

Long
Tas
Lanta

Historical background

Wan
Pul
Rang
Kamp
Kuh
Korn
Kaga
Kata
Soul
Kob
Kah
Sara
Kuna
Kamp
Kau
Kara
Kata
Kora
Kupa
Kura



Introduction

This section provides an historical context for discussion on the key concepts of the Treaty and its principles. The aim is to provide a brief overview of important events preceding the signing of the Treaty, the social context in which the Treaty negotiations took place, the stance of the British Crown in respect of New Zealand, and differences between the two texts of the Treaty. This overview draws on some primary historical materials as well as commentary by New Zealand historians. The use of historical sources raises issues of perspective and interpretation. Many of the sources referred to draw on European accounts or interpretations. As noted later in the discussion of Māori responses to the British Crown's proposal of a treaty, the surviving European accounts of the Treaty signings may reflect the translator's understanding more than Māori intentions and must be read accordingly with this in mind. Further, a brief overview can hope to provide no more than a summary. Readers are encouraged to refer directly to original sources and to the more extended works of various New Zealand historians, some of which inform this section.



The Declaration of Independence - He Whakaputanga o te Rangatiratanga o Nu Tireni

James Busby was appointed as a British Resident in New Zealand in 1832 under the guidance of the Governor of New South Wales. His appointment followed appeals to the British Government from settlers in New Zealand, and from some Māori, who were concerned about law and order and intertribal warfare.

Busby arrived in New Zealand in May 1833 and had few formal powers, acting instead as a liaison with local settlers, traders and Māori communities and as an intermediary in disputes.⁶⁹ He was concerned about the limit of his powers in the absence of a formal justice system, especially given the extent of intertribal warfare. Busby sought to encourage local chiefs in the Bay of Islands region to establish an arrangement for a collective pan-tribal governance structure. To prompt a collective response from the chiefs, Busby first suggested that Māori should establish a system of ship registration for their trading vessels and called a meeting at Waitangi in 1834 at which 25 northern chiefs voted for a flag.⁷⁰ According to one historian, though the flag

received a mixed reception, its significance for Māori lay in a belief “that the mana of New Zealand, closely associated with the mana of the chiefs, had been recognised by the British Crown”.⁷¹

The following year, Busby heard that a Frenchman, Baron Charles de Thierry was planning to set up a “sovereign independent state” in the Hokianga. This news and other events prompted him to call a second meeting on 28 October 1835, attended by 34 northern chiefs, at which they signed a document drafted by Busby and translated into Māori, entitled: The Declaration of Independence - He Whakaputanga o te Rangatiratanga o Nu Tireni.⁷² The English text of the Declaration asserts the independence of New Zealand, “under the designation of The United Tribes of New Zealand”, and states that:

*... all sovereign power and authority within the territories of the United Tribes of New Zealand ... reside[s] entirely and exclusively in the hereditary chiefs and heads of tribes in their collective capacity, who also declare that they will not permit any legislative authority separate from themselves ... nor any function of government to be exercised within the said territories, unless by persons appointed by them and acting under the authority of laws regularly enacted by them in Congress assembled.*⁷³

In the Declaration, the United Tribes ask King William the VI to “continue to be the parent of their infant State” and to “become its Protector from all attempts upon its independence”. Other tribes were invited to sign the Declaration, and the number of signatories reached 52 in 1839, mostly representing tribes from the north of the North Island.⁷⁴ Despite this support, a pan-tribal form of governance did not eventuate.

The Declaration was acknowledged by the Colonial Office with the assurance that the King would protect the Māori people, provided this protection was consistent with a due regard to “the just rights of others and to the interests of His Majesty’s subjects”.⁷⁵ The response of the British Colonial Office indicates that New Zealand was recognised as an independent state, albeit one in a protectorate relationship with Britain. Later, as preparations were made for the drafting of the Treaty of Waitangi, British officials instructed Hobson to take special care to obtain the signatories of those chiefs who had signed the Declaration of Independence.

Today, the Declaration is considered by the Courts to be of no legal effect in New Zealand,⁷⁶ and has not been accepted as a basis for any legal rights or duties. It retains significance in political and constitutional discussion, and is of special importance to the

descendants of its signatories. In addition, the translation of the English text of the Declaration, involving concepts of independence and sovereignty, informs discussions of the differences between the Māori and English versions of the Treaty of Waitangi. This discussion is summarised below.

Why a treaty?

Historical reports show that there were several issues facing Māori and the British Crown in 1840. Prior to the Treaty, Māori communities had expressed concerns over law and order issues, particularly the unruly and unsanctioned behaviour of some settlers in the areas of European settlement, and the devastating impact of musket warfare in intertribal disputes. Māori chiefs were also disturbed by the impact of introduced diseases on their communities and by the increasing pressure from settlers seeking to acquire Māori lands. At the same time, most Māori, if not all, were keen to explore ways to further secure and expand their trading interests, thus strengthening their communities and enhancing their tribal tino rangatiratanga.

The British Crown was aware of the increasing interest of other imperial powers, including France and the United States, and was concerned to secure British trading interests and settlement. Humanitarian concerns, raised in an 1837 *Report of the House of Commons Committee on Aborigines in British Settlements*, were also pressing upon the Crown. This report drew attention to the worst consequences of uncontrolled European settlement and trade on indigenous peoples in other British settlements, warning of the effects of “seizing their lands, warring upon their people, and transplanting unknown disease, and a deeper degradation”.⁷⁷ Groups in Britain advocated strongly for measures to ensure that these consequences did not eventuate in New Zealand.

Britain was initially reluctant to take steps to assert its sovereignty over New Zealand. As the pace of settlement accelerated, however, the pressure on Britain to exercise authority in the territory also increased. The Crown was aware that in the absence of a treaty, it had limited authority to intervene in a territory that it had already recognised as an independent State⁷⁸ and came to see the formal acquisition of Māori consent⁷⁹ as a necessary precursor to the establishment of a settled form of civil government in New Zealand. The perceived need for consent was no doubt intensified by the significant military threat posed by the tribes. By initiating the treaty-signing process, the Crown intended to seek Māori permission to proceed with its wider goals, namely to:

- ensure the orderly, controlled and peaceful settlement of an anticipated influx of British subjects;
- establish law and order mechanisms to resolve lawlessness among existing British settlers and to control intertribal fighting;
- establish civil government as an adjunct to colonial rule from New South Wales;
- secure its interest in New Zealand before other foreign powers, particularly France, became established there; and
- address humanitarian concerns for the welfare of Māori peoples by protecting their property and other rights.

Instructions given to Hobson for negotiating the Treaty

Captain William Hobson arrived in New Zealand in early 1840 with written instructions from the Marquis of Normanby, also known as Lord Normanby, the Secretary of State for the Colonies, to “treat with the Aborigines of New Zealand for the recognition of Her Majesty’s sovereign authority over the whole or any parts of those islands which they may be willing to place under Her Majesty’s dominion”.⁸⁰

Hobson was instructed to obtain the “free and intelligent consent”⁸¹ of Māori, overcoming any initial distrust in or aversion to a treaty by conducting himself with “mildness, justice, and perfect sincerity”⁸² in his dealings with them. He was to:

*... frankly and unreservedly explain to the natives, or their chiefs, the reasons which should urge them to acquiesce [to] the proposals ... [pointing] out to [the chiefs] the dangers to which they may be exposed by residence amongst them of settlers amenable to no laws or tribunals of their own; and the impossibility of Her Majesty’s extending to them any effectual protection unless the Queen be acknowledged as the sovereign of their country ...*⁸³

Lord Normanby also considered:

*It is further necessary that the chiefs should be induced, if possible, to contract with [Hobson], as representing Her Majesty, that henceforward no lands shall be ceded, either gratuitously or otherwise, except to the Crown of Great Britain ... You will, therefore, immediately on your arrival, announce, by a proclamation addressed to all the Queen’s subjects in New Zealand, that Her Majesty will not acknowledge as valid any title to land which either has been, or shall hereafter be acquired, in that country which is not either derived from, or confirmed by, a grant to be made in Her Majesty’s name, and on her behalf.*⁸⁴

In conducting land sales, Hobson was advised that:

All dealings with the aborigines for their lands must be conducted on the same principles of sincerity, justice, and good faith, as must govern your transactions with them for the recognition of Her Majesty's Sovereignty in the Islands. Nor is this all; they must not be permitted to enter into any contracts in which they might be the ignorant and unintentional authors of injuries to themselves. You will not, for example, purchase from them any territory, the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence. The acquisition of land by the Crown for the future settlement of British subjects must be confined to such districts as the natives can alienate, without distress or serious inconvenience to themselves. To secure the observance of this, - will be one of the first duties of their official protector.⁸⁵

The role of the Official Protector of the Aborigines in the colonial government was to safeguard Māori interests in land negotiations. Lord Normanby also outlined other measures to protect Māori welfare, and, as one historian notes, these were ultimately aimed not at preserving traditional Māori society but at amalgamating Māori with the British settler community.⁸⁶

There are yet other duties owing to the aborigines of New Zealand, which may be all comprised in the comprehensive expression of promoting their civilisation, - understanding by that term whatever relates to the religious, intellectual, and social advancement of mankind. For their religious instruction liberal provision has already been made by the zeal of the missionaries ... and it will be at once the most important, and the most grateful of your duties ... to afford the utmost encouragement, protection and support to their Christian teachers ... The establishment of schools for the education of the aborigines in the elements of literature will be another object of your solicitude; and until they can be brought within the pale of civilized life, and trained to the adoption of its habits, 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.⁸⁷

Lord Normanby advised that it remained to be considered how the provisions of the instructions were to be brought into effect. The instructions, dated 14 August 1839 and some pages in length, recognised that:

... we [the British Government] acknowledge New Zealand as a sovereign and independent state, so far at least as it is possible

to make that acknowledgement in favour of a people composed of numerous, dispersed and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert. But the admission of their rights, though inevitably qualified by this consideration, is binding on the faith of the British Crown. The Queen, in common with Her Majesty's immediate predecessor, disclaims, for herself and for her subjects, every pretension to seize on the islands of New Zealand, or to govern them as a part of the dominion of Great Britain, unless the free and intelligent consent of the natives, expressed according to their established usages, shall first be obtained.⁸⁸

The Treaty signing process

There are two texts of the Treaty: a Māori text and an English text. There is some evidence that the original English text, from which the current Māori translation was made, has in fact been lost.⁸⁹ The Māori text of the Treaty was signed by over 500 Māori chiefs, including 13 Māori women. Over 40 chiefs signed the Māori text at Waitangi on 6 February 1840,⁹⁰ and similar gatherings were held elsewhere over the following seven months, enabling more chiefs to sign other copies of the Māori text. The signatures of 39 chiefs were appended to the English text at Waikato Heads in March or April 1840 and at Manukau on 26 April 1840.⁹¹ There are differences between the English and Māori texts of the Treaty, which are discussed in detail later.

A number of prominent chiefs refused to sign the Treaty on the grounds that their chiefly authority would be restricted and other chiefs were never reached.⁹² Some non-signatories may have later supported the Treaty at the major hui held at Kohimarama in 1860 and Orakei in 1879,⁹³ which perhaps may indicate the speed at which the power relationship between Māori and the State changed in the decades following the signing of the Treaty. The Treaty signing process concluded in September 1840.

Assurances and explanations given to Māori prior to signing the Treaty

Discussions of events at the Treaty signings are necessarily speculative. Historical reports describe some common themes, however, in the way in which the texts were presented to Māori. It seems clear that the differences between the texts were not always apparent in discussions, and that for a number of reasons, debate was often cut short or rushed. The explanations given by the Crown representatives and missionaries were intended to assuage the key misgivings felt by

Māori, by reassuring them that their mana would remain uncompromised. The Crown’s benevolence and protection were emphasized instead. It seems probable that Māori placed at least as much emphasis on these comments as they did on the commitments recorded in the texts, given their traditional familiarity with verbal pacts and agreements.⁹⁴ Most Māori present at the signings were probably left with the idea that their authority over their customs and law would remain intact, that their tribal rangatiratanga would be enhanced,⁹⁵ and that British governance would restore law and order and ward off French interest in the new colony.

Hobson, through his interpreters, gave repeated categorical assurances at Waitangi and Hokianga “that the Queen did not want the land, but merely the sovereignty, that she, by her officers, might be able more effectually to govern her subjects who had already settled ... or might ... arrive, and punish those of them who might be guilty of crime”.⁹⁶ Hobson, through his representatives, also pledged that “[Māori] land would never be forcibly taken” and that “truth and justice would always characterize the proceedings of the Queen’s Government”.⁹⁷ Both Hobson and Busby assured the chiefs that “all lands unjustly held would be returned” to Māori.⁹⁸ At Kaitaia, Hobson’s representative, Lt. Willoughby Shortland, conveyed the Governor’s explicit message that: “The Queen will not interfere with your native laws or customs”.⁹⁹

Henry Williams, a senior Anglican missionary at Waitangi, assured the chiefs that:

*... the missionaries fully approved the Treaty, that it was an act of love towards [the chiefs] on the part of the Queen, who desired to secure them in their property, rights, and privileges. That this Treaty was a fortress to them against any foreign power which might desire to take possession of their country ...*¹⁰⁰

The assurances of the missionaries were instrumental in persuading the chiefs to sign the Treaty and in forging an idea among some Māori that the Treaty was like a religious covenant.¹⁰¹ Hobson later acknowledged the pivotal role of the missionaries.¹⁰² One historian adds that “by the 1840s Māori engagement with Christianity was real, deep and broad”,¹⁰³ which likely contributed to the significance of missionary persuasion during the Treaty signing process.¹⁰⁴

The right of pre-emption was presented either as a benefit to be gained or as a concession for retaining tino rangatiratanga. Māori chiefs at Coromandel were told by Major Bunbury (Hobson’s representative), through missionary interpreters, that pre-emption was intended “to check their imprudently selling their lands without sufficiently benefiting themselves or obtaining fair equivalent”.¹⁰⁵ The Crown, he

pointed out, would instead purchase the land directly from the chiefs at a more just valuation than any speculator might offer.¹⁰⁶ At Tauranga others were told that pre-emption was “intended equally for their benefit and to encourage industrious white men to settle amongst them”, rather than absentee land speculators taking hold of the land.¹⁰⁷ While humanitarian concerns were certainly at work and protection emphasized, it is unlikely that the Crown’s other interests were fully communicated to Māori signatories. One of the Crown’s aims was to help finance the development of the new colony through the profits from land sales, making it financially self-sufficient as soon as possible.¹⁰⁸ It is unlikely that Māori were told that Hobson’s instructions were to pay an amount for their lands that would “bear an exceedingly small proportion to the price for which the same land would be resold by the Government to the Settlers”.¹⁰⁹ Indeed, it appears that Hobson may not have made this apparent to others negotiating the Treaty on his behalf. Busby later reported that neither he nor Williams grasped the full significance of pre-emption.¹¹⁰

In giving effect to Lord Normanby’s instructions to gain the “free and intelligent consent” of the chiefs, it seems likely that Hobson did not encourage comprehensive debate at Waitangi and elsewhere. The debates at Waitangi and Hokianga were reportedly cut short by Hobson, whose primary concern was to quickly secure the cession of sovereignty. Before his representatives took copies of the Treaty elsewhere for signing, Hobson warned them to expect long speeches “full of angry opposition, and very little to the purpose”.¹¹¹ He advised them to seek the friendship of influential chiefs, who could be counted on to persuade others.¹¹²

Māori responses to the Treaty proposal

Some of the speeches given by the chiefs at the Waitangi signing were transcribed by British observers, and indicate some of the concerns Māori had about the proposed Treaty, at least as those concerns were understood by these observers. Māori responses to the proposal of a treaty were delivered within Māori customary procedure of debate. Such procedure may have been unfamiliar to some European observers¹¹³ and surviving European accounts may “represent the translator’s understanding more than Māori intentions”.¹¹⁴

The account below of the Waitangi signing is based on the recorded observations of Colenso, a mission printer who attended the gathering. Colenso’s account suggests strong and lengthy challenges, including allegations and impassioned claims, a firm rejection of the Treaty proposal, the timely appearance of leading rangatira offering persuasive oratory in favour of the Treaty, and final consent to the

proposal. According to Colenso the debate at Waitangi went on for some hours, and included personal attacks directed at Busby, Williams and others, over their land purchases, drawing attention to overriding Māori concerns about the loss of their lands and land sales transactions in the Bay of Islands.¹¹⁵ The chiefs initially rejected Hobson's proposal of a treaty, fearing that their own chiefly status might be undermined and preferring instead to continue with existing arrangements. Te Kemara, the senior local chief and tohunga of Ngāti Kawa, responded first:

Health to thee, O Governor! This is mine to thee, O Governor! I am not pleased towards thee. I do not wish for thee. I will not consent to thy remaining here in this country. If thou stayest as Governor, then, perhaps Te Kemara will be judged and condemned. Yes, indeed, and even more than that – even hung by the neck. No, no, no; I shall never say 'Yes' to your staying. Were all to be on an equality, then, perhaps, Te Kemara would say, 'Yes;' but for the Governor to be up and Te Kemara down – Governor high up, up up, and Te Kemara down low, small, a worm, a crawler – No, no, no. O Governor! this is mine to thee. O Governor! my land is gone, gone, all gone. The inheritances of my ancestors, fathers, relatives, all gone, stolen, gone with 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 now standing this day is mine. This land, even this under my feet, return it to me. O Governor! return me my lands ... O Governor! I do not wish thee to stay ... And Te Kemara says to thee, Go back, leave to Busby and to Williams to arrange and to settle matters for us natives as heretofore.¹¹⁶

Rewa, a Kororareka chief, reiterated these views:

What do Native men want of a Governor? We are not whites, nor foreigners. This country is ours, but the land is gone. Nevertheless we are the Governor – we, the chiefs of this 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.¹¹⁷

Moka, a chief of the Patukeha tribe, from Rawhiti, also spoke against accepting the Treaty on the grounds that it would not prevent further land sales:

Who will listen to thee, O Governor? Who will obey thee? Where is Clendon? Where is Mair? Gone to buy our lands notwithstanding the book (Proclamation) of the Governor.¹¹⁸

Tamati Pukututu, a chief of the Te Uri-o-te-hawato tribe broke in, suggesting that the Treaty might serve to ensure that Māori land remained under Māori control: “This is mine to thee, O Governor! Sit, Governor, sit, a Governor for us – for me, for all, that our lands may remain with us ... Remain here a father for us ...”.¹¹⁹ Matiu, a chief of the Uri-o-ngongo tribe, supported this turn in direction, emphasizing the good that might arise from a treaty, stating:

*O Governor! Sit, stay, remain – you as one with the missionaries, a Governor for us. Do not go back, but sit here, a Governor, a father for us, that good may increase, may become large to us ...*¹²⁰

The debate continued back and forth, some rejecting and others accepting the Treaty proposal. It appears from Colenso’s account that a critical turning point came with the intervention of Hone Heke, Tamati Waaka Nēne, and Patuone Nēne, all long-time associates of the missionaries and influential speakers, who spoke in support of the Treaty. Hone Heke spoke first to the Governor:

*To raise up, or to bring down? to raise up, or to bring down? Which? which? Who knows? Sit, Governor, sit. If thou shouldst return, we Natives are gone, utterly gone, nothinged, extinct. What then shall we do? Who are we? Remain, Governor, a father for us. If thou goest away what then? We do not know. This, my friends, (addressing the Natives around him), is a good thing. It is even as the word of God (the New Testament, lately printed in Māori at Paihia and circulated among the Natives). Thou to go away! No, no, no! For then the French people or the rum-sellers will have us Natives ...*¹²¹

Hone Heke further argued that the chiefs should rely on the direction of the missionaries in deciding this matter. An impassioned speech by Tamati Waaka Nēne followed:

I shall speak first to us, to ourselves, Natives ... What do you say? The Governor to return? What, then, shall we do? ... Is not the land already gone? Is it not covered, all covered with men, with strangers, with foreigners – even as the grass and herbage – over whom we have no power? We, the chiefs and Natives of this land, are down low; they are up high, exalted. What, what do you say? The Governor to go back? I am sick, I am dead, killed by you. Had you spoken thus in the old time, when the traders and grog-sellers came – had you turned them away, then you could well say to the Governor, ‘Go back,’ and it would have been correct, straight; and I would also have said with you, ‘Go back’ – yes, we together as one man, one voice.

*But now as things are, no, no, no ... (Turning to Hobson, Tamati Waaka Nēne continued:) O Governor, sit ... Do not thou go away from us; remain for us – a father, a judge, a peacemaker. Yes, it is good, it is straight. Sit thou here, dwell in our midst ...*¹²²

Patuone Nēne, a leader among Ngāpuhi, followed his elder brother, supporting his views and associating the Governor with the benefits brought by the missionaries and the ‘Word of God’:

*What shall I say on this great occasion, in the presence of all these great chiefs of both countries? Here, then, this is my word to thee, O Governor! Sit, stay – thou, and the missionaries, and the Word of God ...*¹²³

Issues debated at Waitangi were reiterated at other Treaty signings. At Hokianga, Hobson was met with strong opposition by the local chiefs. Taonui reiterated the significance of land to Māori:

*We are not good (or willing) to give up our land. It is from the earth we obtain all things. The land is our Father; the land is our chieftainship; we will not give it up.*¹²⁴

Kaitoke charged that Māori had been cheated in their dealings with the Pākehā:

*We gave you land, you gave us a pipe, that is all. We have been cheated, the Pākehās are thieves. They tear a blanket, make two pieces of it and sell it for two blankets. They buy a pig for one pound in gold, and sell it for three. They get a basket of potatoes for six pence, sell it for two shillings. This is all they do; steal from us, this is all.*¹²⁵

At Kaitaia, Māori concerns to ensure that their own laws would remain intact were repeated. Nopera Panakareao, the leading rangatira of Muriwhenua, voiced an oft-quoted phrase: “The shadow of the land goes to the Queen, but the substance remains with us”.¹²⁶ The remarks of Nopera Panakareao clearly communicated his understanding that Māori law, customs, and authority over their lands were to be preserved and respected.¹²⁷ The remark followed assurances from the Crown’s representative, Lt. Willoughby Shortland, that Governor Hobson would strictly honour all the obligations which the Treaty imposed on him in the Queen’s name.

Events which established the British Crown's sovereignty over New Zealand

Hobson assumed that sovereignty was vested in the Crown at Waitangi and ratified by later signings. Within a few months of the Waitangi signings, however, he became anxious about news that the New Zealand Company settlers intended to establish their own form of self-government at Port Nicholson (Wellington).¹²⁸ On 21 May 1840, Hobson accordingly declared sovereignty over the whole of New Zealand; over the North Island on the grounds of cession through the Treaty (referring to the Treaty of Waitangi signed on 6 February 1840) and over the South Island and Stewart Island on the grounds of discovery by Captain Cook in 1769, although by May 1840 some South Island chiefs had already signed the Treaty. On 2 October 1840 the acquisition of New Zealand by the Crown was officially announced in the London Gazette. As stated by Justice Richardson in the *Lands* case (1987), it seems widely accepted that as a matter of international and colonial law, the May proclamations along with the subsequent Gazette notice established Crown sovereignty over New Zealand.¹²⁹ In a High Court decision, Justice Durie, also the Chairperson of the Waitangi Tribunal, said:

*[The Treaty of Waitangi] was no doubt an extremely important document in underpinning the decision of the Crown to annex New Zealand and giving it some moral validity to do so and assisting the Crown at that time to stand out against what were then rival interests from other Governments and in particular a Government of France. However, the Treaty of Waitangi while underpinning the Government's decision to annex New Zealand is not in fact the basis in law on which the Government has legal authority. Its authority arises from the Proclamation of Sovereignty.*¹³⁰

Even given the dispute over the language used in the respective texts of the Treaty, and the uncertainty surrounding the events by which British authority was established, it is generally thought that by building on the sovereignty proclaimed in May 1840, Parliament gained full powers to make law for New Zealand.¹³¹

Differences between the English and Māori texts of the Treaty

As discussed above, it seems very likely that during the Treaty signings, Māori were given verbal promises in addition to those recorded in the texts of the Treaty. There were several versions of the English text of the Treaty, and it also seems likely that the original English text, used to provide the Māori translation, has been lost.

Neither official text is a direct translation of the other, and these differences have given rise to different understandings of the Treaty. The main differences follow.

Preamble

The preamble outlines the overall purposes and intentions of the Treaty. The English text emphasized the Queen’s concern “to protect [the] just Rights and Property” of the chiefs and tribes, to provide for British settlement resulting from “the rapid extension of Emigration”, to secure the “recognition of Her Majesty’s Sovereign authority over the whole or any part of those lands” and “to establish a settled form of Civil Government” to secure peace, law and order for both settlers and Māori.

In the Māori text, however, guarantees preserving tino rangatiratanga and Māori land ownership were emphasized, along with promises of protection for Māori chiefs and sub-tribes, maintaining peace and good order, and acknowledging the presence of settlers. Further, in the Māori text the expected influx of settlers was referred to as “others yet to come”. The Queen’s “Sovereign authority” is described in the Māori text in words which have been translated as “the Queen’s Government being established over all parts of this land and (adjoining) islands”.¹³²

Article I

Article I of the Treaty refers to the British Crown’s right to govern in New Zealand based on the consent of the Māori signatories. In the English text, Māori ceded “all the rights and powers of sovereignty” to the Crown, while in the Māori text, Māori agreed to the Crown’s “kāwanatanga” over their lands. The term kāwanatanga was a recently coined word derived from the word governorship. Māori are likely to have understood this term in the context of biblical references to Pontius Pilate, the governor of Rome, whose authority was subordinated to that of the Emperor and whose power was more abstract than concrete.¹³³ By contrast “tino rangatiratanga” had been chosen by Busby in the 1835 Declaration of Independence to refer to New Zealand’s “independence”. It seems likely that Māori felt that their tribal authority “on the ground” would be confirmed in return for a limited concession of power in the form of kāwanatanga.¹³⁴ Many commentators are of the view that the word “mana” is a closer Māori equivalent to the word sovereignty than kāwanatanga, and in the 1835 Declaration of Independence, “mana” is used to describe “all sovereign power and authority”. In the view of the Waitangi Tribunal no chief in 1840 would have relinquished his or her mana to the Queen,¹³⁵ and the connection of mana with Māori gods and spirituality may further explain why the term kāwanatanga was favoured.¹³⁶

The term sovereignty used in the English text is a complex and culturally embedded European concept, which was unfamiliar to most Māori and which may not have had any direct parallel with Māori conceptions of political and social organisation. The Māori understandings were almost certainly that something less than sovereignty had been given away, possibly only allowing the Crown the right to govern its own (British) people in New Zealand and mediate in intertribal disputes. Many Māori may have believed that they were agreeing to a protectorate arrangement in which their internal power and authority would be preserved.

Article II

In Article II of the English text, the chiefs were guaranteed 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”. Article II of the Māori text guaranteed the chiefs “te tino rangatiratanga o ō rātou wenua o rātou kāinga me o rātou taonga katoa”, which has been translated as “the unqualified exercise of their chieftainship over their lands, villages and their treasures”.¹³⁷ The concept of tino rangatiratanga can be interpreted in various ways, and is generally understood to refer to the unqualified exercise of chiefly authority. While the English text clearly guarantees Māori property rights, the tino rangatiratanga guaranteed in the Māori version conveys a broader capacity. Māori almost certainly understood that they would continue to exercise complete authority over their tribal domains. Similarly, the use of the term “taonga” (translated variously as “treasures” or “all things highly prized”) in the Māori text was a more abstract and wide-ranging term than the “properties” in the English text, and is likely to have included intangible valued possessions such as genealogical knowledge and important customs.¹³⁸

Article II also gave the Crown the right to purchase any Māori land which Māori wished to sell. The English text defines this as the exclusive right of pre-emption, whereby only the Crown can purchase Māori land and so extinguish customary title. The Māori text does not convey this notion of exclusivity, and it is possible that Māori thought they were agreeing to give the Crown the first right of refusal. They may not have understood that under the exclusive right of pre-emption if the Crown did not want to purchase land, then Māori would be prevented from negotiating a sale with other parties.¹³⁹ In addition, given traditional forms of land tenure, Māori may also have considered that any land transactions would be akin to a leasing arrangement.¹⁴⁰

Article III

This Article was designed to serve the goal of settlement while satisfying humanitarian interests.¹⁴¹ In the English text, the Crown extended to Māori people “Her Royal Protection” and imparted to them “all the rights and privileges of British subjects”. Similarly, in the translated Māori text, the Crown promised to protect “all the ordinary people of New Zealand and give them the same rights and duties of citizenship as the people of England”. Māori almost certainly understood that their existence as a distinct people and their ways of life would be protected (reinforcing the Crown’s obligations in Article II), and that they would enjoy an equitable share in all the benefits and innovations of settlement.

Postscript

The Postscript refers to those willing to witness their agreement to the Treaty by recording their signatures or marks. While the English text emphasized that the chiefs had “been made to fully understand the Provisions of the foregoing Treaty” and entered into its “full spirit and meaning”, the translated Māori text records that the chiefs “meeting here at Waitangi having seen the shape of these words ... accept and agree to record our names and marks thus”.

The English text would certainly have conveyed to the Colonial Office that Hobson had followed Lord Normanby’s instructions, requiring that the chiefs be fully cognisant of the implications of signing the Treaty by giving their “free intelligent consent”, thus enabling the British Crown to establish lawful government in New Zealand. The Waitangi Tribunal interprets the emphasis on the full spirit of the Treaty in the English text as being essential to interpreting its meaning and significance today, which also accords with Māori familiarity with intertribal oral compacts upheld by concepts of mana. The Courts have held that this approach accords with a Māori customary view.

The “fourth Article” of the Treaty

During the Waitangi signing of the Treaty, debate concerning ongoing respect for Māori customs and authority “became mixed with a dispute amongst the representatives of the missionary churches”.¹⁴² The French Roman Catholic Bishop, Pompallier, was concerned that the predominance of the Anglican faith amongst the British representatives and missionaries would discourage Māori from adopting Catholicism. Pompallier intervened, asking the Governor to give the assembled chiefs a guarantee that their religious freedom would be protected. A declaration was accordingly drafted, accepted by Hobson, and read to those assembled, the text of which is recorded as:

*E mea ana te Kāwana ko ngā whakapono katoa o Ingarani, o ngā Wēteriana, o Rōma, me te ritenga Māori hoki e tiakine ngātahitia e ia.*¹⁴³

*The Governor says the several faiths of England, of the Wesleyans, of Rome, and also the Māori custom, shall be alike protected by him.*¹⁴⁴

The declaration was never added to the text of the Treaty, and so is not regarded as an official Article of the Treaty, but nonetheless it undoubtedly informed the views of Māori considering the Treaty at Waitangi. The “fourth Article” retains significance for many Māori today, who regard it as an important supplement to the promises made to them in Articles II and III of the Treaty, particularly that Māori customs and authority would be protected.¹⁴⁵

Where has the Treaty been all these years?

In recent decades, the Treaty has gained a new public prominence. This most recent phase in the life of the Treaty has as its immediate source a wave of Māori activism in the 1960s, building on the long tradition of Māori efforts to have the Treaty guarantees upheld. This section summarizes the changing status of the Treaty from its signing, up to the 1975 establishment of the Waitangi Tribunal, and records the approach taken by the Courts over this time. The history of the Crown-Māori relationship is a complex and hotly debated one, and this brief summary does not claim to do justice to the varied perspectives of those with an interest in the story.

In the decade immediately following the signing of the Treaty, the power balance between Europeans and Māori remained in favour of the tribes. The number of European settlers was low, and the relatively small amount of land alienated to accommodate the new arrivals posed little threat to the power base of the tribes. Iwi and hapū retained substantive control over their tribal domains, which included small communities of settlers, dependent on the tribes for protection and for their food supply. The relationship between Māori and Crown was conducted as a type of diplomatic relationship between Queen Victoria and her colonial representatives on the one hand, and the chiefs on the other. The Crown and Māori both referred to the Treaty as the basis for their relationship, and Māori relied on the Treaty when objecting to actions of the colonial government. In 1847, concerned by news that the Crown might be preparing to confiscate uncultivated tribal lands, Te Wherowhero and four other major Waikato chiefs prepared a petition to Queen Victoria, requesting her personal assurance that the Treaty guarantees would be given effect. The reassurance sought was given to the chiefs through Governor Grey.¹⁴⁶

The first reported case of New Zealand’s colonial Supreme Court, *R v Symonds* (1847),¹⁴⁷ was decided just seven years after the signing of the Treaty. This case concerned the effect of a purported waiver of the Crown’s exclusive right of pre-emption, where a settler relied on a waiver issued by the then Governor Fitzroy to purchase land directly from its Māori owners. The Court found that the title was invalid, holding that settlers could not obtain a valid private title to land directly from Māori, since the Crown had an exclusive right to extinguish aboriginal title which was not simply a right of first refusal.¹⁴⁸ The Court affirmed the doctrine of aboriginal title and recognised the Treaty of Waitangi as declaratory of that existing doctrine.¹⁴⁹

In the 1850s, settlement rates accelerated and tensions over land began to emerge. In an effort to empower the tribes through unification and to facilitate the retention of land, Waikato Māori came together in an alliance that became known as the King Movement. By 1860, the movement had attracted considerable pan-tribal support, and exercised exclusive control over the central region of the North Island (the King Country) until well into the 1870s.¹⁵⁰ In 1860, armed conflict broke out between Māori and British troops in the Taranaki settlement of Waitara over disputed land transfers. Concerns about events at Waitara and about the developing King Movement prompted the then Governor Browne to call a meeting of chiefs in 1860, hoping to secure their support for government actions at Waitara and rejection of the King Movement.¹⁵¹ These Kohimarama meetings were attended by over 200 chiefs, including many who had signed the Treaty on behalf of their tribes. Discussions centered on the meaning of the Treaty, and proceedings of the meetings convey the chiefs’ understanding of the nature of the Treaty relationship.¹⁵² A unanimous resolution – the Kohimarama Covenant – was passed by the conference, recognising the sovereignty of the Crown, an act that has been described as a “ratification of the Treaty” which affirmed the rangatiratanga of the chiefs.¹⁵³ Resolutions condemning the King Movement and endorsing government policy on the Waitara conflict attracted much less support.

The 1860s was a pivotal decade in the Crown-Māori relationship. Between 1840 and 1859 the Pākehā population had grown thirtyfold and by 1860 the two populations were almost the same size.¹⁵⁴ By 1865 nearly two thirds of New Zealand had been acquired by the Crown, that is, almost all of the 34 million acres of the South Island and over seven million acres of the North Island.¹⁵⁵ The pressure on Māori to sell their land was intensifying and placed a strain on collective controls over tribal land. The fighting in Waitara erupted into large-scale warfare in Taranaki and the Waikato in what are now known as the Land Wars, also described as the Wars of Sovereignty.¹⁵⁶ The colonial administration saw the organised Māori resistance as a direct challenge to British sovereignty, and responded with an emphatic show of force. British troops (supported by some Māori) greatly outnumbered their

Māori opponents and, eventually, important Māori communities were overwhelmed and dismantled, debilitating some tribes.

In 1863 the New Zealand Parliament passed legislation allowing the Crown to confiscate land from tribes who had fought against it during the wars, and in 1865 the Native Land Court was established to convert Māori customary land rights into Crown-granted titles to allow dealings in this land, a process which had the effect of dismantling Māori collective ownership of land.¹⁵⁷ Between 1865 and 1899 some 11 million acres were further acquired by the Crown under the Native Land legislation.¹⁵⁸ By forcibly suppressing Māori protest in the central North Island during the 1860s, and by confiscating land from tribes involved in the wars (so removing the economic base on which tribal infrastructures depended), the colonial government consolidated its sovereignty over the tribes and ceased to refer to the Treaty as the basis for its relationships with Māori.¹⁵⁹

In the 1870s, the modern infrastructure of New Zealand's colonial society began to take shape. The Treaty appears to have dropped from settler consciousness during this period, even though Māori continued to assert it in their dealings with the Crown.¹⁶⁰ In this context, the New Zealand Supreme Court decided *Wi Parata v the Bishop of Wellington*.¹⁶¹ The *Wi Parata* decision signalled a turning point in judicial consideration of the Treaty. Chief Justice Prendergast made the comment that: “so far as it purported to cede sovereignty ... [the Treaty] must be regarded as a simple nullity”.¹⁶² The Chief Justice based his stance on the assertion that in international law, the tribes had insufficient legal capacity to cede sovereignty, commenting that:

*On the foundation of this colony, the aborigines were found without any kind of civil government, or any settled system of law. There is no doubt that during a series of years the British government desired and endeavoured to recognise the independent nationality of New Zealand. But the thing neither existed nor at that time could be established. The Māori tribes were incapable of performing the duties and therefore assuming the rights of a civilised community ... no body politic existed capable of making cession of sovereignty, nor could such a thing exist.*¹⁶³

Chief Justice Prendergast also held that customary title could not be recognised by the Courts in the absence of statutory recognition, and that “native proprietary rights” could be disposed of by the Crown whenever it chose by simply acquiring the land, with no need for a sale, or for extinguishing legislation. The *Wi Parata* decision was followed by New Zealand Courts for many decades. The Privy Council, however, took a different view on a number of occasions.

In the case of *Nireaha Tamaki v Baker* (1901)¹⁶⁴ the Privy Council disagreed with parts of the Court's findings in the *Wi Parata* case, holding that Māori customary title to land was recognised by both common law and statute, and that executive action such as a Crown grant could not by itself extinguish native title to land. The Privy Council, commenting on the finding in *Wi Parata* that unextinguished customary title could not be recognised by a Court, noted that: "... this argument goes too far, and ... it is rather late in the day for such an argument to be addressed to a New Zealand Court".¹⁶⁵ The New Zealand Courts, however, disregarded the Council's findings, and continued to apply the principles expressed by Chief Justice Prendergast in the *Wi Parata* case.¹⁶⁶ In a second case several years later, *Wallis v Solicitor-General* (1903),¹⁶⁷ the Privy Council again asserted the existence of Māori customary rights to land as part of the common law of New Zealand. The Judges of the colonial Courts responded to the case with outrage,¹⁶⁸ and after much heated discussion the colonial government enacted section 84 of the Native Land Act 1909, barring the enforcement of customary title to land against the Crown. This bar survives today via Te Ture Whenua Māori Act 1993 as an amendment to the Limitations Act 1950, with the effect that claims for the recovery of customary rights to land are only valid if asserted against the Crown within 12 years of the breach. This effectively bars most potential claims dating back to 1840.

The Māori population dropped dramatically in the decades following the signing of the Treaty,¹⁶⁹ while the settler population increased rapidly. By 1878 Māori were outnumbered by ten to one.¹⁷⁰ By the turn of the century the European population numbered around 770,000 compared to around 45,000 Māori (a ratio of around sixteen to one);¹⁷¹ and the Crown had acquired over 80 percent of the country's territory. Despite or perhaps because of the unsympathetic stance of the New Zealand Courts and colonial legislature, Māori protest intensified during the 1880s. In this decade, Māori directed hundreds of petitions to the government, sent two deputations to England,¹⁷² and presented thousands of petitions to the colonial Parliament.¹⁷³ Throughout this period, Māori sought to strengthen their position through unification and repeatedly petitioned the Crown to pass legislation establishing a separate Māori Parliament. The Crown declined to do so, and the tribes eventually established their own Parliament – Te Kotahitanga o te Tiriti o Waitangi – which met for the first time in 1892 and continued to operate for 11 years before gradually losing support.¹⁷⁴ Other important pan-tribal national bodies evolved as Māori worked to redress the power imbalance between the tribes and the Crown. The King Movement in the central North Island established its own Parliament – the Kauhanganui – and in 1913 Te Rata, the fourth Māori King, formed a delegation and traveled to England to appeal to the British Crown to intervene in New Zealand

to rectify breaches of the Treaty.¹⁷⁵ The mission was accorded an audience with King George V and Queen Mary, but Te Rata was instructed to refer his grievances to the New Zealand colonial authorities. The Ratana Church emerged as a powerful pan-tribal grouping around 1918, and in 1924 the head of the Church, Tahupotiki Wiremu Ratana, took a petition to England, requesting the establishment of a Commission to examine Māori grievances. He too was instructed to direct his concerns to the New Zealand authorities.

In the period following the First World War, there was little significant case-law on the Treaty, until the decision of *Te Heu Heu Tukino v Aotea Māori District Land Board* (1941).¹⁷⁶ In this case the paramount chief of Tuwharetoa, Te Heu Heu Tukino, sought to rely on Article II of the Treaty to challenge a statutory endorsement of a Land Board decision concerning ancestral tribal land. The Privy Council held that a claim could not be rested on rights and duties set out in the Treaty in the absence of statutory recognition of those rights, and noted that the New Zealand legislature had not adopted the Treaty as law, stating that: “any rights purported to be conferred by ... a treaty of cession cannot be enforced by the Courts, except in so far as they have been incorporated in the municipal law”.¹⁷⁷ The rule established in the *Te Heu Heu Tukino* case has not been displaced and remains the orthodox position in respect of the Treaty’s status in law, although some trends in statutory interpretation and administrative law may provide new avenues for the consideration of the Treaty by the Courts.¹⁷⁸

Following the Second World War, a number of cultural changes in New Zealand society and the rapid urbanisation of Māori¹⁷⁹ coincided with increased public awareness of the Treaty, including a growing sense of detachment from Britain, and the influence of human rights based movements in other countries and in the United Nations. Māori activism in the 1960s and 1970s raised public awareness of the Treaty, and Māori representatives in Parliament worked hard to convey the intensity of Māori grievances in respect of the Treaty. In 1975 the Treaty of Waitangi Act was passed, establishing the Waitangi Tribunal as a commission of inquiry to consider claims by Māori against the Crown regarding breaches of principles of the Treaty and to make recommendations to the Crown. In 1985 the Tribunal’s jurisdiction was extended to cover all Crown acts and omissions dating back to 1840.

When the Fourth Labour Government began to implement its economic reforms in 1984, Māori expressed concern that the Crown might divest itself of resources which could be used as redress for Treaty breaches. In 1986, Parliament enacted the State-Owned Enterprises Act, including section nine, which required that the Act be

implemented in accordance with the principles of the Treaty. The first major Court of Appeal case of the “new era” of Treaty jurisprudence, *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (the *Lands* case) concerned the interpretation of this section.