THE ANNEXATION OF NEW ZEALAND TO NEW SOUTH WALES IN 1840 : WHAT OF THE TREATY OF WAITANGI?

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For many years the governing class ideology of New Zealand suggested that this country was the most loyal Dominion in the British Empire and Britain was perceived as 'home' by settlers several generations removed from the Mother Country. In recent time however sustained attempts have been made to foster a sense of New Zealand nationalism and an aspect of this has come to be the annual celebration of Waitangi Day on 6 February. From humble beginnings as a local anniversary holiday for Northland (*Waitangi Day Act* 1960) the annual celebrations became significant pomp and ceremony state pageants with the *New Zealand Day Act* 1973 passed by the third Labour Government. The celebrations have also attracted significant opposition from many indigenous Maori for whom the day represented 'a celebration on the part of the Pakeha for what he had achieved and a mourning by the Maoris for what had been lost' (Molloy 1971:191). The historical origins of Waitangi Day are that on 6 February at Waitangi in the Bay of Islands in 1840 Captain William Hobson, Consul and Lieutenant Governor of New South Wales, began the process of obtaining signatures to a Treaty which, in its English text, purported to be a cession of sovereignty to the British Crown. The Maori text actually signed at Waitangi and elsewhere in the country is rather ambiguous as to the location of legal sovereignty (see Ross 1972 and Williams 1985) and an historian has concluded her study as follows:

> However good intentions may have been, a close study of events shows that the Treaty of Waitangi was hastily and inexpertly drawn up, ambiguous and contradictory in content, chaotic in its execution. To persist in postulating that this was a 'sacred compact' is sheer hypocrisy (Ross 1972:154).

Nevertheless, it is now clearly embedded in the current ideology of New Zealand nationalism that the birth of the nation may be traced to the Treaty of Waitangi. The detailed study which follows places that treaty in its historical context and points out the irony that the creation of New Zealand as a separate colony actually followed on from its incorporation into the British Empire as a dependency of New South Wales.

British claims to sovereignty over New Zealand may clearly be traced to Letters Patent of 15 June 1839 which amended the Commission of the Governor of New South Wales by enlarging his colony to include 'any territory which is or may be acquired in

sovereignty by Her Majesty . . . within that group of Islands in the Pacific Ocean, commonly called New Zealand . . .' (McLintock 1958:49). Earlier Imperial legislation purporting to deal with crimes committed by the masters and crews of British ships had explicitly recognized that New Zealand was 'not within His Majesty's Dominions' (*Murders Abroad Act* 1817, preamble) and 'not subject to His Majesty or any European State or power' (*Australian Courts Act* 1828, s 4). By 1839, as a result of diverse pressures on the Colonial Office which have been carefully documented by Peter Adams (Adams 1977: Part I), a policy decision was made to invoke royal prerogative powers and to bring New Zealand under colonial rule. As noted above, the Letters Patent refer somewhat obscurely to territory 'which *is or may be* acquired' (emphasis added). Equally obscurely, Captain Hobson was commissioned *both* as a Consul to be plenipotentiary envoy to the Maori peoples *and* as a Lieutenant-Governor of the New Zealand dependency.

Sir George Gipps, the then Governor of New South Wales, clearly assumed that annexation was either a foregone conclusion or an already accomplished fact. He treated Hobson as a Lieutenant Governor from the date of the latter's arrival in Sydney on 24 December 1839, and Hobson began drawing full salary for both offices from this time (McLintock 1958:57). On 14 January 1840, shortly before Hobson set sail for New Zealand, Gibbs swore him in as Lieutenant-Governor and prepared three Proclamations proclaiming (1) that the jurisdiction of the New South Wales Governor extended to New Zealand; (2) that the oaths of office had been administered to Hobson as Lieutenant-Governor; and (3) that no title to land in New Zealand purchased henceforth would be recognised unless derived from the Crown and that Commissioners would be appointed to investigate past purchases of native land. These Proclamations were actually issued on 19 January (BPP 1970:123-5). The day after his arrival in New Zealand and *prior to* any negotiations for cession of sovereignty from Maori chiefs, Hobson read to a predominantly European settler congregation at an Anglican church the Letters Patent and Commission relative to his appointment *as Lieutenant-Governor.* He then issued two Proclamations of his own. The first extended the laws of New South Wales to such areas 'which have been or may be' ceded to the Crown. The second stated that 'I have this day (viz 30 January 1840) entered on the duties of my said office as Lieutenant-Governor' (BPP 1970:129-30).

Having thus already assumed office as Lieutenant-Governor, Hobson then turned his attention to his consular duties *ie* to persuade the chiefs of the indigenous peoples of the country to give their assent to this assumption of power and the imposition of colonial rule. There were some discussions at a meeting on 5 February and then on 6 February, at Waitangi, 45 or 46 chiefs of some northern tribes signed the 'Treaty of Cession' (of whom 26 had been signatories to the 1835 'declaration of independence'). (BPP 1970: 131). After that initial signing various colonial officials, military officers and missionaries began travelling to all parts of the country, taking a suitable supply of blankets and tobacco, and touting for further signatures to facsimile copies of the Maori language version of the Treaty. This process occupied some months and it was not completed until 15 October when Hobson sent a Despatch to London which collated all the various copies of the Treaty to which had been appended the marks or signatures of 512 chiefs (BPP 1970:220). If this treaty-signing process really was considered to be the key to the British acquisition of sovereignty, then one would have thought that the legal steps to confirm the cession could not have commenced until the imperial authorities

had approved the Despatch of 25 October, and that was not until 30 March 1841 (BPP 1970:234). Moreover there was no doubt that even the 512 adhesions to the Treaty did not include all the tribes of the Maori. An unknown but significant number of chiefs resolutely refused to adhere to the Treaty in 1840. Perhaps the most famous example of non-adherence took place at Ohinemutu, Rotorua where the Arawa tribe were the hosts. This was the occasion when the Arawa chiefs preferred to pay heed to the words of Te Heuheu Tukino from Taupo rather than the missionaries who brought the Treaty with them. As Buick recorded Te Heuheu's argument it was this:

> I will never consent to the *mana* of a woman resting upon these islands. I myself will be a chief of these isles; therefore begone! Heed this, O ye Arawa . . . Do not consent, or we will become slaves for this woman, Queen Victoria.

Moreover he required the return of the red blankets given to a younger brother who, without authority, had been at Waitangi and had signed the Treaty. The blankets were returned to the missionary envoys with these words:

> I am not willing that your blankets should be received as payment for my head and these Islands (Buick 1914:179).

Te Heuheu's influence extended to the Ngaiterangi at Tauranga and although Major Bunbury, Hobson's deputy, left some blankets with a local missionary, the Ngaiterangi chiefs consistently refused on several occasions to adhere. Another chief of great status who did not sign was Te Wherowhero of the Waikato (Buick 1914 : 203). Thus in the central North Island there was substantial non-adherence to the Treaty by Maori leaders who were well aware of the implications of signing away their independence. There were other instances of refusal to adhere and there were some inland communities which never saw the treaty at all.

Yet neither the successes nor the failures to obtain adherence to the Treaty were particularly important in law because by 15 October 1840 all legal steps requisite to the annexation of the *entire* territory of the New Zealand islands as a dependency of New South Wales had already been completed in New Zealand, in New South Wales and in the United Kingdom.

Initially it appeared that Hobson would abide by the formalities of the treaty-signing process as the condition precedent to Proclamations of British sovereignty. After Waitangi, 56 more signatures were obtained at Hokianga on 12 February and Hobson, in a despatch to Gipps, indicated that the Waitangi and Hokianga signings had put beyond dispute the sovereignty of Her Majesty over the northern parts of the island. He proposed to issue a Proclamation announcing this and he added:

> As I proceed Southward and obtain the consent of the chiefs, I will extend these limits by Proclamation until I can include the whole of the islands (BPP 1970:134).

No formal Proclamation of sovereignty over the northern districts was ever issued however and the only formal ceremony ordered by Hobson was a 21 gun salute fired at Waitangi on 8 February (Buick 1914:132). Not only was there to be no formal Proclamation of sovereignty over the northern area, but there were no further ceremonies nor were there any Proclamations extending British sovereignty slowly southwards as the British agents of the Consul reported their successes (and failures) in obtaining signatures. Indeed long before the canvassing for chiefs to adhere to the Treaty had been completed, Hobson received a report from Wellington (then known as Port Nicholson) to the effect that the New Zealand Company settlers had formed for them-

selves a government, proclaimed a constitution, elected a council, enacted laws, and appointed magistrates. Hobson was most alarmed by the report. He considered the settlers' actions to be tantamount to high treason and in defiance of the Queen's authority over British subjects. On the very day of receiving this report, 21 May 1840, he prepared and publicly issued two Proclamations which asserted that 'full Sovereignty' in respect of the *whole* territory of New Zealand was vested in Her Majesty the Queen (BPP 1970:140-1).

The first Proclamation related to the North Island. Its preamble referred to the Treaty of Waitangi, asserted that the Treaty had been 'further ratified and confirmed by the adherence of the Principal Chiefs of this Island', and proclaimed British sovereignty by virtue of the Treaty's cession of all rights and powers of sovereignty absolutely and without reservation. In his despatch to his superiors in the Colonial Office Hobson justified this proclamation on the grounds that there had been 'the *universal* adherence of the native chiefs to the Treaty of Waitangi' (BPP 1970:138). This was patently untrue, and this lack of universal adherence was to become an acute embarrassment later on when members of some of the largest and most militarily significant tribes asserted that they were not, and never had been, British subjects. The second Proclamation, which primarily concerned the 'Middle Island' (now known as the South Island) and Stewart Island, was a bald assertion of British sovereignty without any recital of grounds for the claim. In his covering despatch, however, Hobson relied upon his own 'perfect knowledge of the uncivilised state of the natives' in the southern islands so that it was proper to proclaim sovereignty by right of discovery (BPP 170:138). This rationalization of his hasty action on 21 May is completely at variance with his own earlier actions in ordering Major Bunbury to collect signatures from southern chiefs. Ironically, in carrying out these orders, Bunbury issued a Proclamation of sovereignty over the South Island by right of *cession* on 17 June 1840 (BPP 1970:234). Moreover, Hobson's immediate superior, Governor Gipps, had made an earlier attempt to obtain the signatures of ten Maori chiefs visiting Sydney to a treaty of cession. He actually drew up a 'Memorandum of an agreement' dated 14 February 1840 for signature by these chiefs, *five of whom were from the South Island*. Owing to the activities of various land speculators in Sydney Gipps' efforts were unsuccessful, but there was no indication at the time that South Island Maori people were less 'civilised' than their northern counterparts (Sweetman 1939:64).

Factual niceties concerning the alleged justifications for Hobson's Proclamations of 21 May were apparently of no concern to the British Colonial Office however. With alacrity the Secretary of State for the Colonies approved of Hobson's measures. This approval was publicly notified in London by inserting the Proclamations in a *Gazette* notice dated 2 October 1840 (Rutherford 1949:28). From that date all other European powers were on notice that Britain had definitely claimed the entire territory of New Zealand as a dependency of the British colony of New South Wales, and any doubts as to whether Hobson's Consular acts might not be ratified by the imperial authorities were removed.

Meanwhile over the Tasman Sea in New South Wales, Governor Gipps had introduced a Bill into the Legislative Council for the purpose, as set out in the long title, 'to declare that the Laws of New South Wales extend to Her Majesty's Dominions in the Islands of New Zealand'. This Bill was introduced prior to any knowledge in Sydney of the May 21 Proclamations. It was assented to and purportedly came into force

on 16 June 1840 as 3 Vic No 28. The preamble begins with the apparently unambiguous recital:

> WHEREAS Her Majesty hath been pleased to annex Her Majesty's Dominions in the Islands of New Zealand to the Government of New South Wales . . .

Gipps and his draftsman must have relied upon the 1839 Letters Patent as the basis for this assertion as there was no reference to any of Gipps' or Hobson's Proclamations. The substantive provision in the first section read:

> . . . all laws and Acts or Ordinances of the Governor and Legislative Council of New South Wales which now are or hereafter may be in force within the said Colony shall extend to and be applied in the Administration of Justice within Her Majesty's Dominions in the said Islands of New Zealand so far as the same can be applied therein any Law usage or custom to the contrary in anywise notwithstanding.

It is difficult to rely upon this Act as in itself constitutive of New Zealand's annexation to New South Wales, but its passage on 16 June 1840 adds yet another complicating factor and another date in the tortuous process whereby Britain brought New Zealand into the British realm of New South Wales (Rutherford 1949:5-11).

In spite of the elevation of the signing of the Treaty of Waitangi to the status of national birthday in recent years, it seems clear that the nationwide gathering of signatures cannot possibly have been of legal significance. The details of this treaty-making process, which continued until 3 September, were not officially approved of until 30 March 1841—long after the Royal Charter erecting New Zealand into a separate colony had been promulgated on 16 November 1840 (BPP 1970:153-5). On the other hand, the signature of so few chiefs on 6 February 1840 could not possibly be sufficient for a claim to full sovereignty as most of them were from just one tribe—the Ngapuhi. Indeed, in his earliest Proclamations cited above Hobson was circumspect enough to entitle himself as 'Lieutenant-Governor of the British Settlements *in progress* in New Zealand'. The lack of universal adherence as at 21 May puts in doubt that justification for total annexation, and of course complete coverage was never achieved because of the intransigence of some important chiefs from the most populous tribes.

The conventional view of lawyers and historians, as expressed by Robson, McLintock and Rutherford is that the Treaty of Waitangi was a legal nullity but that the adherence to it of most Maori chiefs constituted a sufficient degree of Maori consent to British sovereignty so as to morally justify the legal acts of annexation. Rutherford's line of reasoning imported a peculiar pseudo-democratic justification for the total annexation of the islands:

> In respect of those parts of the North Island whose chiefs had not signed the Treaty by 21 May but subsequently did so, Hobson was only exercising intelligent anticipation, and no serious infraction of his instructions can be charged against him. Finally, in respect of those parts of the North Island whose chiefs did not sign the Treaty at all, Hobson was acting without the Queen's express authority to annex. He relied, it would seem, in a rough and ready way, upon the principle that the dissentient minority would be bound by the decision of the majority—though this is admittedly a principle of doubtful applicability to dependent tribes—or that the dissentient minority was so small that it could, for all practical purposes, be ignored. So far as Hobson is concerned, the breach of

> instructions, if there were any, was entirely covered by the subsequent sanction given to his action by H M Government (2 October), so that the fact that, in certain particulars though not on the whole, he acted without the Queen's authority is not very important (p 53-4).

The conventional conclusion, therefore, as expressed by McLintock is as follows:

> In the final analysis, therefore, the fabric of British sovereignty over New Zealand vested, in the first instance, on the incontestable prerequisite that Hobson had secured from the natives a generous measure of support for the treaty. More pertinently, with respect to the South Island and Stewart Island, it vested in part upon native consent but more specifically upon rights of discovery together with the inescapable fact of settlement. As for the North Island, so far as native consent was withheld, it vested simply upon rights of settlement or occupation. On these grounds New Zealand passed to the Crown by an Act of State, as expressed by the publication of Hobson's May proclamations in the *London Gazette* of 2 October 1840. New Zealand therefore lies within the category of colonies acquired by occupation (p 62-3. See also Robson 1967:4-5).

A less commonly accepted view is that of Foden. He argued that the procedure of treating with the Maori people for the cession of sovereignty 'was a matter of domestic and internal policy', but that this policy was not relevant to the international legal status of New Zealand as a colony annexed by an Act of State—not by virtue of a treaty of cession:

> New Zealand joined the Empire as the result of the Act of State by which it was added to New South Wales in 1839. The Act of State was based on the fact of settlement which rendered British intervention a matter of imperative necessity (p 38).

The Act of State Foden relied upon was the issuing of the Letters Patent of 15 June 1839. The commissioning of Captain Hobson and all the subsequent legal acts sometimes relied upon by other authors must trace their validity to these Letters Patent. In spite of the ambiguity of terminology—the 'is or may be' of the various legal documents—there can be no doubt that Foden is correct in pointing to the Letters Patent as the *fons et origo* of British sovereignty. The upholders of the conventional view no doubt feel awkward about an approach which eliminates the 'humanitarianism' and 'idealism' which is said to have been so important in the process of New Zealand's colonization. The governing class ideology today lays stress upon a long history of 'harmonious race relations' and this can conveniently be traced back to Maori acceptance of the Treaty of Waitangi. Hence the theory which is generally acceptable is one which attaches *some weight* to the treaty-making process, but without going so far as to jeopardise the legal efficacy of the claim to British sovereignty because of Hobson's misstatements of facts and/or because of his failure to strictly abide by his instructions.

On the other hand, there are some modern authors who argue that the Treaty of Waitangi actually *was* a valid treaty of cession. (Keith 1965; Carter 1980). They reject the racialist and chauvinist attitudes of the nineteenth century which underpinned the assumptions of many international law jurists at that time and they claim that the Maori people had the capacity to enter into a treaty with a foreign power. Some authority for this view has been gleaned from the 1925 award of the American and British Claims

Tribunal (Professor A Nerincx, Sir Charles Fitzpatrick, and Dean Roscoe Pound) in the *Claim of William Webster* (1926) 20 AJIL 391. Thus Keith quoted from the award:

> Great Britain entered into a Treaty with the Native Chiefs and tribes of New Zealand, called the Treaty of Waitangi, whereby *sovereignty was ceded to the British Crown*. (Keith's emphasis)

He concluded:

> This was a case of cession, not settlement (p 137).

Ironically, however, Foden also relied upon precisely the same award to support his contrary viewpoint. He referred to another passage where the Tribunal said:

> Hence, to avoid conflict and to prevent spoliation of the natives, it became necessary for some government to step in. This was done by the British Government when, in 1839, it commissioned Captain William Hobson, R N, as Lieutenant-Governor of New Zealand . . . (p392).

It should be noted, moreover, that the Tribunal referred to and relied upon the Gipps and Hobson Proclamations of January 1840 (which pre-dated the Treaty) in assessing Webster's claim.

The argument that the Treaty was a valid treaty of cession has considerable contemporary political significance for those who wish to elevate its importance in order to highlight the Pakeha settlers' 'broken promises' in their dealings with the Maori peoples. Yet if one adopts this approach it is very difficult to construct a theory which fits in with the constitutional acts creating New Zealand a New South Wales dependency. Presumably all those who adhered to the Treaty after the initial signing must be deemed to have ceded sovereignty retrospectively back to 6 February 1840. This was the reasoning adopted by Hobson in his North Island Proclamation of 21 May which related back to the original signing of the Treaty. What, then was the situation with respect to the scores of signatures obtained *after* 21 May in the North Island? What about the South and Stewart Island signatures and Bunbury's Proclamation which were discounted by Hobson's reliance upon 'discovery'? These are interesting questions, no doubt, but it is submitted that such re-evaluations of the Treaty and of the principles of international law serve only to obscure the actual historical context of the imposition of colonial rule upon the indigenous peoples of Aotearoa (the now generally accepted Maori name for New Zealand). First, as Ross (1972) pointed out the Maori text of the Treaty signed by Hobson and the vast majority of the Maori signatories was not a translation of the English text relied upon by those who argue that it was a valid treaty of cession. Elsewhere I have argued that the Maori text connoted a covenant partnership between the Crown and the Maori rather than absolute cession of sovereignty (Williams 1985). For far too long all academic discussion of the Treaty has proceeded on the incorrect assumption either that the English text is the Treaty or that it is an accurate translation of the Treaty. Secondly, between 1839 and 1843 there was a remarkable shift in the policy of the Colonial Office concerning the Treaty of Waitangi. This little known historical fact is the subject of the remaining section of this article.

The Permanent Under-Secretary of the Colonial Office responsible for British policy in New Zealand was James Stephen who epitomised the 'humanitarian idealism' which was an important strand of thought in the ideological perceptions of the English ruling

class at that time. For him the gaining of sovereignty over 'some part' of New Zealand was an 'unwelcome necessity' (Adams 1977:149). He proposed, in draft instructions prepared for Hobson, that the consul, in negotiating with Maori chiefs, had to display 'the most frank and open dealing' because cession was being sought:

> . . . partly for the protection of the settlers of European origin, but chiefly in the hope that by a wise, humane, and firm administration of the local government, the natives may not only be rescued from the calamities impending over them, but may be gradually introduced to the blessing of civilised society, and to the enjoyment of the advantages inseparable from it (Adams 1977:150).

The Government accepted Stephen's views and, as a consequence, the formal instructions issued by Lord Normanby to Hobson on 14 August 1839 were most definite in requiring 'sincerity, justice and good faith' in all transactions with the indigenous peoples. The establishment of a settled form of civil government was to be the principal object of Hobson's mission and he was ordered to carry it out in this manner:

> I have already stated that we acknowledge New Zealand as a sovereign and independent state, so far at least as it is possible to make that acknowledgment 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 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 part of the dominion of Great Britain, *unless the free and intelligent consent of the natives*, expressed according to their established usages, *shall be first obtained*. Believing however that their own welfare would, under the circumstances I have mentioned, be best promoted by the surrender to Her Majesty of a right now so precarious and little more than nominal and persuaded that the benefits of British protection, and of laws administered by British judges would far more than compensate for the sacrifice by the natives of a national independence which they are no longer able to maintain, Her Majesty's Government have resolved to authorize you 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 (My emphasis) (BPP 1970:85-6).

It is apparent that Hobson was closely following these instructions in the earlier phase of his mission and, indeed, Stephen was delighted with Hobson's success in the north of the North Island. This initial success was proof, according to Stephen's minute:

> if proof were wanting, how much wiser was the course taken of negotiating for a cession of the sovereignty, than would have been the course of relying on the proceedings of Captain Cook, or the language of Vattel in opposition of our own Statute Book (Adams 1977:162).

By this minute Stephen repudiated the notion that Britain's colonization could be justified by the notion of 'discovery' recognized by the principles of European public international law in that era. According to those norms, 'civilized' (ie European) nations had the right to proclaim sovereignty over territories 'discovered' and settled by their

nationals. The fact that such territories had been discovered and lived in for many centuries by 'uncivilized tribes' was of no consequence to title and sovereignty. Emeric de Vattel was a Swiss jurist whose views on the law of discovery and settlement were well known at the time. He asserted that the title of discovery conferred on the government by whose authority or by whose subjects the discovery was made was that of the ultimate dominion and sovereignty over the soil even while it continued in the possession of 'aborigines'. His doctrines were one of the contentious issues in the erudite debate between Governor Gipps and Wentworth (a leading representative of the land speculator interests) on the Claims to Grants of Land in New Zealand Bill in the New South Wales Legislative Council in June and July 1840 (Sweetman 1939:chs IV-VI). If the Colonial Office had chosen to rely upon 'the language of Vattel' then 'the proceedings of Captain Cook' would have been of paramount significance. This is reference to the first circumnavigation of New Zealand by a European. Captain Cook was the British naval officer responsible for this circumnavigation and coastline mapping. He had also purported to take formal possession for King George III of undefined areas in both the North and the South Island (Beaglehole 1974:206-7,214-5). Even according to legal doctrine at the time, Cook's acts were probably insufficient to constitute more than 'inchoate title (which) was not completed by any act of occupation (Robson 1967:1). Be that as it may, Stephen clearly insisted that such doctrines were to play no role in Britain's claim over New Zealand and that to rely upon 'discovery' would run contrary to 'our own Statute Book'—*viz* those statutes cited above which had excluded New Zealand from the category of Her Majesty's Dominions.

It was all very well for Stephen to take the approach he did before he heard of Hobson's action on 21 May 1840, yet as late as 28 December 1842 Stephen is on record, when writing to a Parliamentary Under-Secretary, insisting that it was:

> in virtue of the treaty . . . and *on that basis alone* Her Majesty's title to sovereignty in New Zealand at this moment rests (My emphasis) (Adams 1977:162).

Unbeknown to Stephen, on that very day in 1842 a debate was taking place at Auckland in the New Zealand Executive Council. An immediate practical issue had arisen which brought the significance or otherwise of the Treaty to the fore and demanded some deep soul-searching by the administrators of the infant colony.

On 2 December 1842 Shortland (the Acting Governor after Hobson's death) had landed at Tauranga, the home of the Ngaiterangi tribe, to find that a long standing conflict between two neighbouring Maori communities was about to flare up into warfare. It was alleged that people of the rival Ngatiwhakaue had killed and eaten a number of Ngaiterangi people. The Ngaiterangi were anxious to exact retaliatory compensation. Shortland desired to exert the authority of the fledgling Government by arresting and charging Tongoroa, a chief of the Ngatiwhakaue, who was said to be responsible for the deaths. The Government did not have the military means to successfully intervene in the dispute however and Shortland was assailed by doubts about the legality of any intervention. It will be recollected that the Ngaiterangi were non-signatories of the Treaty and the Ngatiwhakaue were a part of the Arawa tribe—also non-signatories. If neither side had adhered to the Treaty, then were they British subjects? The third article of the Treaty explicitly bestowed this status upon signatories. But what was the status of non-signatories living within the bounds of a country over which Britain claimed full sovereignty? Shortland returned to the capital, and various government officers pre-

pared memoranda on the topic. A lengthy debate ensued in the Executive Council on 28 and 29 December 1842. In the course of the debate the Acting Governor posed a number of questions and the minute book recorded divergent answers to his questions:

> lst Are the islands of New Zealand British territory? The Colonial Treasurer—I consider the whole of the islands of New Zealand are British territory. The Attorney-General—No, they are not.
>
> 2nd Whether the whole of the aboriginal race of New Zealand are British subjects, and amenable to British law? The Colonial Treasurer—I consider they are all British subjects, and amenable to British law. The Attorney-General—I consider that the title of Great Britain to the sovereignty of New Zealand rests partly upon discovery, partly upon occupation; that from these sources conjointly, as against all other nations, and as to British subjects, I think Great Britain has a title to the sovereignty over the whole of New Zealand, and that she possesses the right of pre-emption of territory from the natives, and has the power to regulate trade and commerce with other nations; but as to those tribes who have never ceded the sovereignty, and who refuse to acknowledge the Queen's authority, I think Great Britain has not the right, nor would it be consistent with good faith to impose upon them our penal code.
>
> 3rd Whether the chief, Tongoroa, is to be considered a British subject, and can be apprehended and tried at the Supreme Court, for the alleged murder of the natives of Tohua? The Colonial Treasurer—I consider Tongoroa a British subject, and liable to be apprehended. The Attorney-General—consistently with the opinion I have already given this will depend on the circumstance of whether Tohua, the island where the murder was committed, is part of the territory, the sovereignty of which has been ceded by the sovereign chiefs; if so, I consider that Tongoroa can be apprehended; if it is not, I think that we have not the right to do so.
>
> 4th Whether Tohua can be considered as a part of the British territory, or not? The Colonial Treasurer—I have no doubts on this point; I consider Tohua to be part of the British territory.
>
> The Attorney-General—I think not.
>
> . . .
>
> 7th Whether it would be expedient to apprehend Tongoroa, and try him for the alleged murder of the Tohua native? The Colonial Treasurer—I fear, with the small military force, it would be inexpedient to attempt his apprehension; but I consider it would tend to the tranquility of the colony, that, if a proper force be at the disposal of the Government, he should immediately be apprehended. The Attorney-General—For the reason before given, I think not; and even supposing there to be any reasonable doubt whether Tongoroa is amenable to British law, I think it would be inexpedient to bring him before the Supreme Court, as he might demur to the jurisdiction, the plea might be allowed, and the effect of which I consider would be productive of mischievous results (BPP 1968:460-1).

There was an impeccable logic to the reasoning of the Attorney-general, William Swainson. He had quoted, in his memorandum of 27 December, the relevant parts of Lord Normanby's instructions to Hobson concerning the necessity of obtaining 'the free and intelligent consent of the natives' and disclaiming 'every pretension to seize on the islands of New Zealand'. He disputed Hobson's reliance upon 'the universal

adherence' of the North Island chiefs:

> From a perusal of the reports of the various agents commissioned to obtain the adherence of the chiefs to the Treaty of Waitangi, it appears that, although in most cases the chiefs became parties to it, many influential chiefs in various districts refused to cede their sovereignty to the Queen; I believe, also, that many important districts have never yet been visited, with a view to obtain from the chiefs their adherence to the Treaty; cases, I believe, are constantly occurring, in which powerful chiefs are found, who, in the most indignant manner, disclaim any acknowledgment of the Queen's authority (BPP 1968:471).

He also disputed Hobson's assertions concerning the 'uncivilized' nature of South Island Maori peoples and, indeed, he quoted from a report of Bunbury—Hobson's own emissary—on the 'misunderstandings' concerning 'the intelligence and enterprising character of the natives, as well as the extent of its population . . .' Swainson thus arrived at the following conclusion:

> Now, sovereignty can only be obtained by cession, by conquest, or by usurpation; by cession, it would appear that the sovereignty over parts only of New Zealand has yet been obtained; by conquest, Great Britain has obtained nothing in New Zealand; if the sovereignty of the country has been usurped, it has not been usurped on the part or with the sanction of the British Government, Her Majesty having distinctly disclaimed 'every pretension to seize on the island of New Zealand, or to govern them as part of the dominion of Great Britain, unless the free and intelligent consent of the natives shall be first obtained'. As regards the aborigines, our title to the sovereignty over the whole of New Zealand appears to be incomplete; Great Britain has already and repeatedly disclaimed all rights to seize upon it; she has not gained it by conquest; she has acquired by treaty the sovereignty over a portion of it only. Under these circumstances, and after a review of the history of British colonization in this country, I think it would be inconsistent alike with every principle of justice, and every profession of the British Government, 'to govern any part of New Zealand as a part of the dominion of Great Britain', until 'the intelligent consent of the natives shall be first obtained', and that those only who have acknowledged the Queen's authority, either by becoming parties to the treaty or otherwise, can be considered British subjects amenable to British law' (BPP 1968:471).

Shortland was clearly disconcerted and perplexed by Swainson's advice. His only troops in Tauranga were a detachment of 65 soldiers under Bunbury, whose orders were to 'confine your operations to the general preservation of the peace' (BPP 1968:473). However in his bulky despatch to the Secretary of State on the whole incident he indicated his own position:

> . . . I have determined not to adopt the opinion of the Attorney-General, but to continue to govern the colony until I receive your Lordship's further commands, on the assumption that the whole of New Zealand is a British colony, and that all the New Zealanders (ie Maori) are amenable to British laws . . .
>
> (as to Tongoroa):
>
> I beg to inform your Lordship, that I shall not execute the warrant against Tongoroa, as I consider that greater evil would arise from his being brought before the Supreme Court and dismissed, than by allowing the natives, for a time, to continue their wars (BPP 1968:457).

However, unimpeachable the logic and the forcefulness of Swainson's reasoning, yet his conclusion was utterly unacceptable to Stephen and to the Secretary of State for the Colonies. The claim that the Treaty was the *sole basis* of British sovereignty was now challenged by this unforeseen turn of events. If 'humanitarian idealism' really was the fundamental tenet of British colonial policy towards New Zealand then Stephen should have been seriously disturbed by the implications of Swainson's memorandum. The doubt expressed as to the factual accuracy of Hobson's despatch in support of his 21 May Proclamations ought at least to have lead to some qualms about the Imperial government's ratification of them. There is no doubt that in 1839 Colonial Office policy did *not* require an assertion of sovereignty over the whole country. Lord Normanby's instructions (quoted above) specifically referred to 'the whole *or any parts* of those Islands which they (ie the Maori) may be willing to place under His Majesty's Dominion'. It should not have been inconceivable that in some areas of the country there were chiefs who might remain unpersuaded of 'the benefits of British protection'.

Interestly enough, Stephen's immediate response did not for a moment dwell upon the suggestion that Hobson had acted in breach of his instructions nor did he show any interest in the doubt as to whether the essential prerequisites had been fulfilled when sovereignty had been proclaimed. Rather Stephen in his minute chose to make an essentially *ad hominem* comment:

> It is very singular that this gentleman should never once refer to the fact that the Queen, after receiving Captain Hobson's report, issued a Royal Charter and Commission under the Great Seal for the government of the Dominion of the whole of New Zealand. Mr Swainson may think this unjust or impolitic or inconsistent with former Acts, but still it is *done* (Emphasis in original) (Sweetman 1939:191).

This amoral reliance on legal pronouncements, is hardly consistent with moral imperatives which were the supposed justifications for the colonization policy. Stephen's impatience with Swainson is evident in a fuller minute on the subject:

> Admit for the sake of argument all his premises—that the Queen was pledged not to assert her dominion unless the free and intelligent assent of the natives was first obtained—that some of the natives gave no assent at all—that others assented but not intelligently—that therefore, the pledge given is broken by the assertion of sovereignty—. . . (Yet, nevertheless) The Queen and Parliament have gravely and deliberately adjudged, that all that is necessary for constituting the royal dominion over New Zealand, has been done . . . It was for the Queen, on the advice of her responsible ministers, to interpret her own pledges—to say how far a perfectly unanimous consent of the native chiefs was necessary—and to determine whether the assent actually given was or was not free and intelligent (Adams 1977:163).

It is not surprising, therefore, that Swainson was reprimanded in the sternest possible manner when Lord Stanley officially replied to Shortland's despatch:

> But it is my duty to deny, in the most unequivocal terms, the accuracy of any opinion, whoever may be the author of it, which may deny Her Majesty's sovereign title to any part of the territories comprised within the terms of the commissions issued under the Great Seal of the United Kingdom for the government of New Zealand. . . Mr Swainson must be apprized, that neither he, nor any other person who shall oppose this fundamental principle of your Government, can be permit-

ted to act any longer as a public officer under the Queen's Commission (BPP 1968:476).

It is clear from this episode that the Colonial Attorney-General's grievous error was that he had taken seriously and literally the 'humanitarian idealism' in the 1839 Colonial Office policy pronouncements and that he had assumed that the legal justifications for colonization should have been consistent with official policy. Stephen was himself responsible for evolving those policies, yet he and Stanley deliberately and studiously ignored the implications of Hobson's Instructions. They now brought to the forefront the three royal instruments which were promulgated shortly after Lord Russell had written to Hobson informing him that 'your proceedings appear to have entitled you to the entire approbation of Her Majesty's Government' (BPP 1970:141). That message was despatched on 10 November 1840 and communicated the Imperial government's formal ratification of Hobson's 21 May Proclamations. No inquiry was then made by Stephen or Russell as to whether Hobson's sudden decision in response to the 'treason' at Port Nicholson were in accordance with Normanby's instructions. On the contrary, they proceeded immediately to arrange for the formal separation of New Zealand from New South Wales. This was accomplished by the promulgation of a Royal Charter on 16 November 1840, Letters Patent to Commission the Governor dated 24 November, and Royal Instructions to the new Governor issued on 5 December (BPP 1970:153-64). These were the three solemn acts of Her Majesty which Swainson was castigated for disregarding. The primary instrument was the Charter and it is interesting to note the legal basis upon which it was authorized. The Charter's preamble did not recite the 1839 Letters Patent, nor any of the Proclamations by Gipps or by Hobson, nor the Treaty of Waitangi. The sole basis of authority recited was the Act 3 & 4 Vict c 62 passed on 7 August 1840 . This Act 'to provide for the Administration of Justice in *New South Wales* and *Van Diemen's Land*, and for the more effectual Government thereof, and for other Purposes relating thereto' made provision in section 2 for new colonies to be erected:

> And whereas the said Colony of *New South Wales* is of great Extent, and it may be fit that certain Dependencies of the said Colony should be formed into separate Colonies, and Provision should be made for the temporary Administration of the Government of any such newly-erected Colony, be it therefore enacted, That it shall be lawful for Her Majesty, by Letters Patent to be from Time to Time issued under the Great Seal of the United Kingdom, to erect into a separate Colony or Colonies any Islands which now are or which hereafter may be comprised within the Dependencies of the said Colony of New South Wales.

Precisely how was it that the British Parliament decided that it would be 'lawful' for Letters Patent to be issued? The power thus bestowed by the Imperial Parliament was 'lawful' because the imperialists themselves said so. Parliament is the only judge of the wisdom and desirability, or otherwise, of enacting laws and there were no criteria which had to be met before it became 'lawful' to erect a new colony or colonies. Thus it is not surprising that the Charter of New Zealand on its face is purely an assertion of power:

> Now know ye that we, in pursuance of the said recited Act of Parliament, and in exercise of the powers thereby in us vested, of our especial grace, certain knowledge, and mere motion have thought fit to erect and do hereby erect the said islands of New Zealand . . . into a separate colony . . . (BPP 1970:153).

This bald assertion of power and authority, and the subsequent Commission and Instructions to Hobson (which are patterned in the same way on the imperial act) was the refuge which Stephen had to resort to in order to answer Swainson. As Adams puts it:

> The discrepancy between political reality and legal theory soon led the Colonial Office into a contradictory position. (When this happened then:) . . . James Stephen abandoned the leaking political stopbank and retreated to the higher ground of constitutional law: . . . It seems that Britain had it both ways. If the conditions of a fair cession had not been fulfilled it did not matter: Sovereignty had been asserted, and anyway it was up to the British Government to decide whether the conditions had been fulfilled (p 162-3).

In conclusion it is submitted that the Treaty of Waitangi was rather marginal to the birth of New Zealand as a modern entity. Certainly it was not a significant legal instrument in the annexation of New Zealand and it is strange indeed that it has been elevated to the status of 'the Magna Carta of New Zealand' (Wards 1968:42). Ironically it was settler representatives who at the time were most critical of the Treaty. Somes, for the New Zealand Company, called it 'a praiseworthy device for amusing and pacifying savages for the moment' (BPP 1968:30). A colonist writing in 1860 sarcastically wrote of 'this grave State Paper, this blanket-bought missionary Magna Carta' (McLintock 1958:66). In modern times however the descendants of those colonists overlook the real history of the Treaty as they celebrate Waitangi Day. In a country with so little state pageantry and nationalist flag-waving *something* has to provide a focus for a national day. Despite its unlikely origins the Treaty of Waitangi has had to fit the bill, and modern myth-making has transformed the process of colonization from an imperialist imposition into a consensual cession of Maori sovereignty from which has emerged the multi-racial paradise of a nation with no class divisions—happy New Zealanders one and all!

Finally, by way of an endnote, Australian readers may be interested to learn of the final steps to separate New Zealand from New South Wales. After the erection of the New Zealand colony the very first legislative Act, Ordinance No 1, 1841, continued the application of 'the Laws Acts or Ordinances heretofore made by the Governor and Legislative Council of New South Wales' (s 1). The New Zealand Company settlers bitterly complained of the danger of a 'penal taint' and the Attorney-General agreed to remove 'the baneful influence of a convict code' (McLintock 1958:132-3). As a consequence the 1841 statute was repealed by Ordinance No 19, 1842. The settlers were overjoyed—so much so that they organised a Public Dinner of celebration. The broadsheet (reproduced in McLintock 1958:240) read:

PUBLIC
DINNER
On Thursday, 15th April
At Barrett's Hotel, Wellington
To Commemorate the Intelligence of the Islands of New Zealand
Being declared
INDEPENDENT
of New South Wales

And of the adjustment of
Differences between the
GOVERNMENT
and The
New Zealand Company
Colonel Wakefield in the Chair

Perhaps that was the independence day we should celebrate as our national day!

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