No. 8" ie 40/8) dated 5 February (pp 17-24) with Hobson's account of the treaty presentation, a transcript of the Treaty in Māori (pp 25-27, authenticated by Freeman), then a printed copy of the Treaty in Māori (p 28) and finally a transcript of the English draft of the Treaty, pp 29-32). This corresponds to the transcript of the despatch in G 36/ 1 pp 11-20 which is marked 'despatched per *Samuel Winter* 8 Feb.' and also 'supplied copy to S of State, Copy forwarded per *Martha* to Sydney 20 February 1840.' Finally, Hobson to Gipps, 4 February, "no. 6" gives an account of Hobson's official landing (pp 33-34) and a memorial ('Be it remembered . . .') of two pages and printed copies of the two Hobson Proclamations of 30 January. All of these documents were within the despatch to the Secretary of State 40/1, prepared by Freeman. The despatch was sent per *Achilles* (which visited New Zealand in February 1840) and the despatch was received in London on 28 September 1840, according to dated stamps of receipt. With it was sent Hobson's despatch no. 2 to Normanby, dated 17 February, and this is also in the writing of Freeman, with Hobson's signature (pp 40-55).

One might have expected that the primary (*Samuel Winter*) copy of 40/8 (the one sent to Gipps and forwarded by him to the Secretary of State, and the extant copy now at PRO CO 209 / 7, 13-15) and which was signed by Hobson and Henry Williams, (marked "[To] accompany copy [of] despatch No. 40/8") would be identical. But they are not! For the 40/8 (with complete attachments) at Archives New Zealand G 30/ 1, contains a copy of the Freeman second draft, with the date as 5 February, rather than the "official text" of the Treaty, dated 6 February (see Appendix document 6).

The second transcript of this 5 February text (in the same volume G 30/ 1, 75-78) is by Samuel Edward Grimstone, and is more accurate than the first.<sup>19</sup> The third transcript (in Washington, DC) has a very complex history but it also has an excellent provenance. The examination of this avowed "copy" has solved the problem presented by the drafts of the English-language treaty, for this copy is in the writing of the American Consul, James Reddy Clendon, and is clearly marked 'Copy' in Clendon's hand. It was included in Clendon's despatch no. 7 to the US Secretary of State, in July 1840. It is probable that Clendon copied it directly from the official file copy (then in the Colonial Secretary's office but subsequently lost). The elucidation of the relationship of these three transcript copies will be explained in a later section (Chapter 7).

None of the three transcripts of Freeman's second draft was discussed by Orange (in *The Treaty of Waitangi* (1987)) but they were mentioned by Ruth Ross in 1972 (pages 134-135, notes 31 to 137), whose account is generally accurate.<sup>20</sup> She observed that there are differences in wording in 'versions' (texts in English) sent to Gipps (Henry Williams's transcript) and Normanby (Grimstone's transcript) but she recognised that the discrepancies are mostly "minor, of significance only because there are differences, two of the texts have a different date, differ substantially in the wording of the preamble from the others" and "from each other at one very critical point in the second article" (the omission of a line in the text transcribed by Henry Williams). But Ross was not able to establish the chronological order of these 'versions'. Easton (citing Ross) also notes them as versions but appears to assume that, as the copies postdate the signing, they must be later erroneous translations from the

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19 This document is in the third despatch from Hobson to Normanby, 23 May 1840, which includes Hobson's report of his commissioning the missionaries to obtain signatures to the Treaty, for the purpose of which they were supplied with MS copies of the Treaty in Māori. The English text follows a copy of the letter from Hobson to Henry Williams, and so it appears that the 'official text' was to have been used – but by some mistake (which Henry Williams ought to have recognised) it was the superseded draft, rather than 'official text' which was copied, by mistake. Grimstone, it would seem, thus repeated the error made by Freeman when he sent the draft rather than the official text in February. The duplicate despatch 40/3 also includes two copies of the printed text of the Treaty and the instructions to Bunbury, but not a copy of the 'official' English text.

20 Ross refers to "five English versions" in place of 'the English Version' (p 134) but these are three copies of the "official text" ('Her Majesty Victoria') and two copies of the 'Her most gracious Majesty' draft, analysed below. Ross points out, in her note 70, that the certified copy transposes the words of the Royal Style ('Her Majesty Queen Victoria' instead of 'Her Majesty Victoria, Queen'). The word 'version' was ill-chosen. Ross does not appear to have known of the Clendon transcript.

Māori text.<sup>21</sup> There are two related problems to be solved. The first problem involves the correct identification of the scribes responsible for the documents and the second involves the evidence of textual filiation depending on the establishment of the sequence of the documents. The first of these has been resolved above; the second is addressed below.

As Ross also observes, there is a suggestion of haste and "a considerable degree of carelessness, or cynicism, in the whole process of treaty making".<sup>22</sup> But there may also have been an element of too many cooks spoiling the broth. Henry Williams certified an English text as a 'translation' when it was plainly a modified version of an English-language text (which had *always* been in English), and Hobson either did not notice the fact, or thought it unimportant. Ross and some others have noticed this, but many have not. What can best be called 'Freeman's revised draft' (since it uses his original preamble, with other elements from Busby) is what Henry Williams was asked to translate. Freeman's text is given as document 4 in the Appendix. The revised draft preamble (as transcribed by Henry Williams, with his capitalisation) is:<sup>23</sup>

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 empower and authorise 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.

This preamble is exactly the same (disregarding capitalisation, always variable at this period) as that prepared by Freeman, with Hobson's corrections, around 31 January (see Appendix document 1). The holograph preamble by Hobson (Appendix document 5) is quite different from Freeman's, but it is ancestral to the preamble of the "official text". Hobson's holograph text of the preamble (after the deleted and discarded passages are taken out) says:

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 extent 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 which they

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21 B Easton, *Archifacts* April 1997 p 29

22 Ross, above n 1, 135.

23 The other two transcripts have "Her Majesty's Subjects" rather than "Her Subjects" and both conclude "articles and conditions" rather than "articles".

may be willing to place under her Majesty's Dominion. Her Majesty therefore being desirous to establish a settled form of Government with a view to avert the evil consequences which must result from the absence of necessary Laws and Institutions alike to the Native Population and to her Subjects Has been Graciously pleased to empower me William Hobson a Captain in Her Majesty's Royal Navy Consul, and Lt Governor [& Lt Governor of such parts of New Zealand as may hereafter be ceded to Her Majesty<sup>24</sup>] in New Zealand to invite the Confederated & Independent Chiefs of New Zealand to concur in the following articles & Conditions —

This text by Hobson is almost twice as long as Freeman's earlier one, and is different in emphasis, but is almost exactly the same as that forming the 'official' English text of the Treaty, as authenticated by the signatures of both Hobson and Henry Williams (the despatch sent on the *Samuel Winter* to Gipps, and forwarded by him to Normanby (compare Appendix document 6). The main textual discrepancy is that the phrase "of those Islands which they may be willing to place under Her Majesty's Dominion" has been truncated to "of those Islands" in the text dated 6 February. This time both the 'confederated' and the 'independent' chiefs are mentioned (the Freeman revised draft does not mention the 'independent' chiefs) and this is further evidence for the suggested filiation.

When we compare Freeman's second draft preamble with his earlier version (documents 1 and 4) and then with the 'official text (document 6) it can be seen that Freeman's preamble was altered to make the Treaty more palatable, to make the British intentions more prominent, and to better emphasise their benignity. The revisions also reduce the emphasis placed by Busby on the 'Confederation' – a body which had never actually existed but which needed to be acknowledged so that its imagined 'sovereignty' could be formally repudiated. This is why there is a pointed reference to the "absence of necessary laws and institutions" (the 'confederated chiefs' had not established any of these, and the British would supply what the 'confederated chiefs' had clearly failed to do).

The "confederation of the United Tribes" makes its appearance in the first article, which immediately follows the preamble. Its surviving members (and their heirs) were specifically invited to the meeting with Hobson in order to sign their sovereignty away. This is the whole point of the first article. The text of the first article as given here is exactly the same as that in Busby's 'First Article', as transmitted to Hobson.

The second article, as given by Freeman, is similar to the text provided by Busby to Hobson, and appears to have been transcribed from that, line for line. But in the sixth line the scribe left out the words "and Estates Forests Fisheries" (as a result Freeman's text is "undisturbed possession | of their Lands and other properties | which they may", instead of "undisturbed possession | of their Lands and Estates Forests | Fisheries and other properties | which they may"); it is thus apparent that

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24 This passage is marked with a carat mark to indicate an insertion, but the grammar was corrected for the "official" text, to avoid mentioning Hobson's position twice. (Compare text in Appendix, document 6).

this is an accidental omission, not a deliberate one. The other two extant transcripts of this text both include the words omitted (see Appendix document 4). The error does not affect the sense in the slightest because "other properties" is inclusive of "Estates Forests [and] Fisheries".

The short third article, as transcribed by Freeman, is exactly the same as that provided by Busby. The other two transcripts (by Grimstone and Clendon) also use exactly the same text. The absence of either a place for Hobson's name or title, in Freeman's document, may indicate that it was not given in the master draft copy, but may equally be another case of an omission. For comparison, the Freeman transcript of the Māori text of the signed Treaty has the text "(signed) William Hobson, Consul & Lieutenant-Govern[or]" preceding the attestation (as it should). In both Grimstone's and Clendon's English language transcripts of the draft it appears at the very end (as "Signed W Hobson" for Grimstone and "(Signed) W Hobson" for Clendon). This is further evidence that these three transcripts are copies of a draft Treaty. Henry Williams's transcribed English text of 5 February, and his Māori text of 6 February, are only two pages apart in the same despatch. The attestation clause ("Now therefore we the chiefs [. . .]") is dated "on the fifth day of February" in Henry Williams's transcript, and in Grimstone's and in Clendon's. It is likely that the three scribes copied from the same source document, and that Hobson's designation and the placement of his signature had not been decided when the current draft was written.

Henry Williams was given a copy of this draft text in English to translate about 4pm on 4 February, and Ross considered that it was a composite of the "draft notes of Hobson, Freeman and Busby".<sup>25</sup> As Busby's second article was already incorporated in Freeman's second draft, it is unlikely that any of the earlier drafts were seen by Henry Williams, at the time Hobson delivered Freeman's second draft to him. I think it more probable that Hobson's holograph preamble was created when Hobson and Williams met, and before the translation was attempted, so that difficult expressions could be discussed privately. Until this point nothing had been done to produce a text in Māori. Busby had not attempted one (although it is clear that he was quite capable of writing one, as he had drafted the invitation in Māori for Colenso to print, and he provided a back translation of the Treaty text from Māori into English subsequently – see Appendix document 8). As recently as 16 December Busby had produced a long and complicated land deed in Māori, with a parallel text in English.<sup>26</sup> Why did Hobson ask Henry Williams to do the translation rather than Busby? Was it, perhaps, because the missionary was less compromised than the speculator at 'Victoria', the fictional township at Waitangi? Or was it that courtesies to Busby had gone quite far enough? We can only speculate as to the motives.

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25 This is the document which Easton calls HB, see B Easton, *Archifacts* April 1997 p 24. R Ross, *New Zealand Journal of History* v 16 no 2 (1972) p 135.

26 Holograph of Busby witnessed by Charles Creed and others including the chief Tirarau, a Treaty signatory, in ATL-MS-Papers-2624-6.

## CHAPTER 4

# HENRY WILLIAMS AND THE DRAFT TREATY

A 'literal' translation of Hobson's text into Māori was not achievable by Henry Williams – and probably not by anybody. The very idea of 'literal translation' is suspect, as any translation involves some element of interpretation.<sup>1</sup> Henry Williams was quite well aware of that and Claudia Orange acknowledges as much, when she quotes Henry Williams himself as saying: "In this translation it was necessary to avoid all expressions of the English for which there was no expressive term in the Maori, preserving the entire spirit and tenor of the Treaty."<sup>2</sup> As Orange notes, such words suggest that Henry Williams deliberately recast the wording to better express the intended sense "as translators often do".<sup>3</sup> But he also had the opportunity to modify the draft English text prior to translating it, so as to make the subsequent translation easier. Hobson, between 6 February and 12 February (the date of his despatch to Gipps) provided not only a Māori text but also an authenticated English-language text. This authenticated text is in Freeman's hand, but is signed by Hobson and by Henry Williams, and bears the annotation "I certify that the above is as literal a translation of the Treaty of Waitangi as the idiom of the language will admit of. [signed] Henry Williams" (this is a genuine Williams signature); it was produced to accompany the *Martha* copy of despatch no. 40/8, by which time the collection of signatures stood at 52 from Waitangi and 78 from Hokianga, gathered on or before 12 February.<sup>4</sup>

The problem is that this English text is not, despite the assertion, a "translation". In fact it corresponds in every respect (aside from the odd lapsus calami) to the "official English text" of the

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1 See B Biggs "Humpty-Dumpty and the Treaty of Waitangi" in *Waitangi Maori and Pakeha perspectives of the Treaty of Waitangi* (1989).

2 C Orange, *Treaty of Waitangi* (1987) pp 39-40, quoting Carlton, *Henry Williams* v 2 p 12.

3 C Orange, *Treaty of Waitangi* (1987) p 40.

4 PRO CO 209/7, 13-15. This ought to be the *Martha* copy, sent on 20 February, as the *Samuel Winter* copy was sent on 8 February, before the Hokianga meeting on 12 February which this note refers to. GBPP 1840 (560) pp 9-10, however does not contain the authenticating note and signature of Henry Williams. See also Archives New Zealand G 36 1, letter 8, for information on the transmission of these copies.

Treaty, also known from the Waikato Heads signed copy of the Treaty (at Archives New Zealand), and from the later bilingual transcript preserved at the Public Record Office, London.<sup>5</sup> But this is, in fact, a pre-translation English draft text just slightly changed to give the date as 6 February, instead of the 5th. There is no authenticated "translation of the Māori text" from Henry Williams into English at all, unfortunately!

Recently, it has been asserted by Moon and Fenton that Henry Williams "decided to mistranslate the treaty" and that he indulged in what they term "conscious mistranslation of key concepts of the treaty".<sup>6</sup> Moon and Fenton themselves, however, rely on a later translation of the Treaty text by Kawharu, which itself is a contrived and inauthentic re-translation of the original language.<sup>7</sup> These "Williams mistranslations" lead Moon and Fenton to the conclusion that the second article of the treaty "promised to the Maori signatories the same sovereignty that they were supposedly ceding under the first article of the English version" – a patent absurdity.<sup>8</sup> Henry Williams is then portrayed, by Moon and Fenton, as a devious manipulator:<sup>9</sup>

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5 PRO CO 209/7 p 178, in Hobson's despatch no 7 to the Secretary of State. The duplicate of this despatch (at Archives New Zealand, G 30 /1 with enclosures A-K records "a certified copy of the treaty into English and native language with the names inserted of the chiefs who signed it" (pp 140-141) with documents in several hands including those of Kemp, Freeman and Grimstone, but a certified copy (in either Māori or English) is not present.

6 P Moon & S Fenton, "Bound into a fateful union: Henry Williams' translation of the treaty of Waitangi into Maori in February 1840" *Journal of the Polynesian Society* 111 (1): 51-63 (2002). "He did not deny that the English text of the treaty could be translated into Maori. Instead he deliberately stated that ". . . it was necessary to avoid all expressions of the English" for which he suggested there was "no expressive term" in Maori. It is these two segments that cast doubt on Williams' sincerity and intention to translate the English text of the treaty into a Maori text equivalent in meaning and function to the original and suggest there were other germane considerations." (p 55). Similar claims of deliberate mistranslation appeared in Moon's *Te Ara ki te Tiriti* (2002) pp 139-149.

7 "As if to reinforce the point that the sovereign power of the chiefs was in no way threatened by the terms of the treaty – and thereby giving added incentive for the chiefs to sign the agreement – Williams again interpolated a term in the Treaty that, this time was completely at odds with the English version, in which sovereignty was ceded to the Crown. In the second article of the Maori version (in literal back translation into English) the relevant portion reads: "The Queen of England agrees to protect the chiefs . . . of New Zealand in the unqualified exercise of their chieftainship, over their lands, villages and all their treasures (Kawharu 1989; 321)". Moon and Fenton p 58, quoting Kawharu (ed.) *Waitangi: Maori and Pakeha perspectives* (1989) p 321, quoting Kawharu's "attempt at reconstruction of the literal translation" – which is the text which Kawharu would have liked to exist (with its interpretation of "taonga" as "treasures" rather than as "property" as was plainly intended) see Kawharu *op cit*, p 320 footnote 8). The Kawharu translation of "tino rangatiratanga" ("high chieftainship" is the expression intended by Williams) as "unqualified exercise of their chieftainship" is another mistranslation (see below).

8 Above n 7, 58.

9 Above n 7, 59.

This formidable achievement, done with such precision and care that no-one present at Waitangi on 5 and 6 February 1840 even noticed it, could only have been executed by someone who was extremely fluent in Maori and English. In both Article the first and Article the second, the Maori text was cunningly manipulated to give the impression that it was a competent translation of the English version of the treaty. Yet, in the critical area of the transfer of sovereignty Williams succeeded in devising, in the Maori text, a meaning that was fundamentally at odds with the English version.

But, as John Laurie has observed in his critique of Moon's argument, their case is one of advocacy rather than history.<sup>10</sup> Williams was not selected to translate the Declaration and the Treaty (in 1835 and in 1840 respectively) on account of his fluency or oratorical skill, but because he was the senior missionary present. His long supervision of the affairs of the Church Mission at New Zealand, and perhaps above all his knowledge of the desires of the Church Missionary Society, in its long campaign against colonisation, fitted him well for the task. Thus writes Laurie: "There were actually no existing Maori words which Williams could use to express the concepts of ownership, citizen rights and sovereign power in a state system."<sup>11</sup> The spirit and sense of the whole document had to be addressed, rather than the word-by-word or clause-by-clause approach of legal pettifoggers. The second article of the treaty merely assures the chiefs that their property would remain theirs. No surrender of 'mana' was envisaged, and the term 'mana' is not mentioned in the Treaty. That term is not an appropriate translation of 'sovereignty' in 1840, even if it was mentioned, in a parenthetical sense for 'authority', in 1835. The allegation by Moon and Fenton of a "litany of verbal misrepresentations" is nonsense. Walter Mantell, who did understand 19<sup>th</sup> century Māori, was closer to the mark when, in 1869, he described Henry Williams's translation into Māori as "execrable".<sup>12</sup> This was an 'execrable' translation of the original English.

Henry Williams himself, in an unpublished memorandum called "Early Recollections" (compiled for his son-in-law Hugh Carleton "some years since" relates; "On the 4<sup>th</sup> of February, about 4 o'clock pm, Captain Hobson came to me with the Treaty of Waitangi in English, for me to translate into Māori, saying that he would meet me in the morning at the house of the British Resident, Mr Busby".<sup>13</sup> Little information has come down to us about the process of the translation except brief remarks about modifications to the Māori text on the morning of the following day, 5 February. Henry Williams probably provided his translation on 5 February, as a means of explaining the nature of his alterations to Busby's terminology. There was a small dispute, on 5 February, over whether to use 'huihuinga' (gathering) or 'whakaminenga' (Busby's term for

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10 J Laurie "Translating the Treaty of Waitangi" *Journal of the Polynesian Society* v 111 (3) (September 2002) p 255.

11 Above n 10, 257.

12 *NZPD* 1869 v 6 p 261.

13 H Carleton, *The life of Henry Williams, Archdeacon of Waimate* (1874, 1877) v 2 p 12.

'Confederation') and Busby seems to have won that dispute, because the formal disestablishment of the imaginary corporate body was necessary. It would be acknowledged so it could be dismissed.

From the point of view of the official party on 5 February, the two texts were supposed to be equivalent legally and linguistically, but in reality they were not. The composers of the two final texts (Māori and English) had done the best they could, given the urgency of the matter and the fact that the most able translators (William Williams and Robert Maunsell) were not available. The translation of the draft treaty and its purported back-translation both by Williams, placed him in the crucial position to express both the intentions of Hobson and to assess the likely effect of the Lieutenant-Governor's words on the chiefs. It is highly likely that when Williams received the final Hobson draft, he recognised that some aspects of it would not prove conducive to a rapid cession.

By 5 February Hobson's "regarding with Her Royal Favour" had already replaced Freeman's "regarding with deep solicitude"; and "the Native Chiefs and tribes of New Zealand and anxious to Protect their just rights and property" (the idea added by Busby) had been introduced into the preamble by Hobson. The reference to the advantage of settlement ("to secure to them the enjoyment of Peace and good order") had been introduced in advance of the reference to extensive emigration (the "extensive settlement of British Subjects therein" had been toned down). Next, the negative and threatening tone of "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" had been changed to become a reference to an anticipated boon: "a settled form of civil government with a view to avert the evil consequences".

Finally Hobson introduced himself as a functionary "properly authorized to Treat" for the Queen's authority and the "Confederated and Independent chiefs of New Zealand" were invited to "concur" – rather suggesting "take it or leave it". They were not invited to "treat" for what might be ceded. There was really no attempt to traverse possible amendments, put forward by chiefs, at any point. The die had been cast. Intermediate between Hobson's first attempt at his preamble – on the first two pages of his holograph sheet – is the reconsidered paragraph "Her Majesty therefore being desirous to establish a settled form of civil Government [ . . . ]". The potentially alarming reference to the "evil consequences which must result" appears on the third page of the sheet (left column, substituting from rejected wording in the right hand column). We do not know precisely the date on which this sheet was written (it may have been either 4 or 5 February) but it must have been prepared before the translation took place, so 4 February is the more probable.

### *I 'WAKAMINENGA' V 'HUIHUINGA'*

The document on the table on 5 February (and which according to Colenso had been under discussion between Henry Williams, Busby and Hobson during the levée: "engaged within translating the treaty, and arranging other preliminary matters") was essentially still in English, whether it was Freeman's "Her most gracious Majesty, Victoria" version or Hobson's "Her Majesty Victoria" version. At some point in the proceedings Henry Williams adopted the term

"wakaminenga" (given its last hurrah at Busby's wish) to recognise the status of the Confederated chiefs, and this was the word used when the translation was read to the gathering shortly after.<sup>14</sup> The MS draft for the Māori text was altered at this point, necessitating the preparation of a fresh transcript with the alteration.

But the agreed English version had been simplified at the point of translation. The formal reference to the Royal Style (correctly 'Victoria, Queen of the United Kingdom of Great Britain and Ireland') was altered, when translated, as "Wikitoria, te Kuini o Ingarani" (ie 'Victoria the Queen of England'). The same simplified form of the Royal Style appears in the English text of the articles themselves. But many other simplifications were also made, and the character of these simplifications can readily be established from half a dozen back-translations from the Māori text into English which appeared in the next few years. These are given in the Appendix as documents 7-13. The full text of the Māori preamble is given below, broken into short sections to enable easy comparison of the six contemporary back-translations:

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 tatou 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 wakaetia 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 na nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kau 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 Hopihana he Kapitana i Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aianeī amua atu ki te Kuini e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era atu enei ture ka korerotia nei.

**"Ko Wikitoria te Kuini o Ingarani"** (Victoria the Queen of England) is agreed on by all six translators.

**"I tana mahara atawai"** is a general expression of the Queen's benevolent intentions and, although alternative expressions in other back-translations vary considerably, they all convey similar ideas. The earliest of these, by Davis, has "her gracious remembrance" but Busby has "her gracious consideration", an Anonymous version in Clendon's papers has "her merciful regard" and Gordon Brown has "affectionate remembrance" while S McD Martin has "her kind remembrance", and E J Wakefield has "gracious remembrance".

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14 H Carleton, *The life of Henry Williams, Archdeacon of Waimate* (1874, 1877) v 2 p12.

**"Nga rangatira me nga Hapu o Nu Tirani"** (the chiefs and the *hapū* (subtribes) of New Zealand): Davis has "Native chiefs and tribes in New Zealand" but Busby has "chiefs and people of New Zealand". Anonymous, and also Brown, Martin and Wakefield all have "chiefs and tribes of New Zealand". The anomalous variant is Busby's with "people" rather than "tribes". This has been made much of by the polemicist Ross Baker, but Baker makes the elementary error of thinking that "people of New Zealand" meant both Māori and Europeans – which was certainly not Busby's understanding.<sup>15</sup>

**"I tana hiahia . . . to ratou wenua"** Davis has "and through her desire to preserve to them their chieftainship and their land" but Busby has "and her desire to preserve to them their land". Anonymous has "her desire also to reserve to them their chieftainship and their lands" (with 'rank as chiefs' as a correction). Brown has "desires to point out to their chieftainships in their lands &c" and Martin has "and by her desire to preserve to them their chieftainship and their land" and Wakefield has "in her desire that the chieftainships and their lands". Again it is Busby's version which omits reference to 'chieftainship', an omission which is particularly surprising, unless he thought that sovereignty and chieftainship were inseparable.

**"a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki"** Davis has "and to preserve peace and quietness to them" but Busby has "and to maintain peace and order amongst them". Anonymous has "and that peace may continue to them, and quiet also" and Brown has "that they may keep in peace and live in comfort", Martin has "and let peace ever remain to them and to live in quietness" and Wakefield has "should be secured to them and that obedience should also be held by them, and the peaceful state also".

**"kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira"** Davis has "has thought it right to send them a gentleman" but Busby has "has been pleased to appoint an officer". Anonymous has "has considered it a right thing to send hither a chief" and Brown has "thinks it right to send an English chief" while Martin has "she has thought it a right thing to send here one chief" and Wakefield has "she has considered it a just thing, to send here some chief". Busby's refusal to recognise his successor as a 'chief' may only be semantic, but everyone else seems to have recognised that Hobson was to become a chief treating with other chiefs.

**"hei kai wakarite ki nga Tangata maori o Nu Tirani"** Davis has "to be her representative to the natives of New Zealand" but Busby says nothing about representation. Anonymous has "as a negociator with the native people of New Zealand" Brown has "to advise with the natives of New Zealand" and Martin has "as an overlooker of the aboriginal men of New Zealand" and Wakefield has "to be a person to arrange with the native men of New Zealand". 'Kaiwakarite' was subsequently

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15 The expression "people of New Zealand" has been much promoted, in a series of works, by the pamphleteer Ross Baker, of the "One New Zealand Foundation", to make a political point, albeit one fundamentally mistaken. See eg Baker's *From treaty to conspiracy: a theory* (1998) and his *He iwi tahi tatou we are now one people – New Zealanders* (1992).

used for 'Judge', but it is not a very appropriate term to have chosen. It is quite possible, however, that Henry Williams was intending to draw a biblical reference to judges as lawmakers. The variety of translations chosen in these six versions does, at least, suggest that there was room for confusion as to Hobson's level of authority. Perhaps this is also signified by his ambiguous status as (briefly) 'Consul' (as distinct from 'Resident' – Busby's status), and 'Lieutenant-Governor' (but 'Kawana' in Māori, which might invite confusion with 'Governor Gipps'). So 'representative' or 'negociator' or 'advisor' or 'overlooker' or 'arranger' – it was anybody's guess what his function was, especially as the arrangements were necessarily provisional, at least until British sovereignty was officially asserted by proclamation in the future.

**"kia wakaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga waihikatoa o te wenua nei me nga motu"** Davis has "Let the native chiefs in all parts of the land and the islands consent to the Queen's government" but Busby has "to treat with them for the cession of the sovereignty of their country and the islands adjacent to the Queen". Anonymous has "Let the native chiefs consent to the government of the Queen at (or over) the places of this country, and the islands", Brown has "that they may accept the government of the queen over all their lands and islands" and Martin has "that they, the native chiefs may consent to the kawanatanga of the Queen in all places of the land and the islands" (Martin has an explanatory footnote: "Kawanatanga is not a native word; it has been used by the missionaries since the arrival of Captain Hobson to express 'Governorship'"). Wakefield has "that the Governorship of the Queen may be assented to by the native chiefs in all places in the land and of the islands". Busby is the only person to use "sovereignty", but 'government' and 'sovereignty' were not the same thing. It would hardly be helpful to speak of the 'governorship of the Queen' in the same breath as the 'governorship of Hobson'! "Waihikatoa" the 'word' employed by Richard Taylor, is actually 'wahi katoa' (all the places) and was correctly given in the later transcripts.

**"Na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere na nei."** Davis has "Now, because there are numbers of people living in this land, and more will be coming" but Busby has "Seeing that many of Her Majesty's subjects have already settled in the country, and are constantly arriving". Anonymous has "Because also a considerable number of the people of her nation have dwelt in this land and are coming hither." Brown has "Because there will be thousands of the Queen's subjects to reside in the lands, and they are coming." Martin has "because a great many people of her tribe have settled in this land and are still coming." Wakefield has "Because too many together are the men of her tribe who have sat down on this land and are coming hither." Only two of the six specifically mention the Queen's 'subjects' (nga tangata o tona iwi) but all understand the sense of the expression and all emphasise the large scale of the intended immigration of the Queen's 'iwi'.

**"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"** Davis has "The Queen wishes to appoint a Government, that there may be no cause for strife between the natives and the Pakeha who

are now without law" but Busby has "And that it is desirable for their protection, as well as for the protection of the natives to establish a government amongst them." Anonymous has "Now the Queen is desirous that the government should be made strait (settled) that the evils may not accrue to the native people and foreigners who are living without law." Brown has "The queen is desirous of establishing a government that all the evils now upon the natives from the English living in idleness and lawlessness may be removed." Martin has "Now the Queen is desirous to explain the Kawanatanga, that no evil may result to the aborigines or to the Europeans living without law" and Wakefield has "Now, it is the Queen who desired that the Governorship may be arranged that evils may not come to the native men, to the white who dwells lawless."

**"Na kua pai te Kuini kia tukua a hau a Wiremu Hopihana"** Davis has "It has therefore pleased the Queen to appoint me, William Hobson" and Busby has "Her Majesty has accordingly been pleased to appoint me William Hobson". Anonymous has "Now the Queen has been pleased to appoint me William Hobson" and Brown has "Now the Queen is pleased to send me William Hobson", Martin has "now it was good for the Queen to let go me, William Hobson" and Wakefield has "Now the Queen has been good that I should be sent, William Hobson".

**"he Kapitana i Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani, e tukua aianei amua atu ki te Kuini"** Davis has: "a Captain in the Royal Navy, Governor of all parts of New Zealand, which shall be ceded now or at a future period to the Queen" Busby has "a captain in the Royal Navy to be governor of such part of New Zealand as may now or hereafter be ceded to Her Majesty". Anonymous has "a captain in the Royal Navy to be governor for all the places of New Zealand which shall now or hereafter be let go to the Queen" and Brown has "Capt RN as Governor for all the land of New Zealand, which will at another time be given to the Queen." Martin has "he Kapitana o te Roia Nawi (footnote: "is some kind of gibberish which cannot be translated") as Kawana for all the places of New Zealand given up now and after to the Queen" and Wakefield has "a Captain in the Royal Navy, a Governor for all the places in New Zealand that are yielded now or hereafter to the Queen".

**"e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era atu Rangatira atu enei ture ka korerotia nei"** Davis has "She offers to the Assembly of the Tribes of New Zealand, and to all the other chiefs the following laws" and Busby has "and proposes to the chiefs of the confederation of the native tribes of New Zealand and the other chiefs to agree to the following articles". Anonymous "She says to the chiefs of the confederate tribes of New Zealand and the other chiefs these terms (or laws) here mentioned", Brown has "The Queen says to the collection of the tribes of New Zealand and all the other tribes these are the laws we have spoken of". Martin has "saying she is to the chiefs of the assembly of the tribes of New Zealand and other chiefs besides these laws spoken" and Wakefield has "She says to the chiefs of the Assemblage (Confederation) of the tribes of New Zealand, and other chiefs besides, these laws which shall be spoken now."

While there are some peculiarities of individual transcripts, the common foundation of these back translations is evident enough. It can be paraphrased as follows:

Victoria, the Queen of England in her gracious consideration for the chiefs and tribes of New Zealand, and through her desire to preserve to them their chieftainship and their lands, and to preserve peace and order among them, has thought it fitting to send a gentleman to be her representative to them. Let the native chiefs in all parts of the land and the islands consent to the Queen's government. Now the Queen is desirous that a government should be established so that evils may not occur to either the native people or to foreigners who, alike, are living without law. It has therefore pleased the Queen to appoint me, William Hobson, a Captain in the Royal Navy, Governor of all parts of New Zealand, which shall be ceded now or at a future period to the Queen. She offers to the Assembly of the Tribes of New Zealand, and to all the other chiefs the following laws.

This simplified text can be compared with the rather constipated 'official English text' authenticated by Williams and Hobson, and the even more formal text of the preamble earlier devised by Freeman.

## II 'TE TINO RANGATIRATANGA'

Much confusion has resulted from a neologism "tino rangatiratanga" which was introduced into the text at the point of translation. It is worth spending some time to clarify this point. The signal phrase "te tino rangatiratanga" occurs once only in the Māori text of the Treaty, but it has been invoked repeatedly, at least over the last decade. The phrase "te tino rangatiratanga" and the phrase "tino rangatira" are not authentic Māori expressions. In fact "tino rangatira" is a piece of missionary Māori, coined by William Williams in 1833, when he was asked to translate into Māori a letter announcing the appointment of James Busby as British Resident: *Letter of the Right Honourable Lord Viscount Goderich and address of James Busby . . .* (translated as *Ko te pukapuka o te tino rangatira o Waikautā Kōrerihā me te kōrero o Te Puhipi ki nga rangatira o Nu Tirani*).<sup>16</sup>

The 'tino' as employed here means 'high' in the sense of 'eminent' and was employed in the same sense in 1836, when another Secretary of State for the Colonies (Lord Aberdeen) wrote to "his highness Titore", thanking that 'high chief' of Ngāpuhi for a gift of spars and a valuable *mere pounamu* which Titore had sent as a gift to King William IV. King William sent, as *utu*, a suit of armour for "his highness Titore" and Busby oversaw the presentation of the gift, which still survives, along with the covering letter. The phrase was also used in the first sentence of Busby's 'declaration of independence' of October 1835 (as translated from the original English by Henry Williams: "Ko matou ko nga tino rangatira o nga iwi o Nu Tireni . . ."). The intended meaning is "high chief" and the expression is naturally modified to become "tino rangatiratanga" ie high chieftainship. And that is how the phrase ended up in the Treaty of Waitangi, also prepared by

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16 See Parkinson & Griffith, *Books in Māori 1815-1900* (2004) p 42, entry *BiM* 20 for details.

Henry Williams, with input from Busby. No Māori had anything to do with the formulation of either the English or Māori texts of the document, and the same is true of the Treaty five years later.

Māori in general and Ngāpuhi in particular were averse to the idea that any chief was 'higher' in rank than any other – such matters being matters of whakapapa – and even the suggestions that Hongi Hika (Ngāpuhi) or Murupaenga (Ngāti Whatua) were of exceptional status was rejected when Marsden had made that suggestion in the 1820s. The high Tory elitist Busby, however (described as an 'artful humbug' at the time), persisted in this idea of 'high' chiefs (*high* because he had given them that status) and so he inserted it into his 'declaration'. In his English text of the Declaration he referred to "We the hereditary chiefs . . . and heads of tribes" and Henry Williams (knowing that 'hereditary' was not quite correct) altered 'hereditary' to 'tino' (high) in his translation, to conform to the precedent. No attempt was made after Waitangi to establish any form of governing council of chiefs, lest that inflame chiefly rivalries. The first further step in that direction was the Kohimarama Conference (te Kawenata o Kohimarama or 'Covenant of Kohimarama') of 1860.

The phrase 'tino rangatira' rarely occurred in other contexts, but was later appropriated by the government ('*kawanatanga*' another neologism = governorship) emphasising the distinction between governor- and chief- during the governorships of Hobson, FitzRoy and Grey. Hobson, and FitzRoy, from 1841 were styled 'Governor and Commander in Chief in and over the colony of New Zealand' and 'te tino rangatira o tenei Koroni o Nui Tireni' in their proclamations in Māori. Grey called himself 'te tino rangatira, Kawana Kerei' or 'Governor-in-chief of the New Zealand islands' in proclamations and in the prefaces and dedications of such works as *Robinson Crusoe* (1852), *Pilgrim's Progress* (1854) and *Nga Motiatea* (1853), when he had a lieutenant-governor as subordinate.

The title also appears in 1860, in the titles of Grey's successor (eg "He Panuitanga. | Na Te Kawana Colonel Thomas Gore Brown, Tino Rangatira, aha, aha, na te Kawana o tenei Koroni").<sup>17</sup> It occurs occasionally on other titles as in the title "te tino rangatira o nga meera" (Chief Postmaster) in 1862, and in 1864 Wī Tako Ngatata is addressed as "ko te tino rangatira o te mahi Kingi ki Kapiti" (the chief of the Māori King's works at Kapiti) at the time Ngatata renounced his support for the Kīngitanga.<sup>18</sup> By this time, however, the 'high' chiefs, and rangatira generally had lost most of their political influence, except over tribal matters. The expression 'tino rangatira' had practically disappeared by 1870, and was only used by pākehā for the whole of that period. The plain fact is that 'tino rangatiratanga' or 'high chieftainship' is synonymous with governorship after 1840. The traditional authority of tribal chiefs, their 'mana motuhake' to use the expression adopted by the Kīngitanga, was firmly distinguished from the 'tino rangatiratanga' of the governor. Faced with this

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17 *Books in Māori 1815-1900* entry BiM 509 and in the title of the commanding officer in Taranaki "te tino Rangatira o nga Hoia" (the high chief of the soldiers).

18 See *Books in Māori 1815-1900* entry BiM S14 no 14.

established usage, Kawharu's mistranslation of 'tino rangatiratanga' as "the unqualified exercise of chieftainship" is not merely erroneous, but preposterous. It was made explicit from the start of the Governorship that chieftainship – or 'the power of chiefs' – was qualified, to prohibit certain traditional usages (slavery, cannibalism etc) which were deemed intolerable by the Crown.<sup>19</sup>

There is a single late and remarkable exception to the avoidance of the phrase 'tino rangatira'. This is contained in the English text of the petition of "a number of the Maoris resident in what is known as the Hot Lakes District to Queen Victoria."<sup>20</sup> The Māori text, headed 'Ki tona mana haika ariki tapairu tauanui' ('to the most permanently exalted in place as in rank, to Her Most Royal Majesty Victoria, Queen of the United Kingdom of Great Britain and Ireland, and of her colonies of Australia and New Zealand, and all her dependencies, and Empress of India' using the later form of the Royal Style) still calls the Queen "Te tino rangatira, kia kuini Wikitoria, kuini o Kereiti Piritona me Airana" (The high chief, Queen Victoria, Queen of Great Britain and Ireland). The Queen is also addressed as "the bright and shining Kahurangi, the noble shelter-affording rata and the bond of union with your Maori subjects". The rare expression *ariki tapairu* is a title of honour for the most senior woman in a lineage.<sup>21</sup> That the Queen herself could be addressed as the 'tino rangatira' by Māori tends to show that activist appropriation of the term in the 1980s and following rests on unstable ground. According to Mason Durie "The history of tino rangatiratanga is so closely linked with the search for kotahitanga that each has become critical to understanding the other." The search for political autonomy, most recently reflected in the current Māori Party, emerged from the Kotahitanga (Unity) movement in the 1880s, and successive governments have refused to acknowledge it. While "Maori have never accepted that the Treaty of Waitangi required an abandonment of tino rangatiratanga" the use of that term in the sense of autonomy is entirely at odds with its usage in 1840 and the decades following. The term lost its original signification, and was

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19 See Normanby's Instructions to Hobson, 14 August 1839: "they must be carefully defended in the observance of their own customs, so far as these are compatible with the universal maxims of humanity and morals. But the savage practices of human sacrifice, and of cannibalism must be promptly and decisively interdicted. Such atrocities, under whatever plea of religion they may take place, are not to be tolerated within any part of the dominions of the British Crown" (GBPP 1840 [238] v XXXIII p 40).

20 AJHR 1892 A1 pp 9-10 (English only). The petition is for the establishment of a representative council but the government's ministers said that there were already four Maori in the House of Representatives and two in the Legislative Council "who take an active interest in general politics, and especially in all measures affecting their people and have every facility for influencing legislation as far as is desirable or for their own good." The reply (at AJHR 1892 A2 p 18) states that the Queen received the petition but, as responsible government had been conceded to the Parliament of New Zealand, "Her Majesty cannot interfere in the manner suggested" by the petitioners.

21 See H W Williams, *Dictionary of the Maori language* 7<sup>th</sup> ed p 15 under Ariki. It is also found in the formal name of the present Māori Queen, Te Arikinui Tapairu Dame Queen Te Ata-i Rangi-Kahu Koroki Te Rata Mahuta Tawhiao Potatau Te Wherowhero [Piki Mahuta], the 6th Māori ruler.

used for something quite different when the National Maori Congress emerged in 1990.<sup>22</sup> Durie acknowledges that "there is, then, no single definition of tino rangatiratanga and little comfort can be derived from linguistic origins or simplistic notions about an 1840 understanding of sovereignty."<sup>23</sup>

On 5 February, at the commencement of the meeting with the chiefs, no text of the Treaty was ready to be signed, but from Hobson's point of view that did not matter. He had expected that several days were to be taken up in deliberations over whether to accept the 'Treaty'. Bishop Pompallier arrived uninvited at about half past ten and went directly into the room where the levée was being held. As the Governor's party proceeded to the platform outside, there was a sectarian squabble over ecclesiastical precedence – this led to the Governor's being seated in the middle of the table, with Busby on his left and Pompallier on Busby's left, while Henry Williams was on the Governor's right with the other Church Missionary Society men behind (Colenso, Taylor, and Clarke) with a good opportunity to hear the proceedings and to take notes.<sup>24</sup> Colenso gives a 'verbatim' report of Hobson's words in English: "Here His Excellency read the treaty in English, and the Rev H Williams read the translation of the same, which had been prepared in the New Zealand Language, to the natives."<sup>25</sup>

Colenso assumes that the English text was 'the Treaty', and the Māori text was the translation of it – and this was probably the common contemporary understanding. But which draft English text? Was it the text Hobson had delivered to Williams, or was it the version with the lately improved preamble, which became the 'official English text'? It is probable that the 'official text' ("Her Majesty Victoria") was used, but with the date expressed as 5 February (as Hobson expected a three-day discussion). The texts starting "Her most gracious Majesty" and dated 5 February could surely not have been used after that date, except by mistake. Unfortunately, such mistakes can and do happen, and, as will be explained below, such a mistake seems to have happened in this case, sometime later. But anybody half fluent in Māori, hearing that text and the simplified version given in the paragraph above, would easily have noticed that the two versions did not correspond very well. And these differences were magnified in the more technical passages of the three short articles.

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22 For further discussion of the use of the term 'tino rangatiratanga' see Mason Durie, 'Tino rangatiratanga' in M Belgrave and others *Waitangi revisited* (2005) pp 3-19.

23 Durie, above n 22, p 6.

24 Richard Taylor comments of Pompallier that "he is a mild good looking man having more Xty in his looks than in his heart if the reports of him be correct". (R Taylor, journal entry for 5 February) in ATL qMS-1985 p 188.

25 W Colenso, *Authentic and genuine history* (1890) p 17. In one of his corrections to his draft (p 10) Colenso marked in the margin "Get English Copy" against "Here His Excellency read the Treaty (English) & Mr W read the Native Translation to the Natives." Unfortunately Colenso did not secure a copy of the English text.

### III SUMMARY OF THE PROCESS OF DRAFTING

The first attempt at 'framing' a draft treaty was Freeman's (Freeman 1). There are (or were) probably just two holograph drafts in English in Busby's hand (Appendix document 2 and 3 = Easton's BD1 and BD2). The first extant draft by Busby is that dated "3rd Feby 1840" ("draft of the Articles of a Treaty with the Native Chiefs submitted to Capt. Hobson"<sup>26</sup>). Busby retained this copy and he and sent his second draft to Hobson, this being the extant document at Archives New Zealand (Easton's BD2, see Appendix document 3). The third draft prepared by Hobson and Freeman (Appendix document 4 = Easton's HB, allegedly lost) was sent to Henry Williams for translation on 4 February but at least one duplicate of it was retained in the official papers (before it too was lost). This, however, became the progenitor for at least three transcripts, made by Henry Williams, Grimstone and Clendon between March and July 1840. Then, probably on 4 February, Hobson and Williams simplified the preamble again, to better express official intentions in language the chiefs would be able to understand, and Williams then translated the result. The official text and the purported translation of it, in which difficult ideas were even further simplified, was then read aloud and debated.

Over the brief period of 29 January to 6 February the draft Treaty went through several alterations, many minor and several major. What will seem odd to most present-day readers is that the variations in the three articles of the Treaty are trivial; Busby's text of the three articles hardly changed from 3 February to the 6<sup>th</sup>. It was the expression of the preamble which caused the difficulties, as the officials struggled to express the British Government's philanthropic intentions, while trying to ensure that harmony was preserved between the Māori and the settlers, all the while avoiding controversial or unfamiliar language which might conflict with a general tone of reassurance. And the expression had to be clear and as simple as practicable, as unfamiliar concepts were traversed. Hobson and Williams had to persuade the signatory 'sovereign chiefs' to renounce, and, in a sense, to retrospectively illegitimise the 'infant state' the chiefs (or more particularly, Busby) had sired.<sup>27</sup>

It was important, however, that the chiefs accept that they were not losing anything as a consequence of the new legal and diplomatic arrangements for the transfer of all sovereign power to the Queen. Therefore it was essential that all the existing property rights of the 'sovereigns of the soil' be transferred in an orderly and regulated manner, especially those rights concerning lands and

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26 Auckland Museum Library, AR MS 46 (6).

27 For the use of the term "infant state" by Busby (who took it from Christopher Pitt's 1740 verse translation of the *Aeneid*, lines 757-760: "Trojans be bold; against my will, my fate. / A throne unsettled, and an infant state / Bid me defend my realms with all my pow'rs / And guard with these severities my shores.") See also Parkinson, *Our infant State* (PhD thesis, 2003) p 241, where it is noted that these words were also used by Nicollo Machiavelli in *The Prince* Chapter XII: "Res dura, et regni novitas me talia cogunt, Moliri et lati fines custodet tueri."

resources. This is the point of the second article of the Treaty. The third article simply declared that by virtue of the acceptance of the fact that Victoria was their lawful sovereign, the chiefs would be amenable to British law in the same way as their British settlers. But is it doubtful that any of this was explained in detail; it would have been rather obvious to the Queen's subjects that new institutions would be far-reaching. The chiefs of the north had been asking for the introduction of British customs for some five years, and were certainly ready for a more effective display of British civilisation than had been hitherto available through the former British Resident. But while nobody seems to have paid much attention to the content of the third article at the time, it was problematic later.

But from the point of view of the English settlers, while they too welcomed the beginning of British legality and civil order, they were disturbed by the form this order might take if it would result in their becoming a satellite of the penal colony of New South Wales. Their own 'sovereignty of the soil' (howsoever obtained, whether directly from a 'sovereign chief' or from a subsequent purchase of land already alienated) was on the verge of being confiscated by a land commission and they were not happy about it, notwithstanding its inevitability. For them, therefore, the English text was important, as it would determine their co-operation (or non-cooperation) with the new authorities. This issue would cause great offence as the commission retrospectively disposed of 'unfair' established contracts. The formulation of the messages to the chiefs, and to the settlers, took far more scrutiny than the message contained in the three articles. This is why so much attention was given to the message contained in the preamble and in Hobson's speeches.

## CHAPTER 5

# THE MEETING AT WAITANGI, 5 FEBRUARY 1840

Hobson included in his despatch of 5 and 6 February to Gipps a short account of the proceedings of those days. The only substantial eyewitness account apart from that in Hobson's despatch is that of Colenso (in his *Authentic and genuine history*), but there is also a brief account by another witness, Richard Taylor. There is a brief comment too, by Father Servant, who had accompanied Pompallier. Hobson explicitly states:

The business of the meeting then commenced by my announcing to the chiefs the objects of my mission, and the reasons that had induced Her Majesty to appoint me. I explained to them in the fullest manner the effect that might be hoped to result from the measure, and I assured them in the most fervent manner that they might rely implicitly on the good faith of Her Majesty's Government in the transaction. I then read the treaty, a copy of which [in English<sup>1</sup>] I have the honour to enclose; and in doing so, I dwelt on each article, and offered a few remarks explanatory of such passages as they might be supposed not to understand. Mr H Williams, of the Church Missionary Society, did me the favour to interpret, and repeated in the native tongue, sentence by sentence, all I said.<sup>2</sup>

What Hobson said in this oral preamble to the Treaty will never be known exactly, but a very close approximation to it was provided by Colenso, acting as a reporter for the Church Missionary Society. On the cover of his small notebook with sketches for 1839 is a label ". . .also what Capt Hobson sd to the natives afore the signing the Treaty". The text is here given exactly as written:

As the Lw. of E. gives no civil power to Her M. out of her Dom. her efforts futile unless you consent.  
Her M. has comd. me to exp. y. matters to you ~~kie-mat~~ yt. you may underst. them.

Ye p. of Gt. B. are, thkg. free and so lg. as ye do not transgress the Laws they can go wher. they please  
& their gov. has not power to restrain them. You have sold them lands here and encoragd. them to come  
here Hr. M. always ready to protect her subjts. — is also always ready to restrain them. [continues on  
another page]

Hr. My the Q. asks you to sign ys Try. and so give her yt. power wh. shall enable her to restrain them

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1 This copy is implicitly of the text authenticated by Henry Williams in his signed note on the "official text".

2 GBPP 1840 (560) pp 9-10.

I ask you for ys publicly I don't go to one c[hief]. to anor. I'll give you time to consid. the proposal I'll offer you what I wish them to do is expressly for their own good as they will soon see by the Ty. You yourselves have often asked the Kg. to extend her protectn.

Her My now offers them that protect in ys Treaty. [new page] I think it not necessary to say any more about it. I'll therefore rd. the Treaty. [Another page] One thing I'd ask. Do you think it better for yr. country to be ruled by the Q. who has no other Int. but yrs. or those persons who come here with no other desire but to purchase lands for yourselves.<sup>3</sup>

These words (with slight variation) are also given in the manuscript 'Memoranda of the arrival' and (in an edited form) in Colenso's published *Authentic and genuine history*.<sup>4</sup> The final paragraph in the transcript given above was omitted in the 'Memoranda' (ie "I ask you this publicly") but a preliminary paragraph as an introduction was added when the work was printed.<sup>5</sup> But the speech was an introduction to the Treaty, not the text of the Treaty itself. Father Servant, who had accompanied Pompallier to the meeting, gave a slightly different emphasis when he wrote subsequently:<sup>6</sup>

The Governor proposes to the tribal chiefs that they recognise his authority; he explains to them that this authority is to maintain good order, and protect their respective interests; and that all the chiefs will retain their powers and possessions. A great number of chiefs then speak, displaying one after another all their Maori eloquence. The majority of orators do not want the Governor to extend his authority over the natives, but over the settlers exclusively.

It seems certain that, given differences in content between the 'official' English version read by Hobson, and the simplified Māori version read by Henry Williams, that a handle to confusion was given which could only grow as discussion began. Hobson also said, according to Richard Taylor, that "he did not wish then to sign in haste and appointed a second meeting for the 7<sup>th</sup> but when he had left I thought it most likely that nine tenths of them would leave for their respective homes. I therefore sent a message to him and told him that I would remain until I received his reply to give notice of the meeting being held the next day, his reply was favourable and the rough copy of the treaty was sent to me to get copied. [. . .] I sat up late copying the Treaty on parchment and kept the original draft for my pains."<sup>7</sup> Taylor is clearly referring to a *draft in Māori* prepared by Henry

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3 At the end "for yourselves" is an error for "for themselves". The holograph is in the Hawkes Bay Museum, Napier. Hobson's address, 5 February 1840, is also transcribed in W Colenso, *Diary April 1837*, ATL-MS-0582 p 32.

4 There is an expansion of the words abbreviated (see above) in the *Authentic and genuine history*.

5 W Colenso *Authentic and genuine history* (1890) pp 16-17.

6 Father Servant, "quoted" in translation by P Low in *The French and the Maori* (1992) pp 102-103.

7 R Taylor, journal entry for 5 February, in ATL qMS-1985 p 189.

Williams, (or at least a draft in Māori with an alteration for 'wakaminenga') but no such draft has been traced.

## ***I THE FIRST ARTICLE***

The Māori text of the first article says "Ko nga Rangatira o te wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa ki te Kuini o Ingarani ake tonu atu – te Kawanatanga katoa o o ratou wenua." The literal translation by Richard Davis renders this as:<sup>8</sup>

The chiefs of (i.e. constituting) the Assembly, and all the chiefs who are absent from the Assembly, shall cede to the Queen of England, for ever the government of all their lands.

This is rather unambiguous, aside from the translation of unfamiliar term 'Kawanatanga', as 'government' – a neologism, but one which could be rather readily understood as 'the Kawana's business'. The alternative translations given in the Appendix (documents 8-12) – all arrived at independently – show that European witnesses understood the Māori wording. Busby, who is the only translator to use the word 'sovereignty' – has "The chiefs of the confederation of the united tribes and the other chiefs who have not joined the confederation cede to the Queen of England for ever the entire sovereignty of their country." But "Assembly" remains ambiguous for those (the majority) who did not believe that it existed, and "entire sovereignty of their country" is nowhere near as intelligible as "the government of all their lands". The Anonymous text has "The chiefs of the confederacy and all the chiefs also which were not included in that confederacy wholly let go to the Queen of England hereafter for ever all the government of their lands" and this does not differ appreciably from the text of Davis. Brown's version is "That the chiefs at the assembly and those that were not at the assembly hereby give up entirely to the Queen forever the government of all their land".

Martin has "the chiefs at the assembly, and also all the chiefs (who) have not joined the said assembly, concede absolutely to the Queen of England forever the kawanatanga of all their land" and Wakefield (who goes in for hyperbole) offers "Here's the chief of the Assemblage, and all the chiefs also who have not joined the assemblage mentioned, cede to the utmost to the Queen of England forever continually to the utmost the whole Governorship of their lands". Only Busby mentions the untranslatable term 'sovereignty' which all others sought to avoid, for the good reason that it was likely to be unintelligible to the chiefly audience. The 'official' English text of the Treaty sounds like none of these six back translations, except for that of Busby, who knew what the pre-translation text was, and whose own translation was influenced by that knowledge.

There is one other point to be made. Aside from Busby, none of the interpreters seems to have seen any role at all for the chiefs, in the business of government. The chiefs, also, seem to see the government of the Pākehā as quite separate from them. This was never really practicable – early

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8 R Davis, in Coleman, *Memoir* (1865) p 456.

trivial episodes involving Māori kumara grounds being trampled by stray cattle belonging to settlers, and necessitating the formation of a pound in March 1840 – were a sufficient proof of that. It was certainly not the intention of the Colonial Office, to keep the two peoples separate, nor was it consistent with the idea of one legal system for the two races in partnership. There was obviously a need for a regulator to iron out potential disputes, and that role fell to the Protector of Aborigines when his office was established.

## **II THE SECOND ARTICLE**

The second article, as translated by Henry Williams, is:

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ko nga hapu – ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini to 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.

Davis's back-translation renders this as "The Queen of England acknowledges, and guarantees to the chiefs, the tribes and all the people of New Zealand, the entire supremacy of their lands, of their settlements and of all their personal property. But the chiefs of the Assembly, and all the other chiefs, make over to the Queen the purchasing of such lands, which the man who possesses the land is willing to sell, according to the prices agreed upon by him, and the purchaser appointed by the Queen to purchase for her."

Most of this is a fairly straightforward translation, except that the phrase "the entire supremacy" (te tino rangatiratanga) appears to have been misunderstood by Davis. Williams was undoubtedly intending to refer to 'the high chieftainship', using the Busby concept of the senior chiefs of the 'confederation' (the chiefs who were parties to the earlier Declaration, as opposed to the 'other', non-signatory chiefs).<sup>9</sup> A passing reference to the 'high chiefs', as a compliment, was therefore fitting, especially as the circulated invitations sent out by Busby were addressed to them specifically: "He Rangatira hoki koe no taua Wakaminenga tahi" (For thou art also a chief of the confederation). But Hobson had not intended to limit invitations to the signatories to the Declaration, as witness the references to the 'other' chiefs in all the drafts. The expression used by Davis "entire supremacy of their lands" really makes no sense, for supremacy is "the condition of being supreme in authority, rank or power" and is a prerogative of the sovereign. The expression used by Davis is the antithesis of what the English text of the Treaty is concerned to suggest, ie that the cession of sovereignty to the Queen did not alter, in any manner, the prerogatives of chiefs over their property. From that point of view, Davis made a poor translation.

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9 But even if such an 'assembly' had existed in practice (which is exceedingly doubtful) it was surely a local peculiarity of Te Tai Tokerau, and had no recognition outside that area.

Busby's back-translation expresses the same idea, using different words: "The Queen of England confirms and guarantees to the chiefs & tribes and to all the people of New Zealand the possession of their lands, dwellings and all their property. But the chiefs of the confederation and the other chiefs grant to the Queen the exclusive right of purchasing such land as the proprietors thereof may be disposed to sell at such prices as shall be agreed upon by them and the person appointed by the Queen to purchase from them." This is a rather better translation of the intention, and avoids altogether the problematic expression 'te tino rangatiratanga' (high chieftainship). The Queen's guarantee of 'all their property' to the chiefs and tribes and the 'people of New Zealand' (which specifically means the Māori, not the Pākehā) is comprehensive. There is absolutely no need to mention specific matters as forests or fisheries, or minerals or any other 'properties', except "lands – wenua" and "settlements – kainga", the two terms specifically used in both the Māori and in the English translations.

The Anonymous back translation is somewhat clumsy, but it is consistent with the two versions given above: "The Queen of England makes strait and consents to the chiefs, to the tribes, to all the people of New Zealand, the full chieftainship, or exercise of the power of chiefs over their lands, villages and all their property: but the chiefs of the confederacy and all the other chiefs let go to the Queen the purchasing of those portions of land which the man (or men) whose is the land may be willing to sell according to the payment which may be settled by them and the purchaser whom the Queen may appoint to purchase for her." The expression "makes strait and consents" is an authentic and literal expression for 'acknowledges' (ie the Queen acknowledges the property rights of the chiefs), while "the full chieftainship" is helpfully explained by the marginal gloss "exercise of the power of chiefs" as if they were local officials or magistrates, subordinate to the sovereign power. In that respect, this translation is clearer than the others. It is an assurance of local autonomy, subordinate only to the sovereign authority of the Queen. In other respects, the intention is consistent with the versions of Davis and Busby.

Gordon Brown's version is "The Queen of England agrees and consents to secure to all the tribes, chiefs and all men in New Zealand and the head chiefs to all their rights in the land villages and other property. But the chiefs are to give to the Queen the rights of purchasing all the land that the owners are willing to sell, at the price they chuse to put on it, and the Queen says she will pay for it herself." Here the expression "head chiefs" stands for "tino rangatira" (high chiefs), a reasonable translation, if interpreted in a practical way as 'chiefs with the highest influence'.<sup>10</sup> The right of pre-emption of more clearly stated than in the other versions ("the rights or purchasing all the lands that the owners are willing to sell at the price they chuse to put on it") although the last clause "and the Queen says she will pay for it herself" is wide of the mark.

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<sup>10</sup> The term 'paramount chiefs' (paramount means 'superior to all others') was probably avoided, lest it inflame chiefly rivalries. Chiefs were always sensitive to slights to their prestige and the missionaries appreciated this better than Busby did.

Samuel Martin's version, as one would expect of the canny Scots lawyer and pamphleteer, is also a careful translation: "The Queen explains, consents to the chiefs and to all the people of New Zealand the entire chieftainship of their land, of their settlements and all their property. But now the chiefs of the assembly and all the other chiefs give up to the Queen the buying of other land places, please the person to whom the land belongs, to the amount of the payment agreed upon by them, and the purchaser appointed by the Queen to buy for her." The problematic phrase 'entire chieftainship' (tino rangatiratanga) was, again, difficult to translate – possibly a sign that the term was not in common use at the time – at the time, which appears to have been the case. But in all other respects the translation is a good one. His "entire chieftainship of their land, of their settlements and all their property" is very much the sort of autonomy, under the sovereign aegis, that chiefs seem to have wanted.

Wakefield's version is clumsy because it is too literal: "the Queen of England arranges and confirms to the chiefs, to all the men of New Zealand, the entire chieftainship of their lands, their villages and all their property. But here's the chiefs of the Assemblage, and all the chiefs besides, yield to the Queen the buying of those places of land where the man whose land it is shall be good to the arrangement of the payment which the buyer shall arrange to them, who is told by the Queen to buy for her." There is the usual problem with 'entire chieftainship' (and here it may be remarked that Wakefield's expression is practically identical with that of Martin in all three articles, again suggesting that Wakefield may have been influenced by Martin).

### **III THE THIRD ARTICLE**

The third article is the most problematic of the three. Henry Williams rendered it into Māori as:

Hei wakaritenga mai hoki tenei mo te wakaetanga 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.

Davis's version is "In return for their acknowledging the Government of the Queen, the Queen of England will protect all the natives of New Zealand, and will allow them the same rights as the people of England." The key expressions here are "all the natives of New Zealand" (which is unambiguous) and "the same rights as the people of England" (which is ambiguous). "Nga tikanga katoa" is not just "the same rights" but rather "*all* the same rights" and "tikanga" (here translated as "rights") might more fairly be translated as 'customs' or 'procedures' – in a quasi-legal sense. The clause is not intended to offer statute law 'ture' in any specific way, for although New South Wales had temporarily extended its territorial limits to New Zealand, it was not yet in any position to proclaim sovereign authority.

Some Māori had been asking for the missionaries to give them 'laws' for years. At the time the Treaty was signed, and until the Treaty was adopted by Great Britain, 'ture' could have no effect in New Zealand, and it was probably for that reason the term was not used. Although the term 'ture' was used once in the Māori text of the Treaty (at the end of the preamble), it is used only in

reference to the numbered Articles ("enei ture ka korerotia nei"). This use of the term 'ture' made the subsequent translation of 'rights' as 'ture' impracticable in clause three. It also made any reference to the laws of New South Wales inappropriate, as the laws of the penal colony were not intended to become the laws of New Zealand.

Busby's version is "In return for the cession of the sovereignty to the Queen, the People of New Zealand shall be protected by the Queen of England, and the rights and privileges of British subjects will be granted to them." But the Māori text of the article makes no mention of anything corresponding to 'sovereignty' or of 'cession'. It refers only to "the Government of the Queen" (ie it is Hobson's administration which the chiefs are to acknowledge). Similarly Busby's reference to "and the rights and privileges of British subjects" has no counterpart in the Māori text, which instead refers to a transplantation of the 'tikanga' (practices / procedures and implicitly 'administration') of England. This is a case where Busby has not translated the Māori text; rather he has supplied what he thought it should say. He has reiterated the sense of the first article as he had found it in the first Freeman draft.

Unfortunately, the Anonymous back-translation (found in Clendon's papers), breaks off after the heading of the third article. Perhaps the writer was unable to devise a meaningful translation. Gordon Brown's version is: "This is the consent to the Government of the Queen. The Queen will protect all the natives of New Zealand, and secure to them all the rights and privileges of the people of England." Samuel Martin, however, tries to be more specific: "This is the arrangement come to for the consenting of the Kawanatanga of the Queen, and the Queen will protect all the aborigines of New Zealand and give to them the whole laws exactly like her things to the people of England." Clumsy as it is, this "the whole laws exactly like her things to the people of England" version is more literal than any of the others, and is indicative of the working of a legalistic mind. "The whole laws exactly like" the English implied both statute and common law – the things of England – which Māori had been seeking for years as a system of new institutions to replace the old methods of dispute resolution by force. But the text as given to Henry Williams failed to explain this, and it is regrettable that the intention was not elaborated, especially as the use of the term 'laws' was probably not what was intended – which was the dual concept of 'rights' and 'privileges'.

Wakefield's version, possibly informed by Martin's in the choice of language, is: "This too, is an arrangement in return for the assent of the Governorship of the Queen. The Queen of England will protect all the native men of New Zealand. She yields to them all the rights, one and the same as her doings to the men of England." While the sense is the same as Martin's, the use of the term 'yields' was inappropriate ('grants' would have been a better choice). There is little doubt, despite pettifogging quibbles over particular words, that the introduction of some form of the British legal system was intended, by both Māori chiefs and the Kawanatanga. This is made explicit within a few months when Hobson suggested courts of session, a suggestion which was quickly turned down by Gipps on the grounds of expense.

#### ***IV THE ATTESTATION CLAUSE***

The attestation clause, as translated by Henry Williams, is:

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 i enei kupu. Ka tangohia ka wakaetia 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 te kau o to tatou Ariki.

Davis translated this as "We the chiefs of this Assembly of the tribes of New Zealand, now assembled at Waitangi, perceiving the meaning of these words, take and consent to them all. Therefore we sign our names and our marks. This was done at Waitangi, on the sixth day of February, in the one thousand eight hundred and fortieth year of our Lord."

Busby is slightly different: "Now we the chiefs of the confederation of the United Tribes of New Zealand being assembled at Waitangi, and we the other chiefs of New Zealand having understood the meaning of these articles accept of them and agree to them all. In witness whereof our names or marks are affixed. Done at Waitangi on this 4<sup>th</sup> Feb. 1840." Here 'confederation' is preferred to 'assembly' (and the wrong date is given) but the sense is the same. Neither mentions the expression 'Victoria in Waitangi' – used in the Busby second draft, and in some copies of the Freeman second draft, and in the 'official' text – the proposed township of that name not being in existence. The affected expression 'in congress', which survived from Busby's draft through to the 'official text', was also cut from the Māori text. It is also missing in Busby's translation, a further sign that this is *not* a draft of the Treaty, as was claimed by Baker.

Gordon Brown's version is: "We the chiefs at the collection of the tribes of New Zealand, assembled at Waitangi Are the chiefs of New Zealand and see the truth of these words and accept them and therefore we put our names and marks hereto. Done at Waitangi on the sixth day of Feby 1840." And this is not significantly different from the others. Martin's version is legalistic and ponderous: "Hearken, that we, the chiefs of the assembly of the tribes of New Zealand now collected at Waitangi, and we also the chiefs of New Zealand, to see the meaning of these words and take them, and we consent to them all – therefore we sign our names as a sign. This was done at Waitangi on the 6<sup>th</sup> of the days of February in the year 1840 of our Lord."

Wakefield's eccentric version, with his usual hyperbole, is "Here's the chiefs of the Assemblage of the tribes of New Zealand who are congregated here at Waitangi. Here's we too. Here's the chiefs of New Zealand, who see the meaning of the words, we accept, we entirely agree to them all. Truly we do mark our names and marks. This was done at Waitangi on the six of the days of February in the year one thousand eight hundred and four tens of our Lord." All mean much the same and require no further comment. At the end of his text Richard Taylor wrote "Ko nga Rangatira o te Wakaminenga" (The Chiefs of the Assembly) leaving space to follow. This phrase is not present in any of the subsequent copies of the Treaty.

## V THE SPEECHES ON 5 FEBRUARY

It is unnecessary to trace the course of the debate which followed on 5 February. This is given by Colenso in the published account already cited. It was really not much of a debate – more a series of harangues, delivered in a rather theatrical tradition, as Colenso's paraphrases make clear. There was an uncomfortable early warning over the purchases of lands by Williams and by Busby. Busby said (in Māori) that "the Governor had not come to take away their lands but to secure them in the possession of the lands they had not sold; that he (Mr Busby) had often told them that land not duly acquired from them would not be confirmed to the purchaser, but would be returned to the natives, to whom of right it belonged; that this the Governor would be prepared to do." But Te Kemara, after rejecting the Governor's offer, asserted:<sup>11</sup>

O Governor! My land is gone, gone, all gone. The inheritances of my ancestors, fathers, relatives, all gone, stolen, gone to the missionaries. Yes, they have it all, all, all. That man there, the Busby, and that man there, the Williams. They have my land. The land on which we are standing this day is mine. This land, even under my feet, return it to me. O Governor! Return me my lands. Say to Williams, 'Return to Kemara his land.' Thou" (pointing and running up to the Rev. H. Williams), "thou, thou, thou bald-headed man, thou hast got my lands. O Governor! I do not wish thee to stay.

Both Busby and Williams were forced to justify themselves. Colenso observes that "The officers of the man-o'-war and all strangers were wonderfully struck with his show of himself. To any one unacquainted with New Zealand oratory it is morally impossible to convey a just idea of his excited manner, especially when addressing himself to Mr Busby and to the Rev H Williams on the subject of his lands." But Colenso adds, in his footnote:<sup>12</sup>

And yet it was all mere show – not really intended, as was not long after fully shown, when they gave their evidence as to the fair sale &c. of their lands before the Land Commission, I myself acting as interpreter.

Te Kemara was followed by Rewa and Moka with their own anecdotes of purportedly improper sales of lands by missionaries, mentioning Richard Davis, George Clarke and Charles Baker and the merchants Clendon and Mair: "Where is Clendon? Where is Mair? Gone to buy our lands notwithstanding the book [Proclamation] by the Governor." And Moka came to the platform on which Baker and the Governor stood to press his point that he had no trust that the lands he had sold would be returned, whatever the Governor said. This was starting to become embarrassing. At this point an unidentified Pākehā man:

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11 W Colenso *Authentic and genuine history* (1890) pp 17-18.

12 Above n 11, 18

came forward, and addressing His Excellency, said that the Native speeches were not half interpreted by Mr Williams, neither were His Excellency's remarks fully interpreted to the natives, that a Mr Johnson was present who could interpret well &c.

Johnson was then called forward to interpret for the Governor who said "I am anxious that the natives should know what I say, and also that I should know what they say. Mr Johnson, do you fully understand the native language?" But Johnson begged to be excused: "The gentlemen of the mission ought to be able to do it, and can do it very well; only let Mr Williams speak out loud so that we may hear – we here in the back part of the tent; and let all that the natives say be interpreted to the Governor. They say a great deal about land and missionaries which Mr Williams does not translate to you, Sir." Colenso, however, did not think much of Johnson ("an old resident (dealer in spirits &c) of Kororareka") and comments that "this can only refer to their immense amount of repetition: otherwise Mr Williams translated fairly what they said."<sup>13</sup>

Both were fair objections, particularly if, as seems likely, Hobson had been reading his 'official' English text while Williams was reading his simplified Māori text. Observing Pākehā did not know precisely what text was being agreed upon, and most of them could probably not have followed what was going on in the Māori language, even if they had been close enough to hear it. Their anxieties may have been amplified by an awareness of the inconsistencies between Hobson's presentation and the Williams's translation.

But the deliberate non-publication of any English text was probably also designed to keep the Pākehā in ignorance of their future legal position, while the 'Consul and Lieutenant-Governor' established a diplomatic foothold, by persuading the Chiefs to his views on cession. The Treaty was between the Crown and the chiefs, not between the chiefs and the settlers, even if the old settlers did consider themselves as 'the sovereigns of the country' through their old land purchases. It was unwise of the officials not to have conciliated the settlers, for the result was to undermine Hobson's objectives. Settlers suspicious of Crown motives were quick to circulate rumours of bad faith.

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13 Above n 11, 20. "Johnson" is John Johnson, subsequently proprietor of the first Duke of Marlborough Hotel, and not Dr John Johnson, soon to be appointed Colonial Surgeon by Hobson.

## CHAPTER 6

# THE TOUGH MORSEL

At the conclusion of the meeting on 5 February discussion was adjourned for the chiefs to consult, while Taylor went off with the Māori text to copy. On 6 February 1840, before the signing of the Treaty of Waitangi commenced, Hobson "proposed that the Rev H Williams should read the treaty to the natives from the parchment (as that read the day before was from the draft on paper), which was done by Mr Williams".<sup>1</sup> The words are William Colenso's, taken from his eyewitness account. It was now that the final text in Māori was revealed. A text in English was not used on this occasion.

To the alarm of the missionary party Pompallier, who had attached himself to the official party, Bishop now asked publicly that the Governor confirm that freedom of religion would be maintained, undoubtedly bearing in mind the hostility which had greeted him on his arrival at Hokianga in 1838. Hobson was aware of these matters, and was already briefed on the non-denominational policy of Lord Palmerston, so he assented to the alteration of the Māori text without discussion of the question. The missionaries of the Church of England, however, were taken aback. Colenso, according to his own account, then said to Henry Williams, in a desperate effort to snooker the Bishop:<sup>2</sup>

"Pray, sir, write it down first, as it is an important sentence." Thereupon Mr Williams, taking paper and pencil, proceeded to do so. The paper, when written on, was passed to the Governor for the Roman Catholic Bishop's inspection, who, having read it, said in English, "this will do very well;" on which the paper was read to the natives. The slip of paper contained the following words: "E mea ana te Kawana, ko nga w[h]akapono katoa, o Ingarani, o nga Weteriana, o Roma, me te ritenga Maori hoki, e tiakina ngatahitia e ia." (The Governor says the several faiths [beliefs] of England, of the Wesleyans, of Rome, and also the Maori custom, shall alike be protected by him.) I got Mr Williams (though with some little hesitation on his part) to insert "me te ritenga Maori hoki" (and also the Māori custom or usage) as a correlative to that "of Rome."

The 'correlative' suggested by Colenso was evidently intended to trivialise the Hahi Katorika Romana as no more than 'heathen superstition' like that of the unconverted Māori, in contrast to the Protestant faith ("wakapono"). The text on the slip of paper was recorded, but not transcribed on to the document about to be signed – surely an omission on Pompallier's part. This guarantee of religious freedom has been characterised as the "fourth clause" of the treaty, but it was not

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1 W Colenso *Authentic and genuine history* (1890) 31.

2 Above n 1, 32.

incorporated in any of the subsequent copies of the Māori text, and it was not even mentioned by Hobson in his despatches.<sup>3</sup> The text of the clause is unquestionably authentic, however, and is substantially confirmed by the writings of Henry Williams, Pompallier, Busby and Colenso. Henry Williams observed to Hobson that the guarantee was redundant, given existing British policy. And British policy on toleration of 'heathen practices' certainly did not extend to protection of 'ritenga Māori' such as slavery, plural marriage and cannibalism; such practices were explicitly interdicted as repugnant in Hobson's Instructions from Normanby.<sup>4</sup>

Why had not Pompallier settled the matter by insisting upon having the clause added to Taylor's parchment? Perhaps, just as the American naval officer (from the expedition of Wilkes, then at the Bay of Islands) deliberately absented himself during the speeches on the previous day, so as not to be seen to be involving America in a diplomatic controversy, Pompallier also was anxious not to become a British tool in a political *fait accompli*, stage-managed by his sectarian rivals and compromising his allegiance as a Frenchman. That, probably, was the reason he left the table as soon as the amendment was agreed upon. And that was his mistake. For Pompallier was not the unbiased and apolitical person he pretended to be. Colenso states that Pompallier had gone about urging chiefs not to sign the treaty, including some of those who had spoken against it the previous day.<sup>5</sup> And Pompallier certainly continued these endeavours in the Bay of Plenty soon afterward.

A different perspective on the 4<sup>th</sup> clause incident is given by Henry Williams, who does not mention Colenso's intervention to add the words about 'ritenga Maori':

In the course of a few minutes the French Bishop attended by one of his priests pushed forward to the side of Capt Hobson & requested "That the natives might be informed that that [sic] all who should join the Catholic religion should have the protection of the British Government" Capt H with much blandness observed "but certainly" and expressed his regret that he had not made known his wish earlier as "your desire should have been have been embodied in the Treaty" and turning to me [Henry Williams] requested that I would thus explain the wish of the Bishop. I observed to Cap H I presumed the same protection would be afforded to all, he said certainly. I asked what need of this announcement if all would have protection alike Capt. H. observed that as the Bishop wished the communication to be

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3 The manuscript clause in pencil has not been traced but in the Colenso manuscript 'Memoranda' it appears at the end of a long late addition to page 22.

4 The word 'ritenga' as used in the title of the Book of Common Prayer translations connoted 'usages' as opposed to 'rites and ceremonies' (translated as 'tikanga').

5 Hobson may have decided for his own reasons to eliminate the clause; after the addition of signatures at Hokianga some days later, some of the signatories asked to have their marks removed. For the account of the speeches on this occasion see 'Specimen of New Zealand eloquence. Notes of a meeting at Hokianga, from the original taken on the spot by Shortland, rendered into Anglo-New Zealand by Mr Wade of the Church Mission, February 1840' in *New Zealand Journal* no 26 (16 January 1841) p 20, which took the text from the *Singapore Free Press*.

made he should feel obliged by my delivering the same to the meeting. I accordingly commenced but could not proceed finding that it was somewhat [of a tough morsel] requiring care.<sup>6</sup>

Williams then wrote it down, with or without Colenso's prompting, terming it the 'tough morsel' in his son-in-law's biography.<sup>7</sup>

Catch the idea. This was to be a stipulation between the Queen and the natives of New Zealand. At this date Captain Hobson was under the delusion that the Roman Catholics carried the sway among the Maories. Captain Hobson, after his reply to the Romish Bishop, requested that I would explain the desire of M Pompallier to the chiefs. I observed to Captain Hobson, I presumed the same protection would be afforded to all. He said, certainly. I asked, what need then of such an announcement, if all would have protection alike?

What was really going on? Henry rightly recognised that the guarantee of religious freedom did not need to be in the Treaty, because it was automatically one of the rights and freedoms of British subjects. It was guaranteed by the third clause of the Treaty, so to restate it in the fourth clause was simply redundant. Henry Williams implies in his "Early Recollections" that Pompallier had intended that his own church would be singled out for protection, but this was certainly not the intention of Hobson, nor of Pompallier.<sup>8</sup> The insinuation that Henry had frustrated Pompallier's object also seems far-fetched.

But Henry Williams, like the Bishop, was certainly playing a double game. As recently as January, Williams had visited Tauranga to attend a Special Meeting of Missionaries, when it was recorded that "the Papists have designs of forming a station at Opotiki" and two Protestant missionaries (Wilson and Burrows) were sent there to prevent them. At the same meeting Henry reported on his recent visit to Cook Strait, the danger of papist 'incursions' and land-jobbing and urged that "a successful opposition would be given to Popery & the temporal and spiritual interests of the natives" if Waiapu, Poverty Bay, Kapiti and Wanganui were "immediately occupied".<sup>9</sup>

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6 AR MS 46 (6) document in Busby's hand headed "at the second meeting" and "Treaty of Waitangi". The words "of a tough morsel" are missing in Busby's holograph but are supplied in the alternative Carleton source for the text.

7 H Carleton, *The life of Henry Williams, Archdeacon of Waimate* (1874, 1877) v 2, pp 14-15. Carleton adds in the succeeding paragraph of his 1877 text that "inversion or anticipation of dates is sometimes needed, to preserve continuity of subjects". The text is also given in the revised edition by James Elliott, (Wellington: Reed, 1948) pp 314-315.

8 The manuscript of Henry Williams is also in the Alexander Turnbull Library ATL-MS-2409. The text written by Busby is clearly a transcription of a text by Henry Williams but it is not a faithful transcript of Carleton's published text as Busby had died in 1871 six years before it was published and Henry Williams had died in 1867.

9 Minutes of Special Meeting of Missionaries, Tauranga Jan. 10 1840 in ATL-Micro-MS-Coll-04-33 (CMS Archives CN/M v 11 pp 675-676.

Further signature gathering took place at Te Waimate, and also at Hokianga – despite Roman Catholic meddling – and proceeded without alteration to the written text in Māori. The inconvenient '4<sup>th</sup>' article was not translated into English, so far as is known. By 17 February Hobson was sufficiently confident of the adherence of the majority of the chiefs (26 out of the 52 chiefs of the 'confederation') and a large number of others, that he was happy to have two hundred copies of the Treaty printed in Māori, for general distribution. As early as 6 February he had written to Gipps that "As the acquiescence of these chiefs, 26 of whom had signed the declaration of independence, must be deemed a full and clear recognition of the sovereign rights of Her Majesty over the northern parts of the Island" and so announced at least a partial cession, whereon a 21 gun salute was ordered.<sup>10</sup> A majority of one was sufficient to outvote the 'wakaminenga' (Assembly) and it disappears at this point. The Declaration of Independence had effectively been revoked by a majority of the chiefs who had previously signed it, and the impediment to the assertion of British sovereignty was thereby removed.

As soon as a printed text of the Treaty went into circulation, on 17 February, concerned settlers and others started to ask for copies of it, and also of the English text. Colenso had not been requested to print an English text, although he had produced English texts of Hobson's proclamations of 30 January. Some persons tried to get settlers who were more fluent in Māori to provide a true translation. It is to these translations we turn next.

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10 Hobson to Gipps, 6 February 1840, in GBPP 1840 (560) p 10. These were Moka, Hori Kingi Wharerahi, Rewa, Reweti Atuaahaere, Te Kaua, Kawiti, Pumuka, Kemara, Pomare, Te Tao, Marupo, Wharau, Ngere, Tamati Puketutu, Tamati Waka Nene, Toua, Te Tirarau, Patuone, Papahia and Hone Heke (20 names). Add to these five who signed as heirs: Hakero signed for Titore who had died, as did Mene for his dead father Tareha, Paora Mohi for Haimona Pita Matangi, Ruhe son of Kopiri, and Makoare (Macquarie) for the dead Taonui. All of these occupy the first column, with Wiremu Hau, who although he had not signed the Declaration of independence, had been present in 1834 when the flag was adopted, and he makes the total 26.

## CHAPTER 7

# JAMES CLENDON AND THE BACK-TRANSLATIONS OF THE TREATY

James Reddy Clendon, who had visited New Zealand in 1830 and purchased land at Ōkiato, before settling there in 1832, had been appointed as United States Consul at the Bay of Islands in 1839. He witnessed the first signing of the Treaty on 6 February and, as soon as practicable, began to obtain copies of the two formal proclamations of Hobson (30 January), together with the printed version of the Treaty (17 February), so that these could be sent to his superiors in the State Department in Washington, writing on 20 February: "I have also forwarded a copy of the Treaty entered into with the Chiefs with a translation attached thereto. Many chiefs have signed this Treaty and it is expected that the whole will do so."<sup>1</sup> At first attempt, for his despatch no 6, Clendon was not successful in obtaining the English text of the Treaty, but he had obtained an unofficial translation, headed 'Translation' and appended to the letter, which he transcribed for this despatch, with the comment:<sup>2</sup>

Memo: This translation [into English] is from the native document and 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 Capt Hobson from the Southward I shall apply officially to him for a copy and translation of the Treaty for the purpose of sending it to the government of the United States.

The story of Clendon's effort to get an official text in English really starts with a request to Willoughby Shortland (written and dated 18 March, but filed as IA 40/61, dated 25 March, presumably the date of the actual reply). The inward letter is now missing (a photographic copy survives), and was registered as "US Consul Mr Clendon for copy of Treaty of Waitangi to forward to American Government":

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1 Despatch no 6, 20 February 1840, in United States. Consulate (New Zealand) Despatches ATL Micro-MS-0934-01 pp [1-2]. See also McNab, *Historical records of New Zealand* v 2 p 614. The attested translation in Clendon's despatch no 6 has been illustrated by Doutré in *The Littlewood Treaty* (2005) 78-81, with his signed attesting Memo on page 81. Clendon's transcript of the Busby/'Littlewood' text gives the correct date ("on the sixth day") four lines from the end, on page 80

2 Attachment to Despatch no 6, 20 February 1840, in United States. Consulate (New Zealand) Despatches ATL Micro-MS-0934-01 pp [4-6], followed by the printed text of the Treaty in Māori, and then the two printed proclamations of 30 January.

A document purporting to be a copy of a Treaty made between the Native Chiefs of New Zealand and Her Britannic Majesty's Commissioner, having been placed in my hands, I have the honour to request that I may be furnished by Her Majesty's Government with a copy of any existing Treaty with the said chiefs, that the same may be forwarded to the Government of the United States of America.<sup>3</sup>

A note on the verso by Freeman and dated 6 April says "Mr Clendon is to have a copy of the Treaty and a Translation", followed by a further "answered. H Kemp Interpreter", in Kemp's script. While no translation of the Treaty into English is now present among them, Clendon's papers at Auckland City Libraries do indeed contain a copy of the Māori text annotated "True copy Ja. Stuart Freeman".<sup>4</sup> This document, however, is simply a transcript, in the script of Henry Williams, and was probably copied from the printed document of 17 February. The Māori manuscript which was sent to Clendon (now at Auckland in Clendon's papers), was of no use to him, given that he had that text in printed form already.<sup>5</sup> What he really wanted was a copy of the 'official' text in English. Clendon seems to have approached several people for translations – including Gordon Brown and James Busby – and the version he selected, and which he transcribed into the 20 February despatch no 6, is a transcript of a translation in the handwriting of James Busby, the so-called 'Littlewood document'. Although the Littlewood document is dated 4 February, this date is a transcriptional error; Clendon recognised that the date was really 6 February and that is the date he gave in his despatch.

### ***I THE 'LITTLEWOOD DOCUMENT'***

The Littlewood document (Archives New Zealand, NA Series 6544) surfaced in June 1992 when John Littlewood wrote to the Alexander Turnbull Library that the document had been in the hands of his family for many years, and had probably been owned by Henry Littlewood, once of Russell, later of Auckland, his great-grandfather. The Littlewood family offered to donate the document to the nation if its origins could be ascertained; meanwhile it had been 'encapsulated' at the Auckland Museum about 1990. The museum had thought that it was in Hobson's writing.<sup>6</sup>

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3 Clendon to Shortland, 18 March 1840, formerly IA 1, 40/61 (now missing). Photographic copy at ATL qMS-1603. The letter from Clendon to Shortland is illustrated by Doutré in *The Littlewood Treaty* (2005) 88.

4 This is on a sheet watermarked 'Harris and Tremlett 1838'. As has been noted above there is one other transcript of the Treaty in Māori, in Archives New Zealand (G 30/1, 25-27, part of Hobson's despatch to Gipps, no 40/13 dated 17 February). This Māori language transcript, which is also in the writing of Henry Williams, is illustrated by Doutré in *The Littlewood Treaty* (2005) 137-139.

5 J R Clendon, Papers 1837-76. ATL-Micro-MS-054 (microfilm) originals at AP Clendon Papers "pack 3".

6 The Alexander Turnbull Library pointed out that such an important constitutional document was more appropriately placed in the (then) National Archives than in the Library, but applauded the Littlewood family's offer to donate the document to National Archives (since renamed as Archives New Zealand). The full text of the Littlewood document is illustrated by Martin Doutré in *The Littlewood Treaty* (2005) 6-7, and (in colour) [49-50].

At about the same time Claudia Orange was also approached about the document and she wrote to National Archives on 14 July, to say that she had examined the document, agreeing that it was a National Archives concern, rather than a Turnbull one. She pointed out that the Littlewood provenance was problematic (Henry Littlewood was thought to have arrived in the late 1840s) and that pending proper identification of the document, any publicity about it would be unwise, as the textual variations from the signed treaty of 6 February would be politically sensitive. The Littlewood document contained no mention of the contentious phrase "lands and estates, forests, fisheries and other properties" but instead used the expression "lands, dwellings and all their property". Shortly thereafter, on 23 July, the Littlewood family visited National Archives with the document, which they left on loan, for restoration and scholarly examination. In September the story of the 'draft' was made public by the *New Zealand Herald*.<sup>7</sup> The Secretary of Internal Affairs was informed on 10 September, and was told that the script was not Hobson's but that the scribe of the document had not been identified, nor had the date of writing been confirmed, nor was National Archives confident of the provenance.

After the newspapers published their stories, on 11 September, the then Minister of Internal Affairs (Graeme Lee) was photographed with the document, for a story in the *Dominion* of the following day.<sup>8</sup> On 12 September Hank Driessen, of Archives New Zealand, pointed out that the Littlewood document was very similar to the 'translation from the printed document' in Māori which had been sent by Clendon in his despatch no 6 of 20 February 1840. Claudia Orange was informed of the relationship of the Clendon and Littlewood texts on 16 September. Consultation between the experts was reported to the National Archivist (who was then overseas) on the following day. The similarity of the Clendon text and the unidentified Littlewood text was kept quiet, pending the resolution of the problem of the handwriting. In the face of further media enquiries, an article 'Author of treaty draft a mystery', appeared in the *New Zealand Herald* on 23 September, when it was reported that the minister had been briefed on the document but that no solution to the problem was in sight. The Chief Archivist, on 24 September, said much the same thing.<sup>9</sup>

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7 'Draft puzzles experts' *New Zealand Herald* 11 September and articles appeared in other newspapers: 'Experts study rediscovered Treaty of Waitangi copy' *The Dominion* 11 September and "'Missing" treaty may have been found' *Evening Post* 11 September, with a further story 'Treaty copy may have been used for trial' *Evening Post* 2<sup>nd</sup> ed 11 September which in which of Claudia Orange suggested that Henry Littlewood might have acquired his copy when he had been the defence counsel for Makutu at his murder trial in 1842. Orange pointed out, however that the document was dated 4 February rather than 6 February, and she did not think that it was the missing draft in English translated by Henry Williams.

8 It was here described as having 'fallen from her [the late Mrs Littlewood's] linen cupboard' other accounts trace it to a sideboard. *Dominion* 12 September 1992, 'Experts puzzle over "treaty"' *New Zealand Herald* 12 September, when Ian Wards supported the importance of the document.

9 'Author of treaty draft a mystery' *New Zealand Herald* 23 September, 'Tracing treaty author proving difficult task' *Evening Post* 24 September 1992.

On 21 September, however, the Crown Law Senior Historian, Don Loveridge, reported to the Crown Law Office on his examination of the Littlewood document. He pointed out the similarity between the text in Clendon's despatch no 6 and the Littlewood text ("virtually identical in all respects") apart from the dates (6 February and 4 February respectively) and dismissed the Littlewood document as a misdated copy of an extract of Clendon's despatch: "If someone was trying to create a document which would pass for the lost Williams draft of February 4<sup>th</sup> (or any other English draft predating the Waitangi signing), they did a singularly inept job of it."<sup>10</sup> Claudia Orange considered that Loveridge was 'probably' correct but observed that no solution had been found to the problem of who had 'translated the treaty' for Clendon or when; no solution had been provided to the Littlewood provenance and no solution had been provided to the problem of the discrepancy of the date.<sup>11</sup> In fact Loveridge's examination of the document had added nothing to the resolution of the central problem – who was the scribe?

Finally, the Chief Archivist informed the Littlewood family that a search for further information, in the papers of James Clendon at the Auckland Public Library, had also come up with nothing new: "Given the inability of historians to recognise the handwriting it may be that the writer of the document will never be known. It is clearly not by Henry Littlewood."<sup>12</sup> A press release put out by the Minister of Internal Affairs, on 15 October, quoting the opinions of Loveridge, Orange and the Chief Archivist, concluded that the Littlewood document was not the missing 'lost draft' which Hobson had given to Henry Williams but that it was probably a copy of Clendon's text from the despatch, made by someone yet unknown. That the unknown writing might be James Busby's was not considered, although John Littlewood had suggested this identification at the outset.

However, on examining the Littlewood document myself, in 2000, I immediately recognised the handwriting as Busby's. The document is, as shown above, a back-translation from Māori into English, from the printed text in Māori. It is of historical interest but is of no constitutional significance. It is not a draft of the Treaty nor is it a 'copy' of it. It is simply a translation of the Treaty, and, as Loveridge might well have observed, not a very good translation, although to call it "singularly inept" is perhaps too strong. The paper on which the Littlewood document is written has a watermark (W TUCKER | 1833) which is also found on other documents prepared by Clendon – including despatch number 6, first page – and it is possible, and even probable, that Busby wrote the

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10 D Loveridge to J Lake, 21 September 1992 in Archives New Zealand, file 4/1/18. The Crown Law Office reported this to the Minister on 29 September.

11 C Orange to Minister of Internal Affairs 5 October 1992, in Archives New Zealand, file 4/1/18. Orange found Loveridge's report unsatisfactory: "Dr Loveridge's comment that it was 'in all probability due to a simple copying error' does not entirely satisfy me as an historian. Although it *could* prove in the long run to be correct."

12 K Patterson to J Littlewood, 12 October 1992 in Archives New Zealand, file 4/1/18.

translation during a visit to Clendon in the period 17-20 February (i.e. between Colenso's printing and the date of the despatch) using Clendon's paper stock.

The next developments over the translation came early in April 1840, when Commodore Charles Wilkes, from the United States Exploring Expedition, discussed the recent developments with Clendon. In a letter of 3 April 1840, written at the "Consulate of the US of America at the Bay of Islands, N Zealand" Clendon advised Wilkes (in response to a query of the previous day) of the arrival of Hobson on the 29<sup>th</sup> January, the publication of the two proclamations of 30 January, (copies of which he enclosed, along with the printed Treaty in Māori), and of the visits of Hobson to Hokianga and the Thames (ie Hauraki Gulf), adding that "hitherto these are the only proceedings which have taken place relative to the cession of any rights by the chiefs of New Zealand to the British Crown". Enclosed with this letter were transcripts of both the Littlewood document and also the alternative translation, prepared for Clendon by Gordon Brown.<sup>13</sup>

The story of Clendon's efforts to get an "official copy of the Treaty" does not end here, however. On 20 June 1840, James Freeman (Acting Colonial Secretary, in the absence of Shortland) responded to Clendon with a further letter; "Sir, with reference to your letter of 24 March [sic] last requesting a copy of the treaty of Waitangi for transmission to the United States Government, I now do myself the honour, by the direction of His Excellency the Lieutenant Governor to enclose to you herewith copies of that Treaty in Native Language and English."<sup>14</sup> Clendon copied that latter document to send with his next despatch.

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13 Originals at Kansas State Historical Society, Topeka, Kansas, Charles Wilkes Papers, 1837-1847 ("Wilkes 542" in MS, microfilmed as Collection MS 53). These include Wilkes's letters received and sent including holograph transcripts marked 'Appendix' of the Littlewood 'affectionate remembrance' translation (pp 142-143) followed by 'Translation of the Treaty' with the Brown 'gracious consideration' text (pp 143-145) then Clendon to Wilkes, 3 April 1840 pp 145-6. The papers continue with business relating to squadron matters, but at pp 163-168 is a despatch (no 64 written on the vessel *Vincennes* on 5 April commenting on these documents, with particular emphasis on potential affects on American interests in the Southern Pacific Whale Fishery. Wilkes reports that he arrived at the Bay of Islands on 29 March and hastened to "inquire into the actual state of these islands". He received the documents from Clendon at this point (p 164). "I likewise obtained a copy of the treaty (a translation) also annexed and marked B & C in which the Govt have all the information that has yet been made public." I am indebted to Martin Doutré, a private researcher, for drawing these Wilkes papers to my attention. Wilkes observes that "The number of chiefs who have signed are being but a small part of those who hold not their freedom; indeed those who have signed are not aware of the act they have done, but speak of it as merely a transient thing. I cannot but view this Act of the British Govt as giving a most fatal stab to the interest of our whole fishery" but Wilkes speaks of Clendon as the most influential settler. Prominent deletions in the text, as concern American interests, suggest that the letter book quoted here was edited. Several pages of the Wilkes documents have been illustrated by Doutré in *The Littlewood Treaty* (2005) 93-93.

14 Archives New Zealand, IA 4/1 p 31, in the script of S E Grimstone. This letter had two enclosures, one being the Henry Williams holograph still in Clendon's papers; the other was a text of the Treaty in English, but unfortunately this latter has not been located. See also notes 4 and 5, this chapter.

The transcript in Clendon's next despatch (no 7, of 3 July 1840) advised: "Sir, I have the honour to enclose returns of American Vessels [ . . . ] Also an official copy of the translation of the treaty with the Native Chiefs referred to in my letter No 6 date 20<sup>th</sup> February 1840. The British Government have formed several settlements on this (Northern) Island and are preparing to put their laws in force. At present they have only a Police Magistrate and a small detachment of troops at each settlement." It is Clendon's hand, and clearly marked "copy".<sup>15</sup> The text supplied, however, was not a copy of the "official" English text, but, rather one of the "Her most gracious Majesty" type, with its usual and appropriate date, 5 February rather than 6 February. By a mistake – presumably on Freeman's or Grimstone's part – the WRONG DOCUMENT had been copied, and Clendon provided a copy of Freeman's second draft, rather than the "official English text" (which Clendon had sought).<sup>16</sup> Nobody seems to have noticed the error, including Robert McNab, who printed the texts of both of Clendon's dispatches – without the enclosures, however – in his *Historical records of New Zealand*.<sup>17</sup>

Other documents of around this time are also misdated by the Colonial Secretary's office, perhaps owing to the several changes of personnel there. In the proclamations of sovereignty over the Northern Island, issued on 21 May, the date of the signing of the Treaty at Waitangi is also given (incorrectly) as 5 February. This may be a simple case of carelessness or confusion, but, in either event, it indicates poor record-keeping in the Colonial Secretary's office at this time. Paradoxically, this poor record-keeping turns to the historian's advantage, by enabling us to retrieve the scribal history of New Zealand's founding documents. Despite official incompetence and a century of neglect, these documents are "preserved in the archives of the colony", after all.

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15 B Easton in "The Genesis of the Tiriti" (in *Archifacts* April 1997 pp 38-49) overlooks the Clendon autograph "Copy" in Washington. For the Clendon despatch see Archives New Zealand, Micro 2607, RG 59.

16 This was probably another transcript by Grimstone, resembling that in Archives New Zealand G 30 / 1 pp. 75-77.

17 R McNab, *Historical records of New Zealand* v 2 pp. 613-615. McNab notes that the text of the translation of the Treaty (ie the Busby/Littlewood translation) was to "appear in another place" but it was never printed, and, unfortunately the text sent in despatch no 7 was not printed either.

## CHAPTER 8

# THE REPRINTING AND TRANSLATION OF THE TREATY AFTER 1840

Interest in the Treaty among Europeans declined soon after 1840, but by 1844 – while FitzRoy was Governor – the economic collapse in North Auckland had led to serious questioning of the value of the arrangement between the Crown and the chiefs. At this point George Clarke (the former lay missionary, now Protector of Aborigines) had the Treaty reprinted by the Government printer of the time, Christopher Fulton, with the Māori text and the "official" English text, as authenticated by Hobson and Henry Williams, printed together.<sup>1</sup> In January 1845 the Church Mission printer, John Telford, on instruction from Henry Williams, had the Māori text (only) reprinted again from the first printing made by Colenso in 1840. As the policy of 'racial amalgamation' under Governor Grey proceeded, the Treaty was disregarded by the Government – although not by Māori – until a revival of interest in it in 1860, with the rise of the King Movement, after Grey's departure. This was shortlived, when a second Māori assertion of autonomy was crushed on his return for a second Governorship. The 'Kawana' reasserted his own status as 'Tino Rangatira' to the exclusion of any other governing authority.<sup>2</sup>

Soon after the departure of the devious Grey in 1868, and during the ascendancy of the Fox Ministry in 1869, the status of Māori was again under review. Māori had been admitted to the General Assembly in 1867, and took up their seats in 1868.<sup>3</sup> Walter Mantell, now in the Legislative Council, took up the matter of the Treaty again, over a question involving the foreshore.<sup>4</sup> Mantell asked that a "literal copy of the original treaty of Waitangi", and notes on it by William Baker, from 1865, be tabled in the Council and that there be printed "a copy of the English version of the Treaty

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1 For details of the printing history P Parkinson & P Griffiths, *Books in Māori 1815-1900* (Auckland, Reed, 2004), entries *BiM* 83 (Colenso's printing, 1840), *BiM* 215 (Fulton's printing, 1844), *BiM* 256 (Telford's printing, 1845). This Fulton printing of the 'official' English text was presumably made from the Waikato Heads sheet of the Treaty, and retains its features, such as the omission of Consul from Hobson's title, and the retention of the reference to the Victoria township "in congress at Victoria in Waitangi" even though 'Victoria in' had been deleted from the first official text sent to England (CO 209/7, 13-15).

2 See C Orange 'The Covenant of Kohimarama: a ratification of the treaty of Waitangi' *New Zealand Journal of History* 14 (1): 61-82 (1980).

3 See P Parkinson "Strangers in the House: the Māori language in government and the Māori language in Parliament 1865-1900" in (2001) 32 *VUWLR*: Monograph See especially pp 37-48, concerning the translation of legislative documents.

4 For a more detailed discussion see Orange, *Treaty of Waitangi* (1987) pp 182-183.

of Waitangi, as printed by the authority of the Government in 1840, and a careful translation thereof into Maori; also a literal translation into English of the original Treaty, already 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".<sup>5</sup>

When the then Colonial Secretary, Gisborne, doubted that this was possible<sup>6</sup> – he told the Council that "the original draft [in English] (if any) is not on record in the Native Office or Colonial Secretary's Office" – Mantell, knowing otherwise, insisted that a translation of the English text into Māori should be produced. According to *Hansard*, Mantell: "asked for a new translation to be made, because the original treaty of Waitangi was in the most execrable Maori [. . .] He had been informed that, notwithstanding the accidents by fire and floods and other causes, the original document was in existence".<sup>7</sup> This translation was made by the Native Department's translator, Thomas Edward Young, and his text is given in Appendix document 14.<sup>8</sup> In the documents printed in 1869 the 'official text' of the Treaty (ie the 1840 text, attested – erroneously – as a 'translation' by Williams and Hobson) is a transcript of the text in English signed by Hobson as Lieutenant Governor (i.e. the 'Waikato Heads' sheet). It is accompanied by Young's translation of that document and then by Young's translation "from the original Maori". This is, indeed, a translation from the Waitangi sheet, as that was the only sheet to use the titles 'Consul and Lieutenant Governor'.<sup>9</sup>

Next, in the 1869 translations, comes a schedule of the names of signatories and witnesses, and the notes of William Baker, a witness to the proceedings in 1840, digested from Hobson's despatches and other sources. For the present purpose these notes are of significance only because they record the fact of George Eliot Elliott's rescue of the Treaty sheets from fire in 1842 (erroneously said to have been in 1841), and the further information that the sheets of the treaty were still "in the iron safe in the Colonial Secretary's Office" in July 1865. Orange considers, however "This [the translation into Māori by Young] was not merely a new translation; it was a different Treaty."<sup>10</sup> It

5 NZPD 1869 v 6 pp 260-261 (4 August).

6 Gisborne: "had not as yet caused a search to be made, but he had very little doubt that some of these documents could not now be produced [. . .] but even if the original draft in English of the treaty had been kept and was still in existence he doubted very much if it could be found". (NZPD 1869 v 6, p. 261.)

7 Above n 5, the 'execrable' translation was that of Henry Williams.

8 Judge T E Young (1844-1879) of the Native Land Court, who had been Native Interpreter to the Māori members of the House of Representatives, and was remembered "for the easy and graceful manner in which he translated the oratorical efforts of the late Karaitiana Takamoana and other native representatives" according to the obituary in *New Zealand Mail*, 22 November 1879, p 19c.

9 In fact, however, Hobson signed as 'W. Hobson' rather than 'William Hobson'.

10 Above n 4, 183. The Young versions are printed by Orange pp 262-266, with Young's back translation (comparable to those of Davis, Busby et al., at pp 265-266). Here "kind thoughtfulness" replaces Davis's "gracious remembrance" and Henry Williams's 1847 "kind wishes" (compare documents 6-12 in the Appendix).

was a version of 'what the Treaty ought to have been, if it had been translated from the English correctly' in contemporary eyes – an exercise in revisionism.

Of more interest is Young's attempt at the literal translation of the Māori text, which can readily be compared with all the earlier versions of Davis, Busby, Anonymous, Brown, Martin and Wakefield, given in the Appendix (documents 7-12). The text by Thomas Young is different, but it does have some points in common with the printed text given by Samuel Martin in 1845. In Article 1 both Young and Martin use the word 'Assembly' (which is also used by Davis in the printed Coleman work of 1865) and it is probable that Young's version is partly derived from the two printed texts of Martin and Davis / Coleman.<sup>11</sup> What could be more sensible, than for Young to consult the printed alternatives of his predecessors?

If these translations are 'execrable', then that is a complaint to be levelled at Henry Williams, as Mantell appreciated when he used that term. Bruce Biggs, in 1989, discussed several features of the Henry Williams translation, commenting on the quality of the language of the translation. He pointed out that there was a literal error in the first line ('tana' (her) is written 'taua' (the aforementioned), a clear scribal error by Richard Taylor, who had not been long in New Zealand and was not yet familiar with the Māori language). But in all the subsequent transcripts this error is corrected, so it appears to have been a *lapsus calami* in the strict sense.<sup>12</sup> Biggs commented that neither Apirana Ngata "nor anyone else has provided any detailed comment on the quality of the Māori language used, regardless of what it means" and he rather down-plays Ruth Ross's observation that Williams wrote his text in 'Protestant missionary Maori' – as if there was any other kind before the Marists established their printery in 1842.

But Biggs makes a very good point in characterising the style of oral Māori as abrupt and elliptical, full of short sentences, and dependent on an oral context: "The linking of a number of clauses into long sentences [in English] and the spelling out, as it were, of the syntactic structure is strikingly different from the genius of Maori". The first sentence of Hobson's holograph preamble, a long and carefully crafted sentence of 129 words, is an indication of the idiomatic difficulties the translator faced. It would not happen in oral Māori. Complex sentences could be constructed in Māori, but for an oral presentation, it was not appropriate to use a legalistic, and essentially English-sounding, form of address. The translation is shorter than the English original, at 116 words. A back-translation, given by Biggs, abbreviates the passage to 93 words. Biggs observes that the Māori text of Williams "tries to imitate the explicit, unambiguous style of the English original,

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11 Certainly there is nothing to suggest that the Busby / Littlewood / Clendon text was a source. There is one striking similarity between the Young version and the Anonymous version in Clendon's papers, and that is us use of the word 'negociator' in that document, but this is probably only a coincidence, as the rest of the syntax is the passage is distinct.

12 B Biggs 'Humpty-Dumpty and the Treaty of Waitangi' in *Waitangi Maori and Pakeha perspectives of the Treaty of Waitangi* (1989) p 300.

which is as it should be, even though such long formal sentences were quite unknown in pre-literate Maori".<sup>13</sup>

Henry Williams, in common with other missionaries, uses both loan words and neologisms (such as 'kawanatanga' for governorship and / or government – although these are not precise equivalents), in preference to words already existing in Māori but which were redolent of discarded or disfavoured usages. There are only two such loan words in the Māori Treaty text, and these – Kuini (Queen) and Kawana (Governor) – are not really novelties, since they were in use from at least 1833, in scriptural contexts and in the prayer books.<sup>14</sup> The really difficult words or phrases were chosen to have assigned meanings, which they could take on all the more readily, because such words already had a variety of senses, for different contexts, in authentic Māori. The word 'taonga' (property), for example, as featured by Biggs "was used to refer to a wide range of valuable possessions and attributes, concrete or abstract".<sup>15</sup> The phrase used ('o o ratou taonga katoa' = all their property) was an inclusive expression, with a contextually assigned meaning. To translate it as 'treasures' is wholly inappropriate.

'Tikanga', as Biggs says, also has a wide range of meanings, but to translate it as 'rights' (in a legal sense) is mistaken, for even in English the word 'rights' has multiple significations, dependent upon context. This is a problem when the third article has to be translated (see above). The translation of 'rangatiratanga' as chiefly authority, as distinct from 'kawanatanga' – the governor's authority, which is a complementary form of authority rather specifically associated with the Europeans – is hardly problematic, except when it is mistranslated as 'sovereign' authority, properly an attribute for the Queen alone. From what we can learn of the interpretation of the text, reflected in the various back-translations, much of the Treaty in Māori was intelligible to the witnessing Europeans, even though the Māori text and the English text were quite different. The novelty was

13 Above n 12, 303.

14 The equivalent of the State Prayers in the 1833 prayer book (p. 20) has "E Ihowa to matou matua i te rangi, kaha rawa, e noho iho ana i te runga rawa, te Kingi o nga kingi, te Ariki o nga ariki, te Kawana o nga piriniha, e kite iho ana koe i runga i tou torona i te tangata katoa e noho ana i te wenua [ . . . ]. This employs neologisms for King (Kingi), and Governor (Kawana) and princes (piriniha) and throne (torona) all in one sentence. It uses Ariki (traditionally aristocrat priests) for Lord. (The corresponding English text is the 'Prayer for the King's Majesty' - "O Lord our heavenly father, high and mighty, King of kings, Lord of lords, the only Ruler of princes, who dost from thy throne behold all the dweller on earth [ . . . ]"). The 'rangatira maori' are named in the place of the King (William IV) in 1833. There is an early case when 'glory' was rendered 'kororia' in New Zealand (the 1833 prayer book p 34), in preference to the Tahitian missionary use of the word 'hinuhinu' (translated as 'brightness' or 'lustre'). This may have suggested inappropriate images of a woman's oiled hair as being her 'crowning glory'. As Biggs also remarks, there was a reluctance to use words which might retain heathen associations. A case in point may be 'Ariki', henceforth used mostly in reference to 'o tatau Ariki' (Our Lord), and not used in its genealogical and noble associations; another may be the use of 'ata' (a transliteration of *altar*) instead of 'tuahu' in Puckey's translation of Psalm 51 v 19 in 1840.

15 Biggs, above n 12, 308.

not so much in the words, as in the concepts, which the translators had to communicate. 'Sovereignty' was both a new word, and a new concept, for the chiefs to learn.

In more recent times another form of textual revisionism has occurred with Kawharu's 'attempt at a reconstruction of the literal translation' of 1989.<sup>16</sup> The 'Translation of Maori text by I. H. Kawharu', which is given in the Appendix as document 15 (with a commentary and with eleven explanatory footnotes), is more a revisionist interpretation than a literal translation – which it purported to be. It is a sort of text that Kawharu would liked to have had from Hobson and his officials, but is not by any means a text of which Hobson, or Gipps or the Colonial Office would have approved. While the preamble and first article are unexceptionable, the reference to 'unqualified chieftainship' (with its implicit suggestion that there was any imminent role for the chiefs in the government of the land) would have been doomed at the outset. Normanby's instructions to Hobson made it quite clear that the exercise of chiefly authority would be constrained. And the offer to Māori of "all the same rights and duties of citizenship as the people of England" would doubtless have struck all the Pākehā witnesses, including Lieutenant-Governor, and the missionaries, as visionary and absurd. All that might reasonably have been expected was some involvement of senior chiefs in a consultative capacity, as a sort of add on to the legislative council, when that came into being, at a point after the infant colony was cut from the apron strings of New South Wales. But with the relocation of the capital to Auckland in 1841, that did not happen.

My own 'version' of what the Treaty was supposed to say, in English as a back-translation, is given as document 16 in the Appendix. I have aimed at establishing what it was likely to have meant to those observing Pākehā who lacked vested interests – if such persons existed. The phraseology is drawn from the expressions used by witnesses and contemporary commentators.

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16 Kawharu (ed) *Waitangi: Maori and Pakeha perspectives* (1989) pp 319-321.



## CHAPTER 9

# CONCLUSION – THE UNFINISHED COVENANT

Nothing could be more ridiculous than to see the arrangements for the cession of New Zealand, from the mythical 'Confederation of United Tribes' to Queen Victoria, as some kind of basic law or constitutional framework with enduring effect. Yet that is a common perception of what had occurred at Waitangi. In practice, the Treaty was conceived as the start of a process to progressively acquire sovereignty, as intended by London, to be initiated by the revocation of the Declaration of Independence, so imprudently entered into by Busby, without the prior sanction of his superior, Governor Gipps. Gipps himself is explicit on the point:<sup>1</sup>

The declaration of independence was made, moreover, only by a few tribes, in the Bay of Islands, not extending even so far south as the Thames. Mr Busby has told you, that it was entirely a matter of his own concoction, and that he acted in it without any authority from either the Secretary of State, or the Governor of this Colony, who was his immediate superior: it was in fact, a manoeuvre played off by him against the Baron de Thierry, and it is not even pretended that the natives could understand the meaning of it; still less could they assemble in congress and pass laws, as Mr Busby, in his declaration, had made them to say that they would do. But even supposing the declaration to have been a genuine and a valid one, the only effect of it would have been to prevent Captain Hobson from taking possession of the Island in which it was made, by virtue of the right derived from the discovery of it by Captain Cook, and to make him have recourse to negotiation with the natives. And as this is the very course which Captain Hobson did pursue, and as Her Majesty's Sovereignty has now been acknowledged by the very chiefs who signed the declaration of independence, it follows that all things are now returned to the state in which they would have been, if no declaration of independence had ever been made. The utmost effect of it has been to render a negotiation with the chiefs necessary in the Northern Island, whereas the Middle and Southern Islands [i.e. the South Island and Stewart's Island] have been taken possession of without negotiation, by virtue of the right of discovery. [ . . . ]

If the mere declaration of independence by the New Zealanders could have given to Englishmen the right to dispossess them, by the pretended purchases of their lands, then would the persons who prepared and concocted that declaration of Independence, have been the most insidious enemy that the New Zealanders ever had; and better it would have been for the New Zealanders themselves, and better for the honour of England if they had barbecued [sic] him, as we are told they do their hogs, and eaten him

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<sup>1</sup> G Gipps, *Speech of His Excellency . . . on the second reading of the bill for appointing commissioners to enquire into claims to grants of land in New Zealand*. (1840) pp 23-34.

up outright. But it is not so; and Mr Busby stands acquitted of any such insidious design: his declaration of independence (for it was his) was indeed, I think, a silly, as well as an unauthorised act [. . .] a paper pellet fired off at the Baron de Thierry.

But, nevertheless, there can be little doubt that the basis for an ongoing and collaborative relationship between Māori and Pākehā was being laid down at Waitangi, even though the practical details for the arrangement were far from clear to anybody, and would only develop gradually. In the short-term, life after the Treaty continued much as it had before the Treaty. The chiefs continued to exercise their 'rangatiratanga' in their usual way, and soon notable chiefs, including literate Treaty signatories such as Nene, Patuone and Wiremu Hau, were offering to sell surplus land to the Crown, just as they had previously done to the missionaries and settlers. On 18 May 1840 George Clarke advised the Colonial Secretary that a large tract of "timber land situated at the source of the Hokianga River extending to the main wood leading to Kaitaia, containing 30,000 acres more or less, proposing to be paid for in property & specie to the amount of about five hundred pounds" was available from these very chiefs.<sup>2</sup> It would have come as a shock and affront to these chiefs to learn that no such transactions could be entered into, without the approval of the Queen's commissioners.

But, writing to Hobson on 6 May, Gipps informed him of the terms of the Bill for regulating titles to land in New Zealand:<sup>3</sup>

The Bill, after having in the preamble set forth that neither the chiefs nor any number of individuals of uncivilised tribes, such as inhabit the Islands of New Zealand, have not a right to dispose of their lands to persons not belonging to their own tribes, will in the first enacting clause declare all purchases, or pretended purchases from the natives to be null and void. The second clause, after reciting Her Majesty's gracious promise to confirm possession under certain restrictions, to persons who have obtained lands on equitable conditions in New Zealand, will authorise the appointment of one or more commissioners to enquire into and report on claims to land, and the further clauses will put restrictions upon the recommendations which the commissioners shall be authorised to make.

It was assumed that the individual chiefs, even those like Nene, Patuone and Hau, were incompetent to determine anything for themselves, in any circumstance involving Europeans.

The offers of land by Nene, Patuone, Hau, Panakareao and others to the Kawana could not be proceeded with; neither could the already arranged purchase of land for the proposed capital of Russell on Clendon's Land at Ōkiato. All must await the decisions of the Land Commission. 'Rangatiratanga' was all very well, but 'Komihangatanga' (another convenient neologism) – the tikanga of commissioners – would trump it every time. But this was not what the chiefs, or the

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2 Archives New Zealand, MA 4, 58, (Protector of Aborigines, letter book to Colonial Secretary, 1840-1844) letter 40/3 pp 5-6.

3 G Gipps to W Hobson, 6 May 1840, in ATL qMS-0843.

missionaries or many settlers were expecting, and the fairness of the proceedings was contested from the outset. This became the first violation of the Treaty so recently entered into. Robert Maunsell, in a 30 March 1840 letter, gave an account of the arrival of the Treaty and the response to it at Waikato:

I have lately received from the Secretary [Freeman] a deed to which he requests me to obtain the signatures of the Chiefs of Waikato amongst whom we reside & whom are at the head of a large and powerful body. It expressed an intention on the part of the Queen 'to protect to the natives their just rights and property' & while it claims without reservation 'all the rights & powers of sovereignty' as well as 'the exclusive right of pre-emption over such lands as the proprietors thereof may be disposed to alienate' in consideration whereof it engages to invest them with 'all the rights and privileges of British Subjects'. Considering the present circumstances of this people, their weakness, their want of government and the dangers from without with which they are threatened, one cannot but hail with thankfulness such an arrangement & persuade this people to accede to it, even though involving the sacrifice of two points to which human nature & particularly a native strongly clings, viz his independence and the right of disposing of his land as he pleases. It is stated in the preamble that one of the chief objects of the present Governor will be to establish 'a settled form of civil Government', while it is not stated that the concurrence of the chiefs will be required, beyond the preliminary Act of assenting to the sovereign power of the Queen; neither, also, are those rights defined which it is stated Her Majesty is anxious to protect to the native chiefs. Under the circumstances we cannot but feel our critical situation by having urged our people to assent to the said document, inasmuch as we shall be responsible in their eyes for all the evil consequences that may follow.<sup>4</sup> [ . . . ] 'Summum jus, est summi injurie' is a maxim nowhere more true than in this land; & I cannot therefore but hope that Government will ever have an experienced monitor near them to point out measures most advisable and to urge them to provide men that will exercise a temperate upright & judicious authority.<sup>5</sup>

Maunsell is here quoting the English "official text" of the Treaty, which he witnessed as he gathered signatures – he also had the printed Māori text in hand, as a few chiefs signed that instead. But he at least recognised that each chief was being asked to give up "the right of disposing of his land as he pleases" and that the vague assurances made were of a provisional character.

After the passage of the Commissioners Act, Hobson wrote to the Secretary of State for the Colonies "The New Zealand land bill, which passed the Legislative Council of New South Wales in July last, is fully calculated to meet most of the difficulties that I enumerated in my letters of 17<sup>th</sup> February last and the 23<sup>rd</sup> May; but the inconvenience arising from the want of judicial and legal functionaries is still much felt, and Sir George Gipps holds out no hope of obtaining them." Neither

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4 Maunsell points out that, once sovereignty is ceded, the government has *carte blanche* for future actions. So it was to prove.

5 R Maunsell to Lay Secretary, 30 March 1840, in ATL-Micro-MS-Coll-04-33 (CMS Archives CN/M v. 12 pp 308-309). *Summum jus*: 'There is no greater injury than supreme right' (attributed to Cicero).

a judge nor a surveyor was available. The natives, wrote Hobson "Offer us but trifling interruption, yet their habits are so inveterately opposed to those of civilised life, and other practices so repugnant to the customs of Englishmen, that we can scarcely hope to preserve such harmony when the settlers become more numerous."<sup>6</sup>

In his 1958 study of the origins of Crown colonial government in New Zealand, McLintock noted the meeting of Gipps with several South Island chiefs on 14 February with the object of signing a treaty which would give the Queen "absolute sovereignty in and over the said native chiefs, their tribes and country" but the proposed document was rejected by the chiefs and their commercial agents.<sup>7</sup> As early as April agitation by disgruntled speculators had begun in Sydney and the agitation soon inflamed feelings at the Bay of Islands, despite outward civility towards the incapacitated Hobson. As McLintock says, the signing of the Treaty by a smattering of northern chiefs "could not in itself bring all New Zealand within the sovereignty of the Crown" and the Treaty merely marked a stage in the progressive acquisition of sovereignty, soon to be furthered by Thomas Bunbury and the missionaries. Uncertainty surrounding the whole venture was amplified by events at Port Nicholson in May 1840, leading the Hobson's precipitate declaration of British sovereignty over the whole country on 21 May, even before the missionary emissaries reported back. When the proclamations were published in London, on 2 October 1840, putting the assertion of sovereignty beyond dispute – "an action which in every respect must be regarded as definitive and final and beyond legal quibble" (as McLintock affirms) – the matter had gone so far that there was no effort to apprise the *rangatira* (whether *tinu* or otherwise) of their situation, and no effort was made to circulate the proclamations of sovereignty in Māori, either.

It is true that, two years later, the Attorney-General William Swainson entertained doubts over the legitimacy of Crown actions – on the basis that not all the tribes had signed the Treaty. But he was quickly put in his place.<sup>8</sup> He had confused two principles, the one idealistic and humanitarian and imbued with the ethos of Exeter Hall, and the other concerned with international legal proprieties and resting on theories of legal positivism. The incompatibility between the two postures remains to the present. The Treaty was very limited in any practical application because, whether in terms of the conventions of 1800 or those of the present day, no 'covenant' between the Crown and a collection of tribes could be converted into "an agreement between sovereign states in accordance with the usages of international law". It was true that Hobson and his agents had secured a considerable degree of assent to British occupation of New Zealand, but in terms of legal proprieties, consent had been allied with the rights of discovery and the facts of settlement and

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6 W Hobson to Secretary of State despatch no. 40/8 dated 15 October 1840, duplicate holograph in Archives New Zealand G 30/1 pp 243-261, the original printed in GBPP 1840 (311) p 113.

7 McLintock, *Crown Colony Government in New Zealand* (1958) p 55, see also Sweetman, *The unsigned New Zealand Treaty* (1939) and the text in Orange, *Treaty of Waitangi* (1987) pp 260-261.

8 McLintock, *Crown Colony Government* pp 61-62.

occupation. Consequently New Zealand passed to the Crown by an Act of State and the so-called Treaty "falls rather awkwardly within the pattern of our national polity" not being a part of domestic law, nor an international legal instrument.

It can be treated as "at best a hasty improvisation to meet a problem created largely by unpractical idealists with little grasp upon the practical realities of the situation" or a "non-treaty" (Molloy) even as "a legal nullity" (to use Prendergast's infamous phrase).<sup>9</sup> But it can also be – and increasingly now tends to be seen as – an attempt to reconcile divergent interests, reconciling humanitarianism with justice for the advancement of a common polity, a sort of 'living covenant'. And it is that sense that it was widely embraced by New Zealanders (both Māori and Pākehā) over the last few decades. Ruth Ross's analysis of the drafts and translation appeared in 1972 and was noted by Alan Ward in 1973 with minimal comment.<sup>10</sup> Ward considered that the chiefs were "undoubtedly misled" by the translation into Māori but did not believe that the missionaries had been "deliberately deceitful" and is on sure ground, as the comments of Maunsell and others confirm. Ward, however, is quick to dismiss any speculation that any form of consultative body of chiefs was intended by either missionaries or officials. While Hobson, through his Protector of Aborigines, George Clarke, was assuring the chiefs that their native customs would not be infringed "except in cases that are opposed to the principles of humanity and morals" (as indicated in Hobson's Instructions from Lord Normanby) the chiefs had not conceded any such authority under the third article of the Treaty: "Hobson took no practical steps to engage the Maori leadership in the formal machinery of state. The Maori were placed in a position of subordination and tutelage from which they have ever since been trying to recover."<sup>11</sup>

Almost thirty years on, while Easton (1997) tried to consider the Treaty as a form of social contract, Ward (1999) solemnly asserted that: "The Treaty of Waitangi was a solemn compact between Maori chiefs (rangatira) and the British Crown to build a nation by their joint endeavours."<sup>12</sup> The later, revisionist view may be contrasted with that of 1973. We would err, however, if we were not to recognise that the document, when sensibly translated, is no blueprint for the conduct of a modern society. The idea of a 'living covenant' favoured by Evangelicals and their modern descendants has more to do with the modern cult of the 'Tiriti' than it has to do with statute law, and more to do with a theological covenant than with a New Zealand constitution. There is remarkably little in the three articles, in fact, upon which to base a bicultural polity, or a workable

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9 See also A P Molloy 'The non-treaty of Waitangi' *New Zealand Law Journal* (1971) no 9: 193-196.

10 A Ward, *A show of justice* (1973) 44 fn. 9.

11 Above n 10, 45.

12 A Ward, *An unsettled history* (1999) p 7. Easton considers "that the treaty which Hobson and Busby drafted had elements of a social contract, and the circumstantial evidence suggests that Busby at least intended that the treaty he was involved in drafting be a social compact." (Easton p 33). Neither author recognises that the primary purpose of the 'treaty' was to revoke the Declaration of independence of 1835.

mutuality, when the contemporary texts in English and Māori are closely examined. Even the third article (which all the writers of back translations seem to agree is an assurance of "protection" and "rights and privileges" like those of the English, presents problems (that McLintock rightly termed "vexatious"): <sup>13</sup>

What precisely was the interpretation of the promise to confer on the Maori people "all the rights and privileges of British subjects"? Did it mean that the Maori was to be subject to the same laws as the European and to be governed by a legal code foreign to his way of life and thinking? This was never the intention of the British Government, which from the outset ruled that, wherever the natives were numerous special districts were to be proclaimed in which their customs should be given the force of law.

The "great difference of opinion as to the mode in which that Treaty should be respected" (as Robert Peel said) is as great today as it was in 1840, and it still tends to be approached in the language of lawyers, rather than that of statesmen. <sup>14</sup> Seeking a 'plain meaning' from the words of the Treaty is an impossible task, as Richard Dawson has acknowledged, in declining to give "a particular meaning to the Treaty". <sup>15</sup> It may be tempting, therefore, to place more reliance upon the "principles of the Treaty" rather than on the "words of the Treaty", but such is the continuing uncertainty about what those principles actually are, that the very phrase "principles of the Treaty" has become a source of contention. <sup>16</sup> In 2005 the New Zealand First Party tried to introduce a Bill in Parliament to remove all the references to the 'principles of the Treaty of Waitangi' from legislation, but this effort was defeated. <sup>17</sup>

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13 McLintock, p 67.

14 McLintock, pp 63-64, citing Great Britain Parliamentary Debates 1844 v. 81 c. 958.

15 R Dawson, *The Treaty of Waitangi and the control of language* (2001) p 228.

16 "Much of the contemporary focus is on the spirit rather than the letter of the treaty, on adherence to the principles rather than the terms of the Treaty. Regrettably, but reflecting the limited dialogue there has been on the Treaty, it cannot yet be said that there is broad general agreement as to what those principles are." *NZ Maori Council v Attorney-General* [1987] 1 NZLR 641, 672-673. The principles were also articulated in the State Services Commission's *Towards responsiveness* (July 1989). For a more general discussion of approaches to the 'principles of the Treaty' see Janine Hayward's Appendix to Chapter 20 in A. Ward, *National overview* (1997), 3 v.

17 See the "Principles of the Treaty of Waitangi" Deletion Bill, at the Party's website <<http://www.nzfirst.org.nz/treaty/>> where it is alleged that "the vague term" has harmed race relations since it was introduced in 1986. Because the parliament had not defined these principles in legislation, the task of definition had fallen to judges, and "despite nearly two decades of existence, these principles remain largely undefined and ambiguous." It is also observed that the ongoing litigation is expensive, and, although the expression is not used in the Bill, the fostering of a 'treaty industry' and a perpetuation of the 'grievance mode'. Commentary on the Bill can be found at <[http://www.chenpalmer.com/article\\_541.asp](http://www.chenpalmer.com/article_541.asp)>.

One who well appreciated the problems which the acquisition of sovereignty raised was Dr Samuel Martin, author of at least one of the two supplements to the *New Zealand Advertiser and Bay of Islands Gazette*, in which Gipps was attacked for his views.<sup>18</sup> Martin includes the text of the *Protest* in his *New Zealand in a series of letters* (1845). He explains: "At our meeting at Coromandel harbour, we drew out a memorial to the Home Government, complaining of the injustice of the Government of New South Wales. We also drew out a protest, in the name of the subjects of England, America and France, against the right of the British Government to seize upon the sovereignty of a country whose independence she herself had so frequently acknowledged; and we, in an especial manner, protested against the right of the Governor of New South Wales to confiscate our properties. Both documents were being very numerously signed when I left New Zealand."<sup>19</sup> He continues, in his sixth letter, sent in January 1841:

Sir George Gipps and the New Zealand Council [sic<sup>20</sup>] have an idea that the New Zealanders are like the unfortunate aborigines of New Holland, wandering savages without house, home or any fixed habitations; who in their opinion, the sooner they were exterminated by themselves and their stockmen the better. [. . .] Having procured from his Attorney General all the authorities on the law of nations, and reports of some decisions between the United States of America and some of the Indian tribes, all which, as a matter of course went happily to prove that civilised countries had a right to plunder savages and to take possession of their lands – thus backed with American law authorities, Sir George Gipps delivered himself of a speech which so much astonished his councillors by the profundity of its legal knowledge, that they, without a moments hesitation, became converts to the doctrine that the New Zealanders are savages: this was of course taken for granted as a starting point, and believed as truly as any of Euclid's axioms.<sup>21</sup>

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18 Between issue 18 (8 October 1840) and issue 19 (15 October) of the *New Zealand Advertiser*, its editor, Quaife, published a *Protest of the Subjects of the British and other Powers residing in New Zealand* (Bagnall 4706 there uncertainly dated 1841, although Hocken gives the correct date of 1840), and a *Memorial to Her Most Gracious Majesty Victoria, Queen of Great Britain, Ireland and its dependencies* (Bagnall 3508, also uncertainly dated 1841 by Bagnall). The *Protest* (certainly) and the *Memorial* (probably) were the work of Martin, 'a Doctor Martin, a shrewd and clear man', as is confirmed by William Vitruvius Brewer, and the brother-in-law of Henry Samuel Chapman, editor of the *New Zealand Journal*, who promoted them. (See W V Brewer to H S Chapman, 12 October 1840, quoted in *New Zealand Journal* no 30 (13 March 1841) p 68). Dr Martin later became the editor of the first *New Zealand Herald* (1841-42).

19 S Martin, *New Zealand in a series of letters* (1845) letter vi, 10 January 1841, p 112, the *Protest* text is Appendix II.

20 "New Zealand Council" is an error for "New South Wales Council".

21 Above n 19, letter vi, pp 113-114. Hence, mocks Martin, the British Government considered it had a right to all the lands in New Zealand, whether in the possession of natives or Europeans: "So conceited was the Governor of Botany Bay of his speech, that he actually incurred the expense of printing it, for the purpose of permanently delighting his friends and admirers with his eloquence, learning and justice."

Martin was also the author of a notorious attack on the Shortland administration, following Hobson's death in 1842.<sup>22</sup> Following the debacle of the Northern War in 1845, Martin wrote:<sup>23</sup>

When [Gipps and Hobson] were deputed by the Home Government to establish British authority in New Zealand, they were requested to obtain the cession of sovereignty from the chiefs with their intelligent consent, and on no other terms was British authority to be obtained or attested. How far Sir George Gipps and Captain Hobson discharged the trust reposed in them may be inferred from the late conflict at the Bay of Islands. It is needless to assert that, had they obtained the intelligent consent of the natives, such an unhappy occurrence would never have happened. The intelligent consent of the natives was never obtained either by Captain Hobson or Sir George Gipps, and the treaty by which they pretend to have obtained the cession of sovereignty has not been signed by one third of the chiefs of New Zealand; neither were any of those who were induced to sign [made to] comprehend its full meaning; nor is even the treaty which it is pretended they have signed the same in substance or in meaning with that which was in their own language submitted to them, as any person may perceive by looking at the official and literal translation in the Appendix to these Letters.

The benefits of civil society would be long delayed. Although now nominally they were British subjects, the chiefs had not acquired the 'rights and privileges' consistent with that status. This was not Hobson's fault, for he was subordinate to Gipps, and Gipps himself was in a difficult position, as he was essentially a caretaker for New Zealand pending its anticipated separation from New South Wales. The solution, for Gipps, was to cut New Zealand loose, and that is what he did. Given the disability of the Lieutenant-Governor and the lack of competent – or even honest – officials in his infant administration, Hobson's opportunities for delivering the 'rights and privileges of British Subjects' or (to use Richard Davis's words) 'the same rights as the people of England', were indefinitely deferred. Thirty years later little had changed. The Treaty, according to McLintock, "embraced much but solved little" and even a scrupulous interpretation of its words, in its three brief provisions, "meant the necessity of sowing fresh seeds of discord and the creation of fresh racial tensions" for it was to become, within a few years, a "harbinger of strife".<sup>24</sup>

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22 *New Zealand in 1842; or, the effects of a bad government on a good country. In a letter to the Right Honourable Lord Stanley, Principal Secretary of State for the Colonies, by S. M. D. Martin MD, President of the New Zealand Aborigines Protection Association, and, lately a magistrate of the Colony.* (1842). 32 pp

23 S Martin, *New Zealand in a series of letters* (1845) p 335.

24 McLintock, p 71.

## APPENDIX

### ***THE ENGLISH-LANGUAGE DRAFTS OF THE TREATY OF WAITANGI AND A SELECTION OF CONTEMPORARY AND SUBSEQUENT ENGLISH BACK- TRANSLATIONS***

#### ***DOCUMENT 1***

**James Stuart Freeman's draft notes for the Treaty (undated, but ca 31 January 1840)<sup>1</sup>**

~~Whereas~~<sup>2</sup>

Her most Gracious Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland ~~viewing~~<sup>3</sup> 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<sup>4</sup> which must result both to the Natives of New Zealand and to Her Subjects from the absence of ~~the~~ all<sup>5</sup> necessary Laws and Institutions has been graciously pleased to empower 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.

In consideration whereof

Her Majesty The Queen extends to the Natives of New Zealand Her Royal Protection and imparts to them all the Rights and Privileges of British Subjects. [in margin:] 3d Article

[Inserted note by Freeman:] 1<sup>st</sup> Article

The United Chiefs of New Zealand cede to Her Majesty in full Sovereignty the whole Country contained between [space] and the North Cape with all the Islands adjoining thereto included between the [space] degree of Latitude and the [space] degree of Longitude, and the [space] degree of Longitude.

[Inserted:] 3d.<sup>6</sup>

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1 Original at Archives New Zealand, Treaty Room public display. Freeman's text has been illustrated by Doutré *The Littlewood Treaty* (2005) 36-39.

2 Word 'whereas' deleted.

3 Hobson (probably) substituted 'regarding' for 'viewing'.

4 Hobson (probably) first wrote 'evils' but then corrected it to 'evil consequences'.

5 Hobson (probably) substituted 'all'.

6 '3d' ie '2<sup>nd</sup>' as it is the third clause concerning pre-emption.

The United Chiefs of New Zealand ~~concede~~ yield<sup>7</sup> to Her Majesty the Queen of England the exclusive right of Preemption over such Lands as the Tribes may feel disposed to alienate

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**DOCUMENT 2**

**James Busby's first draft of the Treaty of Waitangi<sup>8</sup> (3 February 1840)**

1st Article.

The Chiefs 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 maybe supposed to exercise or 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 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 ~~thereof~~ and persons appointed by Her Majesty to treat with them in that behalf.

Third 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.

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 gracious invitation of Her Majesty the Queen of England: and being sensible of our own weakness and inability to repress internal dissension 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

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7 'The word 'yield' appears to be Hobson's.

8 Original at Auckland Institute and Museum Library AR MS 46 (6). Busby's text has been illustrated by Doutré *The Littlewood Treaty* (2005) 40-43.

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 sovereignty of our territories extending from the North Cape to the Northern Shores of the Estuaries of Manukau and the River Thames. ~~with~~ and including all the Islands between the [space] ~~degree~~ and degrees of latitude and the [space] degrees of Longitude. ~~In testimony whereof we have affixed our signatures or marks this~~ And we further yield to Her Majesty the exclusive right of preemption over all our waste Lands, accepting the privileges and rights of British subjects and relying upon 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 [space] day [space]

For the Independent Chiefs.

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 ~~sense~~ meaning & extent thereof — in witness whereof we have attached our signatures or marks at the dates and places respectively specified —

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### **DOCUMENT 3**

#### **Busby's 'second' draft of the Treaty (undated, 3 or 4 February)<sup>9</sup>**

##### First Article.

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 possess in<sup>10</sup> their respective territories as the sole sovereigns thereof<sup>11</sup>

##### Second Article

Her Majesty the Queen of England confirms and guarantees to the chiefs and Tribes of New Zealand and to the respective families and<sup>12</sup> individuals thereof the full exclusive and undisturbed

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9 Original at Archives New Zealand, Treaty Room public display. Busby's text has been illustrated by Doutré, *The Littlewood Treaty* (2005) 44-47.

10 The word 'in' is malformed and is written again.

11 The expression is designed to reinforce the fiction that the 'Confederation' was a competent lawful authority capable of making a treaty of cession. In practice, of course, it was not.

12 The word 'and' is written twice; the second word is crossed out.

possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or ~~separately~~ individually<sup>13</sup> 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.

### Third 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.

Signature of the British plenipotentiary?<sup>14</sup>

Now therefore we the chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi<sup>15</sup> on the fifth day of February in the year of our Lord One Thousand Eight Hundred and forty.<sup>16</sup> In witness of which we have attached our signatures or marks at the places and dates respectively specified.<sup>17</sup> And having understood and seriously considered the gracious invitation of the Queen of England: and being sensible of our own weakness and inability to repress internal dissensions and to defend our country from external enemies: and feeling also the want of 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 of<sup>18</sup> Her Majesty's Royal Predecessors to repose entire confidence in Her Majesty, do fully and entirely cede and yield up to Her Majesty the sovereignty of our territories extending from the North Cape to the Northern Shores of the Estuaries of Manukau and the River Thames and including all the islands adjacent thereto lying between the [space] and the [space] degrees of Latitude and the [space] and the [space] degrees of Longitude.

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13 The word 'individually' is substituted in the margin by another writer, probably Hobson.

14 These words are a gloss in Busby's hand, suggesting that it was unclear whether Hobson's signature was to be inserted here, or later in the document.

15 Here an X marks a later insertion in a different hand, probably Hobson's: "For and on behalf of ourselves & those we repre[sent]" but this emendation was later deleted.

16 Here a large X is inserted to continue the text at the foot of the next page: "And we the separate [etc.]".

17 The long insertion ends here, and the text resumes as "And having understood".

18 After 'good faith of' Busby has added with a carat mark 'Her Majesty and of'.

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 upon Her Majesty's Royal Justice and benignity to our simple and unenlightened countrymen.<sup>19</sup>

In witness whereof we have attached hereunto our signatures or marks on this [space] day of [space]

The mark of ——

The mark of ——

For the Independent chiefs<sup>20</sup>

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<sup>21</sup> the same in the full spirit & meaning thereof<sup>22</sup> In witness of which we have attached our signatures or marks at the places and dates respectively specified<sup>23</sup>

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#### ***DOCUMENT 4***

##### **Freeman's English draft of the Treaty of Waitangi (3-4 February)**

Her most Gracious Majesty Victoria Queen of the United Kingdom of Great Britain<sup>24</sup> 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

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19 This paragraph has been deleted.

20 The construction of this next paragraph shows that it was intended as a codicil to the document for signing subsequently to the Waitang meeting, just as the codicil to the Declaration of Independence of 1835 was used with a codicil for later accessions in 1836-39.

21 "accept and enter into" is inserted interlineally with a carat mark, in Busby's hand.

22 The original wording was twice altered, firstly to "full meaning & extent thereof" and then to "full spirit & meaning thereof".

23 The original text refers to the 'confederated chiefs' alone, but the final paragraph was specifically for the others. The inserted X before "And having understood" is probably Hobson's intervention to insert the final paragraph earlier in the text. This paragraph has been termed the 'Short Busby postscript' by Donald Loveridge (undated MS, communicated to Claudia Orange).

24 There are three extant copies of this text, as discussed above. They are (1) by Henry Williams (at Archives New Zealand G 30/1 pp 29-32); (2) by S E Grimstone (at Archives New Zealand G 30/1 pp 75-77). The third is James R Clendon's transcript, in Washington. Clendon's copy has "Brittain" corrected by crossing out the second 't'.

result both to the Natives of New Zealand and<sup>25</sup> Her Majesty's Subjects from the absence of all necessary Laws and Institutions, has been graciously pleased to empower and authorise me William Hobson a Captain in Her Majesty's Royal Navy, Consul and Lieutenant Governor in New Zealand, to invite the confederated<sup>26</sup> Chiefs to concur<sup>27</sup> in the following Articles and conditions<sup>28</sup> —

#### First Article

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<sup>29</sup> over their respective territories as the sole Sovereign<sup>30</sup> thereof.

#### Second 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<sup>31</sup> and undisturbed possession of their Lands and Estates, Forests, Fisheries,<sup>32</sup> 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,<sup>33</sup> yield to Her Majesty the exclusive right of pre-emption, 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.

#### Third 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.

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

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25 Williams has "and to".

26 Clendon's copy has "confederate" for "confederated".

27 Williams has "concurr".

28 Williams has "Articles" for "Articles and conditions".

29 Williams has "or may be said to exercise or possess".

30 Williams has "sole Sovereigns".

31 Clendon's transcript has "exclusion" for "exclusive".

32 Williams omits the words "and Estates, Forests, Fisheries".

33 Clendon's copy has "United Tribes yield" omitting reference to the individual chiefs.

one thousand eight hundred and forty, 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 whereof,<sup>34</sup> we have attached our Signatures or Marks at the places<sup>35</sup> and dates respectively specified —

Signed W Hobson<sup>36</sup>

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### **DOCUMENT 5**

#### **Hobson's holograph preamble to the treaty, probably 4 February<sup>37</sup>**

Her Majesty Victoria Queen of the United Tribes<sup>38</sup> 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 ~~in the extensive Emigrations and are still accumulating in the land<sup>39</sup>~~ and the rapid extent 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 the Sovereignty<sup>40</sup> aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those Islands which they may be willing to place under her Majesty's Dominion.<sup>41</sup> ~~& Her Majesty therefore being desirous to avert the evil consequences that must result, both to the Native Population and to her subjects, resident in New Zealand from the absence of all necessary Laws and Institutions necessary to restrain and to Protect Her Subjects<sup>42</sup>~~ Her Majesty therefore being desirous to establish a settled form of Government with a view to avert the evil

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34 Williams has "of which" for "whereof".

35 Williams has "at the place" for "at the places".

36 Williams omits "(Signed) W Hobson" and Clendon has "(Signed) W. Hobson, [space]". Neither mentions the titles of "Consul" or "Lieutenant-Governor", which were used on 6 February.

37 Original held at Archives New Zealand, Treaty room public display. This sheet was written after receipt of Busby's second draft of the articles, probably on 5 February. Hobson's text has been illustrated by Doutré, *The Littlewood Treaty* (2005) pp. 32-35.

38 Word 'Tribes' deleted, an obvious slip of the pen.

39 Passage deleted and following passage substituted.

40 Passage struck out.

41 "which they may be willing to place under her Majesty's Dominion" appears in the holograph but not in the "official text" of the Treaty as authenticated by Hobson and Henry Williams.

42 Passage struck out.

consequences which must result ~~alike to the Native Population and to Her Subjects~~<sup>43</sup> from the absence of necessary Laws and Institutions alike to the Native Population and to her Subjects Has been Graciously pleased to empower me William Hobson a Captain in Her Majesty's Royal Navy Consul, and Lt Governor [& Lt Governor of such parts of New Zealand as may be or may hereafter be ceded to Her Majesty<sup>44</sup>] in New Zealand to invite the Confederated & Independent Chiefs of New Zealand to concur in the following articles & Conditions —

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**DOCUMENT 6**

**The English text dated 6 February 1840, and sent to Gipps ca 12 February (Given in Hobsons despatch no 3, as given in GBPP (1840 (560) pp 10-11, and ordered printed and published in London on 29 July 1840).<sup>45</sup>**

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 for 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 these 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, has been graciously pleased to empower and authorize me, William Hobson a captain in Her Majesty's Royal Navy, Consul and Lieutenant-governor in New Zealand, over 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

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43 Passage struck out and rephrased.

44 Passage starting '& Lt Governor of such' added in margin, with misplaced carat mark.

45 This text is the same as that given by McLintock, *Crown Colony Government in New Zealand* (1958) pp 415-416, who states "The draft in English. (This English version of the Treaty is not a translation of the Maori text. It must be regarded as the draft as finally approved by Hobson and thereupon 'translated' into Maori. The punctuation has not been altered.)" I agree with McLintock. In fact, although Henry Williams and William Hobson authenticated this as a 'translation' it is really a modified composite of parts of the English language drafts, not a translation at all.

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 said to 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 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 pre-emption 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.

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

Now therefore, we, the chiefs of the confederation of the united tribes of New Zealand, being assembled in congress at Waitangi,<sup>46</sup> 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 whereof, we have attached our signatures or marks at the places and dates respectively specified.

Done at Waitangi this 6th day of February in the year of our Lord 1840.

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<sup>46</sup> "At Victoria in Waitangi" (Busby's original text) has been changed to "at Waitangi" acknowledging that Busby's 'township' of Victoria did not actually exist. In the signed and attested copy of the English official text at CO 209/7, 15 the words "Victoria in" have been crossed out, but they are still present in the other copy sent to England (the bilingual text at CO 209/7, 178). It is likely that the deletion of "Victoria in" was made by Hobson and Williams, both of whom authenticated the official text. And "at Victoria in Waitangi" is still in the Waikato Heads copy.

**DOCUMENT 7****Richard Davis's 'A literal translation into English, made in New Zealand, of the Maori version of the Treaty' provided to J N Coleman<sup>47</sup>**

Victoria, the Queen of England, in her gracious remembrance of the Chiefs and Tribes of New Zealand, and through her desire to preserve to them their chieftainship and their land, and to preserve peace and quietness to them, has thought it right to send them a gentleman to be her representative to the natives of New Zealand. Let the native chiefs in all parts of the land and the islands consent to the Queen's Government. Now, because there are numbers of people living in this land, and more will be coming, the Queen wishes to appoint a Government, that there may be no cause for strife between the natives and the Pakeha, who are now without law: it has therefore pleased the Queen to appoint me WILLIAM HOBSON, a Captain in the Royal Navy, Governor of all parts of New Zealand which shall be ceded now and at a future period to the Queen. She offers to the chiefs of the Assembly of the Tribes of New Zealand and to the other chiefs, the following laws.

- I. The chiefs of (i.e. constituting) the Assembly, and all the chiefs who are absent from the Assembly, shall cede to the Queen of England for ever the government of all their lands.
- II. The Queen of England acknowledges, and guaranteed to the chiefs, the tribes, and all the people of New Zealand, the entire supremacy of their lands, of their settlement, and of all their personal property. But the Chiefs of the Assembly, and all the other chiefs, make over to the Queen the purchasing of such lands, which the man who possesses the land is willing to sell, according to the prices agreed upon by him, and the purchaser appointed by the Queen to purchase for her.
- III. In return for their acknowledging the Government of the Queen, the Queen of England will protect all the natives of New Zealand, and will allow them the same rights as the people of England.

(Signed) William Hobson  
Consul and Lieutenant-Governor

We the Chiefs of this Assembly of the tribes of New Zealand, now assembles at Waitangi, perceiving the meaning of these words, take and consent to them all. Therefore we sign our names and our marks.

This was done at Waitangi, on the sixth day of February, in the one thousand eight hundred and fortieth year of our Lord.

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<sup>47</sup> Text from John Noble Coleman, *A memoir of the Rev Richard Davis* (1865) pp 455-456. The translation was doubtless by Davis, who hosted the signing at Te Waimate.

**DOCUMENT 8****Busby's back-translation of the Treaty of Waitangi, misdated 4 (ie 6) February 1840 and known as the "Littlewood document"**

Her Majesty Victoria Queen of England in her gracious consideration for the chiefs and people of New Zealand, and her desire to preserve to them their land and to maintain peace and order amongst them, has been pleased to appoint an officer to treat with them for the cession of the sovereignty of their country and of the islands adjacent to the Queen, Seeing that many of her Majesty's subjects have already settled in the country and are constantly arriving: And that it is desirable for their protection as well as for 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 the Royal Navy to be Governor of such part<sup>48</sup> of New Zealand as may now or hereafter be ceded [?] to her Majesty and<sup>49</sup> proposes to the chiefs of the confederation of the native tribes of New Zealand and the other chiefs to agree to the following articles –

## Article first

The chiefs of the confederation of the united tribes and the other chiefs who have not joined the confederation cede to the Queen of England for ever the entire sovereignty of their country

## Article Second

The Queen of England confirms and guarantees to the chiefs & tribes and to all the people of New Zealand the possession of their lands, dwellings and all their property, But the chiefs of the confederation and the other chiefs grant to the [word deleted<sup>50</sup>] Queen the exclusive right of purchasing such land as the proprietors thereof may be disposed to sell at such prices as shall be agreed upon between them and the person appointed by the Queen to purchase from them

## Article Third

In return for the cession of the sovereignty to the Queen, the People of New Zealand shall be protected by the Queen of England, and the rights and privileges of British Subjects will be granted to them –

Signed

William Hobson

Consul & Lieut Governor

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48 Clendon despatch 6 has "parts" for "part".

49 Clendon despatch 6 has: "And" starting a new sentence.

50 Clendon despatch 6 has "to the Queen".

Now we the chiefs of the confederation of the United tribes of New Zealand being assembled at Waitangi, and we the other chiefs of New Zealand having understood the meaning of these articles accept of them and agree to them all.

In witness whereof our names or marks are affixed. Done at Waitangi on this 4<sup>th</sup> Feb 1840<sup>51</sup> –

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**DOCUMENT 9**

**Anonymous back-translation of the Preamble and Articles 1 and 2, supplied to J R Clendon, ca 20 February 1840<sup>52</sup>**

Victoria, the Queen of England in her merciful regard towards the chiefs and tribes of New Zealand, in her desire also to reserve to them their *rank as chiefs*<sup>53</sup> chieftainships, and their lands, and that Peace may continue to them, and quiet also; has considered it a right thing to send hither a chief as a negociator with the native people of New Zealand. Let the native chiefs consent to the Government of the Queen at (or over) the places of this country, and the islands. Because also a considerable number of the people of her nation have dwelt in this land and are coming hither.

Now the Queen is desirous that the Government should be made strait (settled) that the evils may not accrue to the native people and Foreigners who are living without law.

Now the Queen has been pleased to appoint me William Hobson a captain in the Royal Navy to be Governor for all the places of New Zealand which shall now or hereafter be let go<sup>54</sup> to the Queen she says to the chiefs of the confederate Tribes of New Zealand and the other chiefs these terms (or laws) here mentioned:-

The First,

The chiefs of the confederacy and all the chiefs also which were not included in that confederacy wholly let go<sup>55</sup> to the Queen of England hereafter for ever all the government of their lands.

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51 Clendon despatch 6 has the correct date: "on the Sixth day of February in the year of our Lord One Thousand Eight Hundred & Forty". This accords with the printed text, printed on 17 February, which was enclosed with the despatch.

52 Holograph, (on paper watermarked 'M. I. Fryer | 1838'), Auckland Central City Library (AP), Clendon House Papers, NZMS 705. Box 1, Bundle 1, no. 1. The scribe responsible has not been identified.

53 "rank as chiefs" is an addition written in the margin.

54 "let go" is an equivalent for 'cede' "e tukua aianei amua atu ki te Kuini"; the 'official' English text says 'ceded'.

55 "wholly let go" is an equivalent for "ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu" The 'official' English text says 'cede'.

The second,

The Queen of England makes strait and consents to the chiefs, to the Tribes, to all the people of New Zealand (is)<sup>56</sup> the full chieftainship *or exercise of the power of chiefs*<sup>57</sup> over their Lands, Villages and all their property<sup>58</sup>: but the chiefs of the confederacy and all the other chiefs let go to the Queen the purchasing of those portions of Land which the man (*or men*<sup>59</sup>) whose is the land may be willing (to sell) according to the payment which may be settled by them and the purchaser whom the Queen may appoint to purchase for her.

The Third

[The text breaks off here; the third article and testamentum clause are not written.]

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### **DOCUMENT 10**

**Translation of Treaty of Waitangi by Gordon Brown<sup>60</sup> (undated, on unwatermarked paper but apparently 1840), in Clendon papers, AP NZMS 705 Box 1 Bundle 1 no 8).**

Victoria Queen of England with her affectionate remembrance to the chiefs and tribes of New Zealand

Desires to point out to their chieftainships in their lands &c that they may keep in peace and live in comfort, thinks it right to send an English chief to advise with the natives of New Zealand that they may accept the government of the Queen over all their lands and islands. Because there will be thousands of the Queen's subjects to reside in the lands, and they are coming.

The Queen is desirous of establishing a government that all the evils now upon the natives from the English living in idleness and lawlessness may be removed.

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56 "(is)" is redundant.

57 The words "or exercise of the power of chiefs" are inserted in the margin as a clarification of the word 'chieftainship'. The sense of the clause, in referring to "all the people of New Zealand" implicitly means *only* the Māori; the pākehā are not included.

58 Compare the expression "the possession of their lands, dwellings and all their property", as in Busby's "Littlewood" text; 'dwellings' suggests dwelling-houses (whare) but the Māori text (kainga) suggests geographical locations, so 'villages' or 'settlements' as used elsewhere, is the better translation.

59 "or men" is a correction in the margin.

60 Gordon Davis Brown (or Browne), a timber merchant of Sydney, and part owner of the Horeke timber and ship-building yard at Hokianga, which went bankrupt in 1830. He resumed trade at Mahurangi in the Hauraki Gulf in 1832 and later at Mercury Bay. He fell into debt, became a prey to religious melancholia and was placed in the care of Mrs Swayne at the Bay of Islands, where he died either in late 1841 or early 1842.

Now the Queen is pleased to send me William Hobson Capt R. N. as Governor for all the land of New Zealand, which will at another time be given to the Queen. The Queen says to the collection of the tribes of New Zealand and all the other tribes these are the laws that we have spoken of.

1<sup>st</sup>

That the chiefs at the assembly and those that were not at the assembly hereby give up entirely to the Queen forever the government of all their land.

2ndly

The Queen of England agrees and consents to secure to all the tribes, chiefs and all men in New Zealand and the head chiefs to all their rights in their lands villages and other property. But the chiefs are to give to the Queen the rights of purchasing all the land that the owners are willing to sell, at the price they chuse to put on it, and the Queen says she will pay for it for herself.

3dly

This is the consent to the government of the Queen. The Queen will protect all the natives of New Zealand and secure to them all the rights and privileges of the people of England.

Signed William Hobson Consul & Lt Governor

We the chiefs at the collection of the tribes of New Zealand, assembled at Waitangi Are the chiefs of New Zealand and see the truth of these words and accept them and therefore we put our names and marks hereto

Done at Waitangi

On the sixth day of Feby 1840.

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## ***DOCUMENT 11***

**Anonymous "Literal and true translation of treaty of Waitangi" With notes, given by Samuel McD Martin<sup>61</sup>**

The Victoria the Queen of England by her kind remembrance to the chiefs and tribes of New Zealand, and by her desire to preserve to them their chieftainship and their land and let peace ever remain to them and to live in quietness – she has thought it a right thing to send here one chief as an overlooker of the aboriginal men of New Zealand, that they, the native chiefs, may consent to the

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61 Samuel Martin, *New Zealand in a series of letters* (1845) Appendix I, pp 360-363. (English back-translation only, facing the 'official text').

*kawanatanga*<sup>62</sup> of the Queen in all the places of the land, and the islands, because a great many people of her tribe have settled in this land and are still coming

Now, the Queen is desirous to explain the Kawanatanga, that no evil may result to the aborigines or to the Europeans living without law – now it was good for the Queen to let go me William Hobson, *he Kapitana o te Roia Nawi*<sup>63</sup> as Kawana<sup>64</sup> for all the places of New Zealand given up now and after to the Queen, saying she is to the chiefs of the assembly of the tribes of New Zealand and other chiefs besides these laws spoken.

Now the first – The chiefs of the assembly, and also all the chiefs (who) have not joined the said assembly, concede absolutely to the Queen of England for ever the Kawanatanga of all their land.

Now the second – Now the Queen explains, consents to the chiefs and to all the people of New Zealand, the entire chieftainship of their land, of their settlements and all their property. But now the chiefs of the assembly and all the other chiefs give up to the Queen the buying of other land places please the person to whom the land belongs to the amount of the payment agreed upon by them, and the purchaser appointed by the Queen to buy for her.

Now the third – This is the arrangement come to for the consenting of the Kawanatanga of the Queen, and the Queen of England protect will all the aborigines of New Zealand and give to them the whole laws exactly like her things to the people of England.

Signed W Hobson, Lieut Governor.

Hearken, That we, the chiefs of the assembly of the tribes of New Zealand now collected at Waitangi, and we also the chiefs of New Zealand, to see the meaning of these words and take them, and we consent to them all – therefore we sign our names as a sign.

This was done at Waitangi on the 6<sup>th</sup> of the days of February in the year 1840 of Our Lord.

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## **DOCUMENT 12**

### **A partial translation of the Māori text, by Henry Williams, July 1847**

Henry Williams himself provided a partial translation from the Māori text he had devised, in response to an enquiry from Bishop Selwyn in July 1847. Selwyn's letter to him (30 June) was

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62 "*Kawanatanga* is not a native word; it has been used by the missionaries since the arrival of Governor Hobson to express Governorship." (Footnote of Martin.)

63 "*He Kapitana i te Roia Nawi* is some kind of gibberish which cannot be translated." (Note by Martin.)

64 "*Kawana* intended for Governor." (Note by Martin.)

answered on 12 July 1847. Texts of both are in his son-in-law's biography of the missionary (H. Carleton, *The life of Henry Williams Archdeacon of Waimate*, vol 2 (1877) pp 153-157:

Your Lordship has requested information in writing of what I explained to the natives, and how they understood it. I confined myself solely to the tenor of the Treaty.

That the Queen had kind wishes towards the chiefs and people of New Zealand, And was desirous to protect then in their rights as chiefs, and rights of property,

And that the Queen was desirous that a lasting peace and good understanding should be preserved with them.

That the Queen had thought it desirable to send a chief as a regulator of affairs with the natives of New Zealand.

That the native chiefs should admit the Government of the Queen throughout the country, from the circumstance that numbers of her subjects are residing in the country, and are coming hither from Europe and New South Wales.

That the Queen is desirous to establish a settled government, to prevent evil occurring to the natives and Europeans who are now residing in New Zealand without law.

That the Queen therefore proposes to the chiefs these following articles:

Firstly – The chiefs shall surrender to the Queen forever the Government of the country, for the preservation of order and peace.

Secondly, – The Queen of England confirms and guarantees to the chiefs and tribes, and to each individual native, their full rights as chiefs, their rights of possession of their lands, and all their other property of every kind and degree.

The chiefs wishing to sell any portion of their lands, shall give to the Queen the right of pre-emption of their lands.

Thirdly, - that the Queen, in consideration of the above, will protect the natives of New Zealand, and will impart to them all the rights and privileges of British subjects.

His text is, essentially, a paraphrased translation of his text in Māori, omitting the concluding attestation, but adding a few explanatory phrases (such as the reference to "the preservation of order and peace" already mentioned in the preamble). It was probably a fresh version translated from the Māori text, without reference to the 'official' English text, first printed in 1844.

**DOCUMENT 13**

**Purported 'Translation of the Maori Text' "As given by Buick op cit [*Treaty of Waitangi* (1914 ed)] 102-3. Another literal translation is given by Brown, S M D (*New Zealand*) app No 1."<sup>65</sup>**

Here's Victoria, Queen of England, in her gracious remembrance towards the chiefs and tribes of New Zealand, and in her desire that the chieftainships and their lands should be secured to them and that obedience should also be held by them, and the peaceful state also; she has considered it a just thing, to send here some chief to be a person to arrange with the native men of New Zealand, that the Governorship of the Queen may be assented to by the native chiefs of all the places in the land, and of the islands. Because too many together are the men of her tribe who have sat down in this land and are coming hither.

Now it is the Queen who desired that the Governorship may be arranged that evils may not come to the native men, to the white who dwells lawless. There! Now the Queen has been good that I should be sent, William Hobson, a Captain of the Royal Navy, a Governor for all the places in New Zealand, that are yielded now or hereafter to the Queen. She says the chiefs of the Assemblage (Confederation) of the tribes of New Zealand, and other chiefs besides, these laws which shall be spoken now.

Here's the first: Here's the chief of the Assemblage, and all the chiefs also who have not joined the assemblage mentioned, cede to the utmost to the Queen of England for ever continually to the utmost the whole Governorship of their lands.

Here's the second: Here's the Queen of England arranges and conforms to the chiefs, to all the men of new Zealand, the entire chieftainship of their lands, their villages, and all their property.

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65 Although this is the text given by Buick, he did not get it from 'Brown, S M D (*New Zealand*)' – which is a garbled reference to S McD Martin's 1845 text, given above – but from Edward Jerningham Wakefield's version in *Adventures in New Zealand* (1845), which contains the English 'official text' ("the translation of this famous treaty which is given officially to the world" p 457) and the text given here. Wakefield's exact words are: "The greater part of these complicated and formal expressions [the English official text] could not be translated into Maori, which had no words to express them. Here follows an exact and literal translation of the Maori version which is also published officially." (p 459). Although Wakefield expresses himself oddly, he means to say that the 'Here's Victoria' text is an exact and literal translation of the Māori printed text – which was indeed printed, published officially in November 1844, with the English printed text. But that is not to say that Wakefield's text was an 'official' one, for it is one devised by him, to defend the failing New Zealand Company. The tone of Jerningham's whole book is partisan, a fact which he himself acknowledges on page 531: "And since my arrival [in France] I have written the foregoing narrative. [. . .] So earnest has been this intention that I have often dwelt overminutely on trivial details, and have fallen almost unawares, into the language while I acquired the unavoidable spirit of a partisan." Wakefield derived the Māori text from the bilingual text printed by Fulton in 1844, and he appears to have made his mocking version by literally translating the Māori text for humorous effect. But some elements of his text appear to be derived from Samuel Martin, whose version had appeared the previous year.

But here's the chiefs of the Assemblage, and all the chiefs besides, yield to the Queen the buying of those places of land where the man whose land it is shall be good to the arrangement of the payment which the buyer shall arrange to them, who is told by the Queen to buy for her.

Here's the third: This too, is an arrangement in return for the assent of the Governorship of the Queen. The Queen of England will protect all the native men of New Zealand. She yields to them all the rights, one and the same as her doings to the men of England.

(Signed) W Hobson  
 Consul & Lieutenant Governor

Now here's we: Here's the chiefs of the Assemblage of the tribes of New Zealand who are congregated at Waitangi. Here's we too. Here's the chiefs of New Zealand, who see the meaning of the words, we accept, we entirely agree to all. Truly we do mark our names and marks.

This is done at Waitangi on the six of the days of February, in the year one thousand eight hundred and four tens of our Lord.

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#### ***DOCUMENT 14***

**Translation 'from the original Maori' by T E Young, Native Department, 1869, published in AJLC 1869, 70-71.**

Victoria, Queen of England, in her kind thoughtfulness to the chiefs and hapus of New Zealand, and her desire to preserve to them their chieftainship and their land, and that peace may always be kept with them, and quietness, she has thought it a right thing that a chief should be sent here as a negotiator<sup>66</sup> with the Maoris of New Zealand – that the Maoris of New Zealand may consent to the government<sup>67</sup> of the Queen over all the parts of this land and the Islands, because there are many people of her tribe who have settled on this land and are coming hither.

Now the Queen is desirous to establish the Government, that evil may not come to the Maoris and the Europeans who are living without law.

Now the Queen has been pleased to send me William Hobson, a Captain in the Royal Navy, to be Governor for all the places of New Zealand which may be given up now or hereafter to the Queen; and [s]he<sup>68</sup> gives forth to the Chiefs of the Assembly<sup>69</sup> of the hapus of New Zealand, and other Chiefs, the laws spoken here.

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66 A footnote explains 'He kaiwhakarite'.

67 Another footnote explains 'Kawanatanga'.

68 'he' is a printing error for 'She', referring to the Queen.

*The First.*

The Chiefs of the Assembly, and all the Chiefs also who have not joined in that Assembly, give up entirely to the Queen of England for ever all the government<sup>70</sup> of their lands.

*The Second.*

The Queen of England arranges and agrees to give to the Chiefs, the Hapus and all the People of New Zealand, the full chieftainship<sup>71</sup> of their land, their settlements, and all their property. But the Chiefs of the Assembly, and all the other Chiefs, give to the Queen the purchase of the 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.

*The Third.*

This is an arrangement for the consent to the government of the Queen. The Queen of England will protect all the Maoris of New Zealand. All the rights will be given to them the same as her doings to the people of England.

William Hobson,<sup>72</sup>  
Consul and Lieutenant-Governor.

Now we the Chiefs of the Assembly of the Hapus of New Zealand, now assemble<sup>73</sup> at Waitangi. We, also, the Chiefs of New Zealand, see the meaning of these words: they are taken and consented to altogether by us. Therefore are affixed our names and our marks.

This is done at Waitangi, on the sixth day of February in the year one thousand eight hundred and forty, of our Lord.

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**DOCUMENT 15**

**"[Literal] Translation of Maori text by I H Kawharu" from *Waitangi – Maori and Pakeha perspectives on the Treaty of Waitangi* (1989) 319-320.**

Victoria, the Queen of England in her concern to protect The Chiefs and the sub-tribes of New Zealand in her desire and to preserve to them their chieftainship<sup>74</sup> and their land and to maintain

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69 Another footnote explains 'Whakaminenga'.

70 Another footnote explains 'Kawanatanga'.

71 Another footnote explains 'Tino Rangatiratanga'.

72 The actual signature is 'W Hobson'.

73 'assemble' is a printing error for 'assembled'.

continually the Peace<sup>75</sup> to them and the quiet living therefore has considered she a thing right<sup>76</sup> to give a Chief<sup>77</sup> one who will arrange with the people ordinary of New Zealand<sup>78</sup> to reach an agreement by the chiefs ordinary [for] the government of the Queen [to be] upon the places all of this land and the Islands<sup>79</sup> because also there are many other people of her tribe [who] have lived on this land. And will come here. So the Queen desires to establish the government so that no evil will come to the people Maori [and] to the European living law without.<sup>80</sup> So it has pleased the Queen to allow me William Hobson a captain in the Royal Navy to be Governor for the places all of New Zealand to be received shortly [and] hereafter to the Queen [and so] is making<sup>81</sup> she for the Chiefs of the Confederation of the subtribes of New Zealand and the other chiefs these laws set out here.

[This is] the first

The Chiefs of the Confederation and the chiefs all also [who] have not entered that Confederation give absolutely to the Queen of England forever the government<sup>82</sup> of all their land.

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74 Kawharu glosses the word 'chieftainship' "this concept has to be understood in the context of Maori social and political organisation as at 1840. The accepted approximation today is 'trusteeship' see NZMC Kaupapa 1983." In 1840, however, there was no dispute about the meaning of the word, and no distinction is drawn in the Treaty between 'subtribes' and 'tribes' (or hapū / iwi).

75 Kawharu glosses the word 'rongo' 'Peace', seemingly a missionary usage – rongo to hear the 'Word' the 'message' of peace and goodwill etc." It also suggests (in the expression 'Rongo pai' – gospel, good news) but is here intended to evoke civil order.

76 This "therefore has considered she a thing right" an absurd literal translation, using inverted word order, is the first of several instances of poor expression in Kawharu's text.

77 Kawharu glosses 'Chief' "(Rangatira) here is of course ambiguous. Clearly a European could not be a Maori, but the word could well have implied a trustee-like role rather than that of a mere 'functionary'." The most natural expression in missionary English at the time at this time is 'gentleman', indicating a respectable person, an 'English chief'. 'Gentleman' was the terminology used by Thomas Kendall in his 1820 *Grammar and Vocabulary*.

78 "people ordinary of New Zealand" is another absurd literal translation, using inverted word order, when it is perfectly clear that 'New Zealanders' (Māori) (as distinct from the British) is intended.

79 'Islands' – as Kawharu notes, this means 'neighbouring' (or 'adjacent') islands, not those of Oceania.

80 "The European living law without" is another example of inverted word order. "Europeans living outside the law" is plain enough.

81 Kawharu glosses this 'making' as "offering or saying but not inviting to concur (cf English version)" but this is wrong. The Queen is not 'making' anything – she is offering an option to accept or refuse.

82 Kawharu comments "Government: kawanatanga. There could be no possibility of the Maori signatories having any understanding of government in the sense of 'sovereignty' ie any understanding on the basis of experience or cultural precedent." On the contrary, the word 'Kawana' was familiar through its use for the Roman governor (gubernator – governor – kawana all with the same etymology) and the governorship of New South Wales was certainly familiar the Northland chiefs. 'Sovereignty', however, is quite a different

[This is] the second

The Queen of England arranges [and] agrees to the Chiefs to the subtribes to people all of New Zealand the unqualified exercise<sup>83</sup> of their chieftainship over their lands over their villages and over their treasures<sup>84</sup> all. But on the other hand the Chiefs of the Confederation and the Chiefs all will give to the Queen the sale and purchase<sup>85</sup> of those parts land is wiling [to sell] the person owning the land for the amount of the price agreed between them [viz the vendor and] the purchaser appointed by the Queen as an agent to purchase for her.

[This is] the third

For arrangement therefore this for the agreement concerning the Government of the Queen will be protected by the Queen of England the people ordinary all of New Zealand [who] will give them all

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concept. 'Government of all their land' was understood by the authors of all the early translations of the Māori text.

83 'Unqualified exercise' according to Kawharu "would emphasise to a chief the Queen's intention to give them complete control according to their customs." This is certainly erroneous, as consideration of Normanby's instructions to Hobson makes clear. Native customs 'abhorrent' to British practice (slavery, cannibalism etc) were to be suppressed. Kawharu also glosses the phrase 'tino rangatiratanga': "Tino has the connotation of 'quintessential' " but this is not correct either (see Chapter 4). 'Tino rangatira' is a phrase first in use in connection with Lord Goderich in 1833 ('Te tino rangatira Waikautā Kōrerihā' in Busby's instructions as British Resident). The natural connotation of 'tino' in this phrase is not 'quintessential' but 'high', in the sense 'eminent'.

84 Kawharu's 'treasures' is another mistranslation, as all 1840 sources agree, using the expression 'property' with deliberate intent. 'Treasures', a distinctly vague term, narrows the scope of the property covered in a way certainly not intended, as witness the "taonga katoa" ie *all* their property. The expression is clearly intended to be comprehensive and the other translators treat it in that way. Kawharu says "Submissions to the Waitangi Tribunal concerning the Maori language have made clear 'taonga' refers to all dimensions of a tribal group's estate, material and non-material – heirlooms and wahi tapu, ancestral lore and whakapapa etc." But this is a modern notion, and would not have had any currency in 1840. It is simply opportunist historical revisionism.

85 Kawharu's gloss on 'sale and purchase' (hokonga) is correct.

the rights and duties<sup>86</sup> all in equal measure [that apply] under her constitution to the people of England.<sup>87</sup>

[signed] William Hobson  
Consul and Liut Gov[.]

So we the Chiefs of the Confederation of the subtribes of New Zealand meeting here at Waitangi are therefore the chiefs of New Zealand having seen the shape of these words being accepted and agreed all by us, thus are recorded our names and our marks.

Done this at Waitangi on the sixth of the days of February on the year one thousand, eight hundred and forty of our Lord.

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### **DOCUMENT 16**

**A new synthesis of the back-translations of the Treaty, from contemporary sources listed above:**

Victoria, the Queen of England, in her gracious consideration for the chiefs and tribes of New Zealand, and through her desire to preserve to them their chieftainship and their lands, and to preserve peace and order among them, has thought it fitting to send a gentleman to be her representative to them. Let the native chiefs in all parts of the land and the islands consent to the Queen's government. Now, the Queen is desirous that a government should be established, so that evils may not occur to either the native people or to foreigners who, alike, are living without law. It has therefore pleased the Queen to appoint me, William Hobson, a Captain in the Royal Navy, Governor of all parts of New Zealand, which shall be ceded now or at a future period to the Queen. She offers to the Assembly of the Tribes of New Zealand, and to all the other chiefs, the following laws.

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86 Kawharu's gloss on 'rights and duties' is: "'tikanga' while 'tika' means right, correct . . . 'tikanga' most commonly refers to customs, for example of the marae, and customs clearly includes the notions of duty and obligation." That is true, but the purpose of this article is specifically to extend the rights and obligations of British subjects to Māori, not the other way around – ie Māori were expected to adopt British tikanga.

87 Kawharu's second gloss on 'tikanga' is even more problematic. He says "There is a real sense here of the Queen protecting (ie allowing the preservation of) the Maori people's tikanga (ie customs) since no Maori could have had any understanding whatever of British tikanga (ie rights and duties of British subjects). This, then reinforces the guarantees in Article 2. This is nonsense, as British customs (both religious, social, civil and procedural had been under Maori observation for years, and these 'tikanga' had been the subject of favourable comment among them. The expression 'under her constitution to the people of England', does not appear (in any sense) in other translations, nor in any of the drafts in English.

## The first article

The chiefs of the Assembly, and all the chiefs who are absent from the Assembly shall cede to the Queen of England, forever and entirely, the government of all their lands.

## The second article

The Queen of England confirms, and guarantees to the chiefs, the tribes and all the people of New Zealand [ie all Māori], the high chieftainship [or, the exercise of the power of chiefs] over their lands, of their settlements and of all their property. But the chiefs of the Assembly, and all the other chiefs, grant to the Queen, exclusively, the rights of purchasing of any such lands, which the man who possesses the land is willing to sell, according to the prices agreed upon by him, and the purchaser appointed by the Queen to purchase for her.

## The third article

In return for their acknowledging the Government of the Queen, the Queen of England will protect all the natives of New Zealand, and will allow them the same rights and practices as the people of England

W Hobson, Consul & Lieutenant Governor

We the chiefs of this Assembly of the tribes of New Zealand, now assembled at Waitangi, perceiving the meaning of these words, take and consent to them all. Therefore we sign our names and our marks.

This was done at Waitangi, on the sixth day of February, in the one thousand eight hundred and fortieth year of our Lord.

The Chiefs of the Assembly

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**DOCUMENT 17**
**Memorandum, ca 1860, about Māori attitudes to the Treaty of Waitangi.**

Text of a memorandum, located in the papers of Donald McLean, (ATL MS-Papers-0032-0138), with further MS notes in his hand added. This document, unattributed but in an official hand, possibly that of the assistant native Secretary Thomas Henry Smith, is watermarked T H Saunders 1858 and is accompanied by transcripts of both the authenticated Māori text of the Treaty and a transcript of Gordon Brown's translation of that text into English (the originals of which are in James Clendon's papers at Auckland, see above). It is probable that it is associated with the Kohimarama Conference of 1860.

The Treaty of Waitangi, which forms the basis of English settlement in these islands, was differently understood and interpreted by the contracting parties.

The natives simply regarded it as yielding, on their part, permissive occupation to Europeans to settle in the country, as they had been already in the habit of doing. A few were alive to the necessity of forming such alliance with England as might prevent aggression from other foreign powers. None, however, were aware – altho' they entertained various suspicions as to the ultimate object of the Government – that the treaty could, in any way, interfere with the free and independent exercise of their own rights, privileges, and customs.

The English Colonists, on the other hand, regarded the treaty as conferring rights of sovereignty, which the natives never practically understood or recognised. The Colonists also claimed protection as British subjects; or, in other words, equal submission to law from both races.

With few exceptions, neither party have fully comprehended their actual relative positions, as occupants of the same country.

It is, therefore, not surprising that difficulties existing when the Colony was established should be found to repeat themselves, with occasional intermissions, as colonisation progressed.

The various tribes and communities throughout New Zealand regard themselves as possessing independent sovereign powers. They declare war, and make peace, at pleasure; exercising full sway and dominion within their several territorial limits, and are extremely jealous of any direct interference with whatever they conceive as appertaining to their own political rights.

The New Zealanders are trained from their infancy to a knowledge of war and politics; and many of the leading minds among them have a pretty clear conception of the necessity of maintaining, as among themselves, the balance of power. Various instances have occurred in which a powerful tribe has interfered to protect from the aggressions of stronger and contending parties a weaker tribe, when placed in a position of danger, by lying between the territories of the belligerents, and when its existence as a distinct tribe has been endangered.

The teachings of Christianity, but more especially their acquisitiveness and love of gain, have been instrumental in diverting their attention for certain periods from warlike pursuits; but these causes, of themselves, have never been sufficiently powerful to remove a slumbering desire for the excitement occasioned by war; nor is it probable that this feeling, however dormant it may remain for a time, will be altogether extinguished until the present generation of old warriors, who delight in reciting their deeds of strategy and bravery, shall have passed away.

[Additional remarks in McLean's hand:]

There are phases in the Native mind that can only be compared to mental epidemics, at one time it is strongly impregnated with superstitious beliefs, at another it yields to acquisitiveness afterwards it expands itself into a species of self-denial and profuse liberality to gain a name, sometimes it relapses into extreme covetousness but it fails to realise steadiness or consistency of character throughout every phase ambition ~~displays~~ associated with a yearning with a desire to gain personal distinction is a most prominent feature.

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## *Explanation of Acronyms:*

AJHR Appendices to the Journals of the House of Representatives  
 AJLC Appendices to the Journals of the Legislative Council  
 ATL Alexander Turnbull Library  
 AP Auckland Central City Library  
 AR Auckland Museum Library  
 GBPP Great Britain Parliamentary Papers  
 GBPP 1840 (560)  
 GBPP 1840 [238]  
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