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THREE HISTORICAL INTERPRETATIONS OF THE TREATY OF WAITANGI
(1840)

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The Treaty of Waitangi was signed between February and May 1840 between the Crown, represented by Governor William Hobson, and around five hundred Maori chiefs, mainly from the North Island of New Zealand. This paper examines the standing and purpose of the Treaty from three historical perspectives: those of the Crown, the Governor, and the Maori signatories to the Treaty.

Assembling the straying strands of surviving evidence on the Treaty of Waitangi in order to constitute some sort of historically valid meaning from the standpoint of the groups involved is a problematic task. While there is a hefty collection of records from the Colonial Office relating to the Treaty, there is a corresponding sparsity of documentation from Maori sources in this period. In addition, numerous subsequent analyses and interpretations of the Treaty have partially obscured the original intentions of the parties, and so some re-evaluation and clarification is required.

British Government Policy on the Treaty

His Excellency the Lieutenant-Governor was instructed to acquire the sovereignty of the native chiefs by means of treaty....This was a mere formal step to prevent other nations, or individuals, or bodies, from acquiring in any way sovereign rights. It could not imply any duties to be performed by the natives, or any sacrifices to be made by them....

Ernst Dieffenbach, 1843. (1)

A synthesis of the instructions and internal communications of the Colonial Office and other branches of the British Government indicate that full British rule over New Zealand through the Treaty of Waitangi was not the intention of the Colonial Office. After all, it did not provide Hobson with the means for such rule, and couched its documents relating to New Zealand in language that suggests that at first, it sought a more limited intervention of British government, probably limited to the administration and maintenance of law and order among the settler population.

The 1837 House of Commons Committee of Aborigines in British Settlements was frank enough to acknowledge that further British settlement was likely, but recommended that the requirement to extend British sovereignty was necessary only to enable British law to be applied to British settlers, who at the time '...were amenable to no laws or tribunals of their own...'(2) The Committee then assessed the impossibility of indigenous peoples being able to be protected from settler populations who were unrestrained by any laws unless the sovereign authority of the Crown was accepted by the indigenous people over the country, for the purpose of regulating the behaviour of settlers.(3) In August 1839, a letter from Palmerston, the British Foreign Secretary,

revealed that the basis of Britain's intervention in New Zealand lay in the fact that specifically British settlement in the colony '...indispensably requires the check of some contending authority'.(4) No mention was made of such authority extending its jurisdiction to Maori. That no reference was made to the rule of Maori was not the result of any vagary however. Colonial Office officials were explicit about what a cession of sovereignty would entail. Henry Labouchere, replying to a letter written by a New Zealand Company spokesman in May 1839, threatened that if the Company went ahead with its just-announced plan to ship a large number of settlers to New Zealand, then:

...Her Majesty's Government cannot recognise the authority of the agents whom the Company may employ; and that if, as is probable, the Queen should be advised to take measures, without delay, to obtain cession in sovereignty to the British Crown of any parts of New Zealand, which are now, or shall be occupied by Her Majesty's subjects [author's italics], officers, selected by the Queen, will be appointed to administer the executive government within any such territory.(5)

Sir James Stephen, whose influence in Colonial Office policy was arguably singularly more pervasive than that of any other person during the late 1830s, also favoured the establishment of a ruling body to in New Zealand which would govern '...the Anglo Saxon Race...' in order to prevent conflict between Europeans and Maori.(6) In his minute dated 15 March 1839, Stephen emphasised that one of the cardinal points in the establishment of New Zealand as a fully-fledged colony was '...the introduction *among the colonists* [author's italics] of the principle of self Government.' (7) Again, on 13 June 1839, Stephen wrote in a letter about the establishment of some suitable British authority in New Zealand, and observed that since the previous year:

...circumstances have transpired which have further tended to force upon Her Majesty's Government the adoption of measures for providing for *the government of the Queen's subjects resident in or resorting to New Zealand* [author's italics].(8)

The British Treasury was apparently in a similar mind as Stephen. A Treasury official wrote to Stephen on 22 June, requesting that Stephen convey to his political chief, Lord Normanby, that the treasury concurred in the opinion that a consul be appointed to New Zealand so as to establish '...some competent control *over British subjects* [author's italics] in the New Zealand Islands...'.⁹ The reference to the British Government adopting specific measures solely for the government of British subjects living in New Zealand, and of those who would arrive in the future, was reported in the Treasury Minute of 19 July 1839, which officially sanctioned an advance from the revenues of the New South Wales administration to provide for the installation of a

consul in New Zealand. (10)

Most important in the catalogue of official British designs for New Zealand was the development of policy by Normanby in 1839. In May 1839, Normanby wrote to the British Attorney General, recommending a cession of sovereignty, but also, outlining the fact that the practice and jurisdiction of British government in New Zealand would be limited to the rule over British settlers. Normanby wrote of the need to establish '...some system for governing the numerous body of *British subjects* [author's italics] who have taken up their abode in the New Zealand Islands...'.(11) The British annexation and acquisition of sovereignty over New Zealand therefore has to be considered in the context of Britain's desire to extend rule only over the settler population, whilst retaining a nominal claim to governing the entire country. Normanby went on, in the same letter, to specifically link the extension of British sovereignty to New Zealand with legislative authority being exercised specifically '...over the British subjects inhabiting that territory'.(12)

The principle of extending British authority and jurisdiction *only* to British subjects living in the colonies of the Empire was not just an anomaly that was prescribed for the New Zealand situation. Rather, it was a thematic component that penetrated the thinking of Colonial Office officials, and therefore, assumed the capacity of a policy. This policy, later articulated by Grandville, aimed at furnishing colonies with administrations equipped to manage only the British citizens living there:

British subjects of all classes, engaged in innocent pursuits, are entitled abroad as well as at home, to the protection of their Gov[ernmen]t. Where they have been treated with injustice, they have a right to expect that redress should be demanded in strong but dignified language....(13)

The only impression that the British Government had some intention of stretching British rule, perhaps through a treaty, to cover the entire population of New Zealand, including Maori, came from dealings between the Colonial Office and New Zealand Company of officials, the latter of whom were pressing for official sanction for their enterprises in land acquisition from Maori and the subsequent organisation of British settlement. In such circumstances, the Colonial Office needed to assert its position in a resolute manner, hence the following reply to the New Zealand Company in May 1839:

...the Queen should be advised to take measures, without delay, to obtain cession in sovereignty to the British Crown of any parts of New Zealand...officers selected by the Queen will be appointed to administer the executive government within such

territory....(14)

Yet, even in this terse assumption of British dominance over the events taking place in New Zealand prior to the signing of the Treaty of Waitangi, no mention is made of the Crown asserting its powers of government over Maori. The Crown was not unaware of the use of specific provisions to govern indigenous peoples, it simply made no decision to attempt to employ them in New Zealand's case. The distinction between assuming sovereignty, and wishing to rule over the indigenous people in the colony was a clear one in British relations with its colonies. The second Virginia Charter of 1609 affected '...the persons beinge our subjects which shall goe and inhabit within the said Colonye and plantacion'. Similarly, the letters patent to the Newfoundland Company of 1610 restrict British jurisdiction to the same degree. (15)

The other type of agreement specifically extended British rule over the indigenous people in the colony they were involved with. The letters patent to Merifield for the islands of St. Christopher, Nevis, Barbadoes, and Monserrat in 1625, gave the Crown agents '...full power and authority for as to order all and singular persons...as well as over natural born subjects as Natives and Savages of the said Islands'.(16) The type of sovereignty asserted in the latter example is a legal as well as territorial sovereignty, covering all persons in the colony, whereas the former category, of which the Treaty of Waitangi was an example, was limited to territorial sovereignty, with legal rule severely restricted - almost invariably to British subjects.

In his instructions to Hobson, written in August 1839, Lord Normanby asserted the common law right of Maori to their land, and their sovereign status. In devising any agreement with Maori, Hobson was advised that the Maori's:

...title to the soil and to the sovereignty of New Zealand is indisputable and has been solemnly recognised by the British Government.(17)

Normanby did qualify the type of sovereignty he believed Maori exercised, however, emphasising that the Crown would not simply seize New Zealand unless there was full, free and intelligent consent from the natives to do so - the sort of consent which was indisputably not acquired through the Treaty of Waitangi for the powers the British later claimed they had acquired from Maori. (18)

Normanby decided to post Hobson to the position of Consul in New Zealand. The powers and rights of a Consul were more specific than those of a Resident, and used to meet a particular level of need. Normanby and his advisors were well-versed in the capacity of Consuls, and were conscious of a Consul's role when they appointed Hobson to

that position in New Zealand. The difference between Resident and Consul was clearly definable:

A consul was expected to protect and watch over the interests of his nation's subjects living under the jurisdiction of a sovereign government: the resident was expected to exercise a benign influence on British subjects, and thus ameliorate the effects on Maori of contact. (19)

The appointment of a Consul by the British Government is one of the most important indications of the intent of the British to curtail the extent of British rule in New Zealand.

Gipps' Proclamations of January 1840 were used, in the overall scheme of British policy on New Zealand, as a constitutional 'safety net'. If the Treaty did not receive a mandate from Maori, or if its eventual terms proved insufficient to meet the expectations of the Colonial Office, then Gipps' Proclamations could be resorted to as an alternative:

The Crown moved to institute an exclusive right of pre-emption even before the Treaty, in a proclamation of January 1840 issued by the Governor of New South Wales to prohibit wholesale trafficking in native lands. It was promulgated again in Act 4 Vic No 7 of the New South Wales Legislature in August 1840 and then enacted for New Zealand as a separate colony in the Land Claims Ordinance of 1841. For a brief period from 1844 to 1846 the Crown's exclusive right of pre-emption was lifted (by Governor FitzRoy) but with that exception it was retained until 1862 (when the right was finally disbanded). (20)

Pre-emption was a preferred option for the British in its new colonies because it usually succeeded in shutting the door on reckless land speculators. Maori were limited to selling land to the Crown, depriving them of the same rights and privileges as British subjects. Moreover, this created a monopoly right by the Crown, which New Zealand Governments abused to profit from land sales to settlers.

Regardless of the alleged status of the Treaty as some sort of warrant permitting British rule to blanket New Zealand, it was legislation passed by the British Parliament which formalised and secured this right - and not the Treaty. Thus, the British Government could not possibly have seen the Treaty by itself as granting any right to the Lieutenant-Governor to rule and legislate for all the inhabitants New Zealand.

Under the New Zealand Act of 1840, Letters Patent were issued on 16 November that year (known as the Charter of 1840) which established the islands of New Zealand as a separate colony. The Letters Patent also authorised the Governor or Lieutenant Governor to form a

Legislative Council responsible for the enactment of ordinances to regulate the colony.(21)

On 3 May 1841, the inhabitants of Auckland were assembled, along with Government troops and officials, to hear the reading of the Proclamation which established New Zealand as an independent colony of Britain. Following the reading of this Proclamation, Hobson took the oath of office for the position of Governor. It was at this point that the Crown formally subsumed the powers of governance and sovereignty from Maori - without a single Maori signature in sight, and still with no Maori mandate for this sovereignty to be extended to cover Maori.

For the British Government to exercise influence in New Zealand, it was important to produce a treaty which would nurture good relationships between the two parties to it. The British were in no position to conquer and thereafter subdue the entire indigenous population of New Zealand during the 1830s, and so an agreement which seemed to solicit official British involvement in the country was needed. In the immediate wake of a treaty being signed where the British were in a weak position, some concessions of power were made, but this was only until the British position in the colony had consolidated to the point where these concessions were no longer necessary. The cynical nature of this approach was both a common and a successful ploy utilised by the British:

...it was necessary to pay serious regard to recently signed Agreements and to avoid infringements of rights purportedly protected by such treaties. In time, however, British control in political, economic, and social terms became more pervasive, and colonial capitalism tended to undermine the power base of traditional indigenous institutions.(22)

In essence, the practical and material demands that the Empire imposed on a colony always prevailed over any agreements it devised to initially gain entry into the colony: 'Solemn treaties were of no great weight in the scales of justice as balanced by colonial judges and the Privy Council'.(23)

Colouring the Colonial Office's information on New Zealand in the late 1830s was a succession of crude, ad hoc campaigns concocted by some missionaries to coax the British Government into further involvement in and commitment to New Zealand. A few years earlier, Danesdon Coates, the Lay Secretary of the Church Missionary Society, had been one of the leading opponents of further British entanglement in New Zealand. Coates clung to a doomed hope that if the forces of colonisation were able to be reigned in, then the adverse effects on Maori of British imperialism would be minimised. Coates, encouraged by letters from Marsden and others, believed that a British assumption of sovereignty was unnecessary because Maori had demonstrated the

capacity to govern themselves. He conceded that some sort of official British presence in New Zealand was needed, mainly to control the excesses of the unregulated settler populations. Eventually, Coates envisaged, British law would seep into tribal systems of justice to the point where a national government would evolve.(24) However, what Coates' prescription for New Zealand failed to register was that the ravaging of the land sharks needed more required more immediate checking.

The Colonial Office was in a position to preside over this dilemma, and stumble forward to the next stage of involvement. While some Maori may have seemed to confirm the growing British perception that they would not object to a more formal British presence in New Zealand, insufficient attention was paid to the specifics of what Maori were saying. Typical of Maori requests to the British Government for more intervention was an underlying desire by one iwi or hapu to gain a strategic advantage over an adversary. This was highlighted in a submission to a Select Committee of the House of Lords in 1838 by the Reverend John Flatt, in which he argued that while some of the more senior chiefs would probably oppose British rule, '...the young men, I am confident, are anxious for it; they say there would be no fear of a Party coming and falling upon them, and that unless something was done, they would all be dead'.(25) In this instance, the missionaries misconstrued the desire for iwi to be better protected from their neighbours as a request for the establishment of formal British rule throughout the country. Significant also in Flatt's statement is a recognition that the older chiefs - the leaders and decision-makers of the iwi - would most likely object to the imposition of British law. It would be this latter group who, two years later, signed the Treaty of Waitangi. Stephen too had suggested in 1838 that Maori had '...evinced a strong disposition to place themselves under British protection', and cited the subsequent failure of Busby to deliver this protection as a contributing reason for the decision to install a Consul.(26)

The path of British policy on extending government to New Zealand was eased by the faulty assumption that Maori would not object to the probable curtailing of their own authority over their own territory by an external power keen to regulate the actions of its settlers in the colony. If there was to be any objection by Maori on a large scale, this was not perceived by the British Government as an insurmountable problem. The Letters patent issued in London on 15 June 1839 omitted any reference to the method of acquiring sovereignty over New Zealand.(27) By late 1839, there was little doubt in official circles that New Zealand was on the verge of becoming a fully-fledged British colony, eventually with its own Governor. A treaty of cession was not the only device which was available to achieve this end. The act of occupation was just as valid a means of securing sovereignty as a formal statement of cession. The Treaty itself, in its preamble, referred to

the existing presence of settlers, and correctly anticipated additional settlement in the future as a reason for annexation. Increasingly, settlement assumed priority over an 'official' cession of sovereignty. Hobson's Proclamations of 30 January 1840 referred, significantly, to the existing and prospective settlement of British subjects in New Zealand, as though to provide some constitutional safety-net should the plans for the Treaty not eventuate. Also offering protection if the Treaty failed, was Hobson's citing in his Proclamations of the Letters Patent of 15 June 1839 as being the device by which British jurisdiction was able to be extended to New Zealand - something which smudged the issue of the extension of government, sovereignty, and legal jurisdiction, and certainly neglected the status of the Treaty.(28)

The choice of 1839 as the date of the cession of New Zealand's sovereignty to Great Britain was predicated on the basis of British settlement in New Zealand, as opposed to a treaty of cession. The 1839 date was subsequently adopted by the Colonial Office. In the Return of 20 February 1845, of the 'Date at which each colony or foreign possession was captured, ceded, or settled', New Zealand is noted as 'Acquired by settlement, 1839'.(29) The emphasis of settlement over a treaty of cession as the basis of the British annexation of New Zealand was accepted by the British in a way that was to adversely affect the Treaty of Waitangi:

The Treaty of Waitangi was made nugatory during the nineteenth century by the simple fact of mass migration. Foreign settlement demanded land; demand for land required the assertion of authority and the supremacy of settler law, treaty or no treaty, and the government required revenue which must come either directly or indirectly from the sale of land. (30)

Hobson's Intentions for the Treaty

Hobson relied strongly on the instructions he received from his superiors in London to guide his early policies in New Zealand. Subsequent historians have invested in Hobson a degree of legal knowledge which was well in excess of his likely abilities as a naval officer whose formal education ended at the age of ten.(31) Hobson's initial plan for New Zealand, devised in 1837, had been for the colony to be divided up into a number of regions, some of which would be controlled by the British Government, indirectly, through a factory system similar in principle to the British East India Company. Within these relatively small territories, British law would apply predominantly, and possibly even exclusively to the European inhabitants. In Hobson's 1837 report to Burke, he spoke of the need of some sort of restraint to be introduced to regulate the behaviour of '...the licentious whites without exciting the jealousy of the New Zealanders [Maori], or of any other power'.(32) There was no mention made in this report of legislating

for, or even presiding over Maori. The basis of Hobson's proposed involvement by the British lay in the regulation only of the settler population. The idea of extending British rule to the Maori was only mentioned as a possible future development in the report - an evolution that would take place after the factory system was established for some considerable time. Hobson also recommended that a treaty be concluded with the chiefs, but not for a cession of Maori sovereignty. Instead, such a treaty would serve a much more restricted function of confirming Maori recognition of the factory system, and the protection '...of *British subjects* [author's italics] and property'.(33)

Events hurried past Hobson's proposals, and by 1839, he had been issued with new instructions which called for a full cession of sovereignty, but in a way that differed from later presumptions about the Treaty of Waitangi. Hobson kept up with the changes - eager not to be seen to be diverging from the policies being laid down by the Colonial Office. He perceived the acquisition of sovereignty as a method of excluding other powers from New Zealand, and of protecting the settler population for lawlessness.(34) In the words of George Clarke junior, the son of the Protector of Aborigines, this was more or less a symbolic 'supreme sovereignty'. (35)

The thought of an administration that would be involved in governing Maori, far from being a principle concern, was not even mentioned by Hobson. From his standpoint, there would be no purpose in immediately embracing Maori in the rule of British law because of what he foresaw as the demise of the Maori population at a pace that would soon result in the country being inhabited solely by Europeans anyway.(36) A partial annexation would have left the rest of the country exposed to interference by the French and possibly other scavenging powers as well. It would also create areas where the British Government would be unable to exercise jurisdiction over its own subjects.³⁷ The barrier to the Crown asserting the rule of law over any of the British subjects living in New Zealand was that the British Government had yet to secure sovereignty over New Zealand - a technical prerequisite for any attempt at establishing legal authority. In practice, the effective limits of British sovereignty were conceived to be over European settlers. Hobson's proclamations at Kororareka on week before the first signing of the Treaty at Waitangi, clarified exactly over whom British sovereignty would be exercised:

Whereas Her Majesty Victoria...has been graciously pleased to direct that measures shall be taken for the establishment of a settled form of civil government over those of *Her Majesty's subjects* [author's italics] who are already settled in New Zealand, or who may hereafter resort hither'.(38)

There is no question that Hobson implicitly grouped Maori separately from British subjects because later in the Proclamation, Hobson

clearly distinguished between '...Her Majesty's subjects...', and '...the chiefs and native tribes of the said islands'.(39)

Most critical of all to the issue of what Maori ceded to the Crown was Hobson's explanation to the assembled chiefs at Waitangi, just prior to the initial signing of the Treaty, of the reason why Maori ought to give their consent to the Treaty. Hobson's message was pivotal because it constituted part of the Treaty in as far as international law recognises verbal promises made in connection with a treaty as being a binding element of the Treaty.(40) Rather than indicating that the British Crown was resolved to rule the Maori as well as the settler populations in New Zealand, Hobson spoke in terms of the need to extend British law to New Zealand to enable the Crown to protect Maori from British settlers. He commenced by stating that he had been sent to New Zealand, in the capacity of Governor, to conclude a treaty with the chiefs:

...for the welfare of *her* [Queen Victoria's] *subjects* [author's italics] living among you...(41)

Hobson then offered a rationale for the requirement of a treaty: '...as the law of England gives no civil powers to Her Majesty out of her dominions, her efforts to do you good will be futile unless you consent [to the Treaty].'(42)

If any ambiguity remained, at this juncture, Hobson believed he swept it away as he continued with his deliberation to the chiefs:

Her Majesty, always ready to protect her subjects, is also always ready to restrain them.*Her Majesty the Queen asks you to sign this treaty, and so give her that power which shall enable her to restrain them* [i.e. the settlers; author's italics]. I ask you for this publicly....I will give you time to consider of the proposal I shall now offer you. What I wish you to do is expressly for your own good, as you will soon see by the treaty. You yourselves have often asked the King of England to extend his protection unto you. Her Majesty now offers that protection in this treaty. I think it not necessary to say any more about it.(43)

Hobson deliberately presented the Treaty to Maori as an instrument of protection - a means of allowing the Crown to rule over the settler population in order to regulate their behaviour. Hobson was not explicit about this rule cloaking Maori as well.

Felton Mathew, who was present at the signing at Waitangi, made a detailed note in his journal of what Hobson, through Williams, was advising Maori. Mathew's summation was even more categorical than Colenso's on the vital issue of what Maori were told by the Crown's representatives regarding the contents of the Treaty. According to

Mathew's notes, Hobson pointed out:

...the necessity which existed for the [British] Government to interfere for their [Maori] protection on account of the number of white people who had taken up abode in this country.(44)

Mathew understood the element of protection to be the key determinant in Maori acceptance of the Treaty. Mathew went on to describe how the Treaty effectively resulted in Maori '...throwing themselves on her [Queen Victoria's] protection, *but retaining full power over their own people...*[author's italics]'.(45)

Various representatives of the Crown were dispatched by Hobson around the North Island to get more Maori signatures on the Treaty. In the process, the explanations of what the Treaty actually promised became even more warped. Major Bunbury, desperate to get virtually any chief to give their consent to the Treaty, explained in one instance to a prospective Maori signatory, that the Treaty would eventually require:

...that tribes must no longer go to war with each other....Strangers and foreigners must no longer be plundered and apprehended by natives, who, in their turn, were not to be injured by white men. It was not the object of H.M's Government to lower the chiefs in the estimation of their tribes, and I said that his [Te Hapuku's] signature being now attached to the treaty could only tend to increase his consequence by acknowledging his title.(46)

With an agreement promising to deliver so much, with no visible concessions required by Maori in return, Bunbury predictably experienced no difficulty in getting Te Hapuku to sign.

For historians, the picture of Hobson's intentions for the Treaty becomes more murky because of the shifting attitude he displayed towards it within the space of a few months from when it was first signed. On 5 February 1840, Hobson wrote to Gipps, indicating that he was desirous of avoiding even the impression that the chiefs were coaxed or bribed into signing the Treaty:

In the course of this proceeding I have courted the utmost publicity, and I have forborne to adopt even the customary measure of propitiating the consent of the chiefs by presents or promises; and not until the treaty had been signed did I give them anything.(47)

Yet, by April, there had been a full reversal of this policy by Hobson. As the desperation rose in Hobson's mind to get more Maori endorsement for the Treaty, he abandoned the prohibition of bribes,

and instructed missionaries collecting signatures for the Treaty to:

...treat with the principal native chiefs, in the southern parts of these islands, for their adherence of the treaty....! have the honour to enclose a copy of the treaty, which I have signed; and to request you will obtain the signatures thereto of such high chiefs as may be willing to accede to its conditions, first explaining to them its principle and object, which they must clearly understand before you permit them to sign....Such presents as may be required will be put on board. and placed at your disposal.(48)

Hobson's capitulation to the expediency of offering gifts in exchange for Maori support for the Treaty was indicative of two things. Firstly, it demonstrated the declining importance he placed in the Treaty -something which was confirmed in his Proclamations of Sovereignty of May 1840, which in Hobson's opinion effectively overrode the Treaty. Hobson had satisfied his Colonial Of flee masters by achieving a nominal cession of sovereignty from Maori, and therefore no longer needed the Treaty as part of his governmental armoury. On the other side of the world, Lord Russell was congratulatory of the manner in which Hobson and his assistants had effected Maori adherence to the Treaty.(49)

The second feature revealed by Hobson's introduction of the gifts-for-signatures policy is that it shows how far Hobson had come to view the Treaty as a token formality. As far as Hobson was concerned, the real extension of British rule over the Maori was not achieved by the Treaty. Indeed, British law only began to apply to Maori later on, and gradually. As for the reality of governing Maori, this was not fully achieved until half a century later. Certainly, in the first few years after the Treaty was signed, the power of the Crown in New Zealand was limited, and only able to be exercised in a haphazard fashion, as noted by Swainson:

Before parliamentary, or "responsible", government is established in a Colony, the representative of the Crown both reigns and governs: he fills up all appointments to vacant offices, determines upon the policy and measures of the Government, and his officers carry them into effect. He is entitled to command their advice, but he is not bound to act upon it; and in the exercise of his powers he is responsible to her Majesty alone....the Governor has an arduous and harassing duty to perform: he is at all times, almost unavoidably, in a state of unpleasant relations with some portion of the community; and he is personally made the principal object of attack by the Colonial Press. In the ordinary discharge of his duty, he has frequently to thwart the projects of those who, regardless of the

public interests, seek to promote their own aggrandisement; and even in the disposal of the patronage of the Government, he makes more enemies than friends; and, however popular he may have been at the commencement of his reign, he is soon surprised to find himself pursued with malice by a host of bitter enemies. Coarse and violent abuse is too common to have much weight; and even the most unscrupulous assertions are little heeded in the Colony itself where the writer, his character and motives, are known and understood: but the calumny may find its way to England, and, if read, may possibly be taken for a truth. A Colonial Governor has not only to see himself daily held up to public odium, and to bear the trying responsibility of a difficult command, but has his life constantly embittered by the apprehension of being suddenly recalled - with his reputation damaged, and all his hopes of professional advancement utterly destroyed; and it needs but some public Company or Colonial Agent in England, ever ready to undermine him in Downing Street, to fill up the measure of his uneasiness. No man who fears responsibility, and who has a reputation to lose, should seek to become the Governor of an infant Colony.(50)

The first session of the Legislative Council of New Zealand was opened on 24 May 1841, and all members of the public were permitted to attend. Hobson used the occasion to discuss his views on the policy direction required for the colony. His speech was significant in connection with his perception of whom he was primarily responsible for governing. While Hobson outlined a vision for the country, his reference to Maoris, as well as being almost in passing, indicates that his government would not be passing laws which applied to Maori as much as passing laws the effects of which would supposedly benefit Maori:

...it will be my endeavour, during the recess, aided by the advice and assistance of the law officers of the Crown, to prepare for your consideration, such laws as will best provide for the administration of justice and the contingencies of social life in New Zealand; therefore the measures now proposed to you, must be deemed temporary and contingent, as resulting from the present peculiar condition of the Colony.

By command of Her Majesty, I will bring under your consideration, the repeal of the Land Commission Act, and submit for your adoption, an ordinance for the same general purposes, but granting to the Governor of New Zealand the same powers as heretofore enjoyed by the Governor of New South Wales. I will, likewise, lay before you, Bills for the regulation and collection of Her Majesty's Customs, for establishing Courts of Quarter Ses-

sions and Requests, and for the prohibition of distillation. These, Gentlemen, are the only subjects for the present, on which I shall require you to deliberate.

Gentlemen, - We have a solemn and important duty to perform; by our means conflicting interests are to be reconciled, harmony and tranquillity established, and measures are to be adopted for improving and elevating the character of the aboriginal inhabitants....(51)

Evidence that Hobson was concerned predominantly with British rule over British subjects in New Zealand can also be traced from particular geographical factors. The areas where he sent officials and to where he wished to extend law and order were all, without exception, European settlements. During the period of Hobson's rule, a Police Magistrate and Sub-Collector of Customs were posted to New Plymouth, Nelson, and Wellington. In practice, this was the extent of Government involvement in the country. The system itself did little to expand the Government's horizons of control beyond the main pockets of British settlement. Regional branches of Government were later devised as a way of increasing the control over the settler populations of New Zealand, and in 1841, Russell suggested to Hobson that a system of municipal administrations should be formed to facilitate New Zealand's progress towards full self-government.(52) In 1842, Hobson duly passed the Municipal Corporations Ordinance in an attempt to achieve this, but with little immediate success. Even two decades later, the pitiful extent of Government control in New Zealand was remarked on by the Governor at the time, Gore Browne:

Some of the most populous districts, such as Hokianga and Kaipara, have no magistrates resident among them; and many, such as Taupo, Taranaki, and the country about the East Cape, have never been visited by an officer of the Government. The residents [settlers] in these districts have never felt that they are the subjects of the Queen of England, and have little reason to think that the Government of the Colony cares at all about their welfare.(53)

In this extract, the Governor used the term 'populous' to refer to concentrations of Europeans. The emphasis was maintained on the provision of a functioning system for justice to the European population of the country. Browne did not include Maori as being covered either to the same extent or necessarily fully by the same system. Certainly, for Hobson, a few decades earlier, the matter of attempting to govern the Maoris was an entirely different one to that of establishing rule over Europeans. He foresaw from early on the potential for problems:

...the native population offer us but trifling interruptions; yet their habits are so inveterately opposed to those of civilised life,

and their practices so repugnant to the customs of Englishmen, that we can scarcely hope to preserve such harmony when the settlers become more numerous.(54)

Hobson did not intend to govern Maori as much as he did manage their interaction with the European population, over whom he did have some constitutional rights of rule. It is critical that the Crown policies on Maori in the few years immediately following the signing of the Treaty be seen in this light. This way, the statements of officials at the time become more explicable. For example, the following two contemporary assessments of the role of the office of Protector of Aborigines illustrates how the relationship between the Colonial Government and Maori was more one of trusteeship than of rule:

“Protector of Aborigines” is the official person by whom these duties are professed to be performed; but it is perfectly impracticable, that the various numerous duties of such an office, over such an extent of country, and so great a number of natives, can be performed by one person, with satisfaction to the Government, or with justice to the Aborigines.(55)

...allusion is made to the Protector of Aborigines. Were the functions of this officer confined to the protection of the natives from physical injury or injustice there could not be two opinions on the subject of his duty; but in matters which relate to their general welfare he and I, with equal zeal in their cause, may entertain very different ideas. I sincerely hope that the duties of this officer may be exactly defined, and that the Government may be secured from the effect of captious opposition.(56)

One of the most important statements connected with the limits of the authority of Hobson's Government over Maori came from Lord Russell. In his January 1841 instructions to Hobson regarding the office of Protector of Aborigines, Russell stressed that the Government's functions in relation to Maori were limited to '...promoting the health, civilisation, education and spiritual care of the natives', and not of directly ruling them.(57)

For the colonial administration in New Zealand, the restrictions of a Treaty did not need to become a barrier to stretching out the arms of government to embrace Maori. Hobson was able to organise the government of the colony irrespective of the understanding of the Treaty he had given to Maori. A practice that became common in other parts of the Empire as well.(58) The assumed right to govern Maori was adopted gradually and in an ad hoc fashion, in contrast to the earlier reluctance to extend rule to anyone other than the European settlers.

3. What Maori Ceded

On 10 March 1842, Barzillai Quaife, a Congregationalist missionary in Kororareka, and editor of *The Bay of Islands Observer*, published a stinging editorial on the way in which the Crown appeared to have deliberately misconstrued the Treaty for sordid political ends.(59) Quaife's editorial provides one of the most lucid examples of a contemporary acknowledgement that the Treaty's provisions of governance did not extent to Maori:

If the subjection of the Maoris to the Crown commenced with the Treaty of Cession, how is it that the servants of the Crown are attempting at this very hour, as they have done all along, to pass an act binding them retrospectively?...There is only one way to account for this - they are mixing up the old 'right of discovery' principle afresh with the right conferred by the treaty of cession, although they are as destructive of each other as alkali and acid, and are sure to produce violent effervescence....

If the subjection of the Maoris with regard to themselves and their territory arose only out of that Treaty and was expressed only by their voluntary signatures to that document, how, it may be asked, is it that the whole country is regarded by Captain Hobson's administration as under British authority no exception being made in any of the actual measures of government with regard to such chiefs as never signed the Treaty, or with regard to their lands?

The Maoris are not and cannot be governed by the Crown [author's italics]. Those who signed it and those who didn't alike disregard it, as far as the Government is concerned....The sovereignty over them on the part of Great Britain is entirely nominal....

Thus, there are really two distinct communities in this country, living and more or less mingling with each other, governed on different principles, and by different laws and customs, and acknowledging a totally different authority. This evil - and who can deny that it is such? - is wholly owing to want of accurate distinction in the first movements in colonising this country.(60)

It is absolutely certain that Maori did not and indeed could not have ceded full sovereignty to the British Crown. Maori were not conquered by the British, and therefore were not a vanquished group signing some agreement to avoid further military punishment. The British were '...not in possession of physical force to make itself respected in a single Native pa'.(61) Moreover, it is questionable whether Maori even had the right to cede sovereignty, based on the absence of Western legal rights to do so in traditional iwi structures, (62) and on the fact that the chiefs who signed the Treaty were not bestowed with the capacity to give away the sovereignty of their iwi or

hapu. Dieffenbach noted this point in 1843, arguing simply that:

...the chief has no authority to give away what he does not himself individually possess; each of its [the tribe's] members is the sovereign possessor of his own plot of ground, and to have the consent of all would have amounted nearly to an impossibility.(63)

George Clarke, who had direct experience with Maori land-holdings during the early 1840s, through his involvement in the office of the Protector of Aborigines, concurred with this understanding:

The private, separate, and exclusive ownership of land was *not* recognised among them [Maori], though I have seen this denied....No Chief, however high his rank, could dispose of a single acre without the concurrence of his tribe. Without such a law, no tribe could be sure of its integrity, and any number of wedges might be driven into its territory....It was fatal to the tribe to allow the individual, on his own mere motion, to admit a stranger to get a foothold on its land.(64)

Another contemporary observer, Charles Terry, was even more detailed in his analysis of the cultural impasse that necessarily prevented British policies from being legitimately realised. Terry's description of the principles of traditional Maori land tenure highlighted a problem that the British officials had chosen to ignore:

Next to the proper understanding and acknowledgment, by the Natives, of any document it may have been alleged they have signed, is to ascertain, whether the Natives, who have been parties to such sale, are the real owners of the land claimed. The laws and customs of the aboriginal chiefs and natives, regarding land, are so well understood and acknowledged amongst themselves, that the various respective boundaries of every tribe and chief are well known, and can easily be ascertained. They possess their land either hereditarily, or by right of conquest, and such dominions are not the property of one individual or chief, but the property of the tribe in common, according to their grade, as minor chiefs or *rangatiras*, and their relatives, the younger branches of old families, and frequently females who claim in right of their parents. The chief is the organ of the tribe; but he has neither exclusive property nor power, except similar to clanship or the feudal system, which, in truth, approximates nearer to the customs of the Natives in New Zealand, than any other form of government. They never actually divide their property; but move, according as their inclination, or their idea

of more productive cultivation may prompt, from one part of the property of the tribe to another. Then each individual occupies and cultivates a certain quantity of land, which is regarded as his exclusive property for the time: occupation being held sacred.(65)

Various tenets of international law support these assessments. The key to the endorsement of a treaty is the possession by both groups of signatories of Full Powers. The original purpose of a Full Power was to grant a duly authorised agent of a sovereign state to bind the state to a treaty. Hobson fulfilled this function on behalf of the British Crown, but the Maori chiefs could not automatically be said to be in the same position.(66)

That the signatures of the chiefs were accepted by the British was as much a case of expedience as anything else. In the case of a treaty, the chiefs had no reason to believe they possessed Full Powers to bind their iwi in perpetuity. At least, nothing in Maori lore up until that point bestowed such a function on chiefs. In Hobson's bid to earnestly comply with his instructions from the Colonial Office, he seems to have been deficient in his duty to adequately verify the Full Powers of the other party to the Treaty.

George Clarke, whose experience with Maori in his administrative capacity was almost unrivalled among his cohorts, was the first to acknowledge that the basis of Maori land possession effectively precluded the Crown from exerting governance over Maori, no matter what the Crown may believe. The links bonding Maori land and Maori rule appeared immutable:

Most of the land held by tribes was held by right of inheritance - but not a little was claimed to have been wrested from its original owners by force of conquest. To establish the force into a right, it was never enough to invade and overrun a given district, and even to drive out for a time the inhabitants if the invading force were then to retire from the raid. Permanent occupancy was the condition of permanent possession, and it was expressed by building paens, making tracts of actual cultivation....(67)

Thus, according to both traditional Maori practices and contemporary international legal principles, the tribe which occupied an area was also the absolute sovereign and governing authority in that area, unless another group could physically demonstrate their dominance - usually militarily, and then through subsequent occupation. Under such a system, the sovereignty of iwi was pronounced and clearly delineated. The ambiguous graduations of governance and sovereignty that Hobson had argued to his superiors he had successfully

introduced were entirely incommensurate with the regimes and precedents of Maori.

The British Government was adamant that the opposite was true however. Lord John Russell's dispatch to Hobson on 9 December 1840 maintained that Maori sovereignty had been ceded to the Crown, although why Russell was so desperate to argue the point when the Treaty had supposedly already confirmed this ten months beforehand is unclear and perhaps slightly suspicious. Russell's justification that the British had acquired Maori sovereignty was founded on the faulty pretext that Maori were a *single* sovereign entity - thus denying the sovereignty of individual iwi. Furthermore, Russell's reliance on the belief that Maori ceded their full, collective sovereignty exposes the tenuous claim the British had to 'title' over New Zealand:

...[the Maori tribes] are not mere wanderers over an extended surface, in search of a precarious subsistence; nor tribes of hunters, or of herdsmen; but a people among whom the arts of government have made some progress;....In addition to this, they have been formally recognised by Great Britain as an independent state; and even in assuming the dominion of the country, this principle was acknowledged, for it is on the deliberate act and cession of the chiefs, on behalf of the people at large, that our title rests.(68)

For Maori, tino rangatiratanga necessarily took precedence, over any attempt by an outside body at governing tribes. In the context of the Treaty, rangatiratanga had biblical associations with notions of the kingdom of God, earthly kingdoms, and master, whereas kawana-tanga or kawana had been used in connection with Pontius Pilate, and the idea of a prince or regional ruler.(69) Therefore, according to the Maori version of the Treaty, supreme sovereignty remained where it always had: with the iwi. Rewa, one of the northern chiefs, articulated the primacy of the iwi in the debate preceding the initial signing of the Treaty on 5 February 1840:

What do Native men want of a Governor? We are not whites nor foreigners. This country is ours, but our land is gone. Nevertheless we are the Governor - we, the chiefs of our fathers' land. I will not say 'YES' to the Governor's remaining. No, no, no; return. What! This land to become like Port Jackson and all other lands seen (or found) by the English. No, no. Return. I, Rewa, say to thee, O Governor! Go back.(70)

The question then emerges of whether Maori ceded to the British the right to govern all the peoples in New Zealand. A good prima facie case has been made for this by most writers on the Treaty. Ngata

staunchly defended the view that Maori surrendered such rights absolutely. In reference to the wording of Article the First of the Treaty, Ngata mistakenly observed that: 'These are but a few words but they indicate a complete cession'.(71) But this ignores a vital question: over whom did the Maori cede the right of the British Crown to govern? Was it over all the population of the country, or just British settlers? If Maori intended the British to rule over all the people in New Zealand, including themselves, then it would have been unnecessary to insert Article the Third into the Treaty, because the Maori cession of this level of authority would automatically imply that Maori were British subjects, and it would therefore be superfluous for Article the Third to state that Maori were to be granted the same rights and privileges as British subjects. However, Article the Third was included in the Treaty exactly because Maori were not British subjects, but rather, were granted the same rights and privileges as British subjects. The distinction may seem almost trivial, but it is one which provides a substantial piece of evidence that Maori retained not only their sovereignty, but also their right to self-government, which they exercised both constitutionally, and in practice. The right bestowed on Maori by Article the Third of the Treaty - effectively one of joint citizenship - supplemented rather than transplanted Maori claims to self-government.

It may be retorted that, in fact, Maori at least ceded some rights of government to the British through their agreement to the terms of the Treaty. But the historical precedent in Maori communities of a Governor, and the conception of Governorship, was so weakly developed in most cases as to be effectively non-existent. In practice, the experience of most Maori who had any contact with a British official prior to 1840, understood the role of those officials as one which focused on protecting the interests of their fellow British citizens. And Busby in particular demonstrated repeatedly his ineffectiveness even in this area. Any idea he may have conceived of governing Maori would have been physically impossible. There was no reason why Maori should have treated Hobson any differently, or perceived him any differently, when he arrived in New Zealand at the end of January 1840. With a physical presence that was even more insipid than that of Busby's, Hobson had yet to demonstrate any sort of authority of the nature that would later be associated with Governorship when he signed the Treaty. It would have been difficult for Maori to even imagine the extent of rule they were allegedly ceding, based on the collective experience they had accumulated to that point in time on the exercise of British government in New Zealand. The authority of the Governor was certainly something that was not understood by Maori. In a culture in which the mane of a person was critical to their standing in the community, Hobson still had to demonstrate his credentials as a leader:

Where does the Governor get his authority? Is it from the Queen? Let him come; what power has he? Well, let him come, let him stop all the lands from falling into the hands of the Pakehas. Hear, all ye Pakehas!....(72)

Other chiefs were almost indifferent, simply seeing Hobson as being as useless as Busby had been:

Will the Governor remedy the crooked dealing [in land]? If they would listen and obey. Ah, yes! Good that! But have they ever listened to Busby, and will they listen to thee - a stranger, a man of yesterday? (73)

Even if the faint likelihood existed that a handful of Maori did possess some comprehension of the concept of a Governor and of Governorship, it is not possible to turn a blind eye to the fact that when negotiating the Treaty with the Maori on 5 February 1840, Hobson was not a Governor, but a Consul. On this basis, it would make more sense to argue that *kawanatanga* equates to Consulship in practice rather than Governorship. Certainly, this would have been the more likely conclusion arrived at by the chiefs signing the Treaty at Waitangi.

For many chiefs however, the issue of governance, in whatever manifestation, was palatable only when it applied to other Europeans. Aperahama Taonui, a chief from the Hokianga region, spoke of the delineation of the powers of the Governor in February 1840 as the Treaty was being signed at the Mangungu Mission Station. Taonui's statement is one of the clearest examples of the Maori belief that the Crown's request for the right of governance should apply only to British rule over the settlers:

We are glad to see the Governor. Let him come to be a Governor to the Pakehas. As for us, we want no Governor. How dot he Pakehas behave to the black fellows at Port Jackson? They treat them like dogs!....(74)

The understanding of the Treaty, as it was presented to Maori at Waitangi, was heavily influenced by the explanations given to the assembled chiefs by Hobson, and then by Henry Williams. Hobson's conveyance of the notion that the Treaty had been devised to protect Maori from the settlers by delivering a means by which the Crown could regulate the settlers' behaviour was elaborated on by Williams and became one of the main theme of the British presentation to Maori. Williams suggested, more seductively, that the Treaty was:

an act of love towards them on the part of the Queen, who desired them to secure their property, rights and privileges; that this treaty was a fortress for them against any foreign power which might desire to take possession of their country....(75)

Neither Hobson nor Williams, two of the principal protagonists of the Treaty who were visible to Maori at Waitangi, mentioned anything about the rule of British law being imposed on iwi. Instead, both were eager to portray the document as one which would serve Maori interests without denying or removing any existing traditional Maori rights. On this basis, it is not surprising that there was widespread Maori endorsement of the provisions of the Treaty as they understood them to be. The role of missionaries again surfaces at this point as being crucial. The subsequent interpretation that some missionaries gave to events tended to distort rather than explicate the position of Maori in relation to the Treaty. Buick cited Samuel Marsden as having claimed that the Maori chiefs were actively seeking some form of stable government from the British to take the place of their tribal system. This appeared to be proof that Maori were agreeable to ceding their right to govern to the Crown. However, in actuality, the chiefs Marsden referred to were not seeking government at all, but rather, just '...the protection afforded them from the British Government'.⁽⁷⁶⁾ Buick perpetuated this confusion between the chiefs seeking British protection, and requesting that their iwi be ruled by the British: the former was a strategic initiative, the latter an irrational and inexplicable response to the shifting balance of power among iwi.

Hobson's reaction to the confusion he had sown was less than satisfactory. Instead of addressing the problem and trying to clarify the issues that were perplexing his audience, he stubbornly suggested that any misunderstanding was no longer his responsibility:

If the Native chiefs do not know the contents of this treaty, it is no fault of mine. I wish them fully to understand it. I have done all that I could do to make them understand the same....⁽⁷⁷⁾

This attitude only compounded what was already an increasingly negligent approach by Hobson to the issue of Maori comprehension of the Treaty. Certainly, from the Maori perspective, the understanding and awareness of the Treaty often differed dramatically from what the Crown's representatives had attempted to convey. At least some chiefs had acknowledged an unfamiliarity, not only with what was being ceded, but even the process of signing the Treaty:

We all tried to find out the reason why the Governor was so anxious to get us to make these marks. Some of us thought the Governor wanted to bewitch all the chiefs, but our pakeha friends laughed at this, and told us that the people of Europe did not know how to bewitch people. Some told us one thing, some another....We did not know what to think, but were anxious [that the Governor, Hobson] might come to us soon; for we were afraid that all his blankets, and tobacco, and other things would be gone before he came to our part of

the country, and that he would have nothing left to pay us for making our marks on his paper....and when we met the Governor, the speaker of Maori [that is, the interpreter] told us that if we put our names, or even made any sort of mark on the paper, the Governor would then protect us, and prevent us from being robbed of our cultivated land, and our timber land, and everything else which belonged to us....The speaker of Maori then went on to tell us certain things, but the meaning of what he said was so closely concealed we never found it out. One thing we understood well, however, for he told us plainly that if we wrote on the Governor's paper, one of the consequences would be that great number of pakeha would come to this country to trade with us, [and] that we should have an abundance of valuable goods....we were very glad to hear this.(78)

Colenso evidently felt much the same about the Maori comprehension of some of the terms and conditions of the Treaty, although he betrayed no anxiety about the situation: 'I have spoken to some of the chiefs concerning it [their understanding of the Treaty]...' Colenso whispered to Hobson as the chiefs were putting their marks on the document, '...who had no idea whatsoever as to the purport of the treaty'.(79)

Other sources verified the worrying lack of appreciation some of the chiefs had regarding the document they were committing themselves and their iwi to. (80) Charles Wilkes, commander of the United States Exploring Expedition, was in the Bay of Islands within two months of the first signing of the Treaty. Wilkes' observations must preclude any serious argument that most Maori fully comprehended the content and implications of the Treaty:

So far as the chiefs understand the agreement, they think they have not alienated any of their rights to the soil, but consider it as only a personal grant, not transferable. In the interview I had with Pomare, I was desirous of knowing the impression it had made on him. I found that he was not under the impression that he had given up his authority, or any portion of his land permanently; the latter he said he could not do, as it belonged to all his tribe.(81)

As the Treaty was circulated around Northland, the feeling among several chiefs was that the explanations of the Treaty provided by its promoters were far from adequate, and occasionally conflicting. To compound this problem, for some Maori, there was not necessarily a distinction between what those Europeans promulgating the Treaty promised, and the assurances given by other Europeans:

The Pakehas say the Governor comes to take the land. This is the first time I have heard the pukapuka [the treaty]. The pakehas explained it differently. Some people say plenty of Pakehas are coming to buy our land, but not for our good. They say the soldiers are come to shoot us, and that the Governor will not be a

shepherd for us. They say Mr. Puckey and Mr. Matthews know what is to become of us but will not tell us. These are my sayings.(82)

When the Treaty arrived in Ngai Tahu territory, the nature of the promises told to the chiefs were important influences in the acquisition of signatures, but were also later to become a source of disillusionment:

It has been stated to me on many occasions by our Pu Korero that the European had offered the Maori a world free of conflict, free of barbaric practices, where all men would be equal. This was but one of the attractions advanced to encourage our ancestors to sign the Treaty....These noble thoughts were agreed to by our people in faith and trust, in expectation of the agreements made with our Treaty partner, that further lands would be allocated to our ancestors.

....On the other hand, much discussion has taken place since the signing of the Treaty...as to the material needs that people require for survival. This Marae, this wharenuui has heard the echoes of these complaints, the non fulfilment of the...agreements between the Maori and the Crown, within the Treaty of Waitangi....(83)

With these, and numerous other accounts of the degrees of Maori comprehension of the terms of the Treaty, any serious historian would shudder at claims that the Maori knew they were ceding the right to govern the country, in perpetuity, to the Crown. Still, for 150 years, it was reiterated in histories of New Zealand that Maori were fully aware of what they were giving their consent to when signing the Treaty of Waitangi.

In many cases, the assumed purpose of protection from hostile neighbours was a compelling reason in itself for some chiefs to sign the Treaty. John Flatt's 1838 submission to the Select Committee of the House of Lords made this reason for Maori enthusiasm for the Treaty explicit, and following the signing of the Treaty, Major Bunbury inadvertently confirmed this key motive for many Maori agreeing to the document:

On being told I was chief of a body of soldiers....the chief inquired, Should his tribe [be] agreeable to my request [to sign the Treaty]....would the governor send a portion of my force to protect them?(84)

Bunbury's vague answer was enough to convince the chief to sign. The deceptive promise of military protection which the chief under-

stood to be a provision of the Treaty was of no concern to Bunbury thereafter.

As for those iwi representatives who either refused to sign, or were denied the opportunity, the British Government responded to the New Zealand Attorney-General, Swainson's, suggestion that those iwi did not come under British jurisdiction by declaring that the opinion of the Attorney-General had been '...overruled by the opposite opinion of the Queen and Parliament and must thenceforward be silenced'.(85)

Thereafter, British administrators in New Zealand unhesitatingly abandoned any traces of adherence to the verbal promises which constituted part of the Treaty, even though international law asserted and continues to assert that solely written elements need not be the only requirements necessary to create a treaty, provided that:

...the two persons whose spoken words are relied upon as evidence of the agreement, are duly authorised bind their States, there is no reason in principle why a binding relation should not result.(86)

Despite the inconvenience and the generally undesirable nature of verbal components of a treaty, they remain on an equal legal footing with the written parts of the agreement. Of course, for the uneasy and anxious colonial administrations in New Zealand in the 1840s, the suggestion of determining and enforcing the verbal provisions of the Treaty would have seemed preposterous. An arbitrary assertion of unilateral sovereignty over the territory and peoples of New Zealand was an infinitely more practical proposition, and was the one eventually pursued. The iwi concerned were themselves, however, bound on a different path, and were soon to challenge the British claims of sovereignty. The Treaty of Waitangi was about to be severely tested.

Notes

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