

TREATY-MAKING, BRITISH COLONIALISM, AND INDIGENOUS  
SUBJUGATION:  
A COMPARATIVE STUDY OF NEW SOUTH WALES AND AOTEAROA NEW  
ZEALAND

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## **Dedication**

This thesis is dedicated to my ancestors and every Indigenous person who have been displaced. Your spirits and courage continue to guide my journey, both academic and beyond.

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## **Abstract**

Until this day, the Indigenous community experienced the legacy of colonization. Yet, current research on British settler colonialism lacks an emphasis on how the treaty-making process consolidated the oppressive colonial power dynamics. By comparing the treaty-making approaches of the British Empire in New South Wales, Australia and Aotearoa New Zealand, my thesis explores how the absence and presence of treaties shaped complex and evolving relationships between Indigenous groups and colonial powers. It investigates the inconsistency of the British treaty-making approach in settler-colonial territories by examining the abandonment of treaty-making in Australia in the 1780s and the reinstatement of treaty-making diplomacy in Aotearoa New Zealand between the 1830s to 1840. By narrating both the Indigenous and colonial perspectives on a transnational scale, it compares how first encounter and geopolitical factors contributed to a shift in colonial diplomatic strategies and the evolution of colonial expansion. It will also examine the legacy of the colonial era by comparing land and assimilation policies in the 19<sup>th</sup> and 20<sup>th</sup> centuries. Overall, it demonstrates that in the short term, the absence and presence of treaty-making subjugated Indigenous sovereignty and land rights both in Australia and Aotearoa New Zealand. However, treaty-making impacted the long-term reconciliation and decolonization framework. This research will contribute to a better understanding of the historical and ongoing impacts of colonialism on Indigenous communities in Oceania and potentially assist policymakers in developing reconciliation strategies.

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## Introduction

In 1943, three-year-old Rita Wenberg was placed in the Cootamundra Domestic Training Home for Aboriginal Girls (Cootamundra Girls' Home). Throughout her youth, she was unaware that she was in a government home. Wenberg spent her whole childhood learning the European style of life and even believed she was a white European despite being Aboriginal. Like the other girls forcibly removed from their homes, she never met her parents until seventeen or eighteen. Reflecting upon her experience, she believed the government was responsible for her shattered identity. She stated that “there's two different worlds and [she was] in the middle of it.”<sup>1</sup> Her experience was representative of children who grew up in these government homes.

Wenberg was one of the twenty thousand children of Australia's Stolen Generation, who were forcibly removed from their Indigenous communities. Assimilation policies following forcible removal were first introduced by Governor Lachlan Macquarie in the early nineteenth century. In response to the Indigenous-settler violence in the Neapean River region in 1814, Macquarie opened the Parramatta Native Institution.<sup>2</sup> Around forty Aboriginal children were taken from the frontiers and trained in British tradition. Macquarie's ideology of eliminating tribal influence and adopting a European framework was embedded in the education the children received at the institution. However, his approach failed once parents recognized the institution essentially removed their children from their lives.<sup>3</sup> Around the end of the nineteenth century, the colonial government

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<sup>1</sup> “Rita Wenberg's Testimonies,” Stolen Generations' Testimonies, accessed December 15, 2023, <https://www.stolengenerationstestimonies.com/rita-wenberg.html>.

<sup>2</sup> *Historical Records of Australia*, vol. VIII (Canberra: W.G. Murray, Govt. Printer, Commonwealth of Australia, 1971), 368-372.

<sup>3</sup> *Ibid.*

devoted less resources to suppressing violence on the frontiers and successfully stabilized the institution. State governments began to prioritize Indigenous assimilation by authorizing the legal removal of Aboriginal children from their parents. In New South Wales, the Aboriginal Protection Board developed policies to separate mixed-racial children from their families, driving their integration into society.<sup>4</sup> Between 1893 and the 1970s, around five thousand children were forcibly taken from their families.<sup>5</sup> Similar to Wenberg, these children were alienated from their traditional customs and Aboriginal identity. This government-sanctioned practice forbade children from learning and practicing their Indigenous culture since the colonial period. Even the post-colonial Australian government was determined to eradicate Aboriginal culture and “dilute” the bloodline of the nation.

Oceans away in Aotearoa New Zealand, the government also implemented assimilation policies. Their approach focused more on cultural assimilation through education. When the colonial government was formed in 1852, *Te Reo Māori* and English were both used in parliamentary proceedings. However, the passage of the 1867 Native Schools Act meant speaking *Te Reo Māori* “had to be left at school gates.”<sup>6</sup> The impact extended beyond the classroom as bilingual parents began solely speaking English at home to familiarize their children with the English-speaking environment. A century after the enactment of the policy, fluency in *Te Reo Māori* had decreased from 95 percent to 25

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<sup>4</sup> 1. “Indigenous Law Resources Reconciliation and Social Justice Library,” Bringing them Home - 3 New South Wales and the ACT, accessed December 15, 2023, <https://www.austlii.edu.au/au/other/IndigLRes/stolen/stolen09.html>.

<sup>5</sup> Ibid.

<sup>6</sup> “Finding of the Waitangi Tribunal Relating to Te Reo Māori,” Waitangi Tribunal, 1986, [https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt\\_DOC\\_68482156#/:~:text=The%20Tribunal%20did%20not%20recommend,language%20than%20to%20impose%20it](https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt_DOC_68482156#/:~:text=The%20Tribunal%20did%20not%20recommend,language%20than%20to%20impose%20it).

percent.<sup>7</sup> As the young generation grew unfamiliar with their native language, they became more susceptible to alienating themselves from Indigenous culture and customs. Aotearoa's agenda of promoting the dominant Pākehā (European) culture was successful. Nevertheless, in comparison to Australia's forceful removal approach, Aotearoa's method employed less violence and consequently erased relatively less Indigenous culture. The Stolen Generation, on the other hand, experienced trauma and violence under governmental sanctioned policies.

Considering the two nations' geographic proximity and their status as former British colonies, the drastically different assimilation approach in Australia and Aotearoa seemed puzzling. The long-lasting timeframe of the policies prompts the question of how colonial ideologies and legislation have manifested into contemporary society and subsequently impacted Indigenous populations. To explore the reasons behind the contemporary differences in New South Wales, Australia and Aotearoa, it is essential to investigate their colonial history under the British Empire. This will provide insights into why two nations that commenced engaging with European colonizers in the same period would develop into settler colonies with distinctive policies towards the Indigenous population.

As colonial expansion brought European powers to the different corners of the world, the practice of settler colonialism emerged to assert dominance over Indigenous populations and promote resettlements on their territories. Historian David Armitage established a connection between British colonial practices between the seventeenth and nineteenth centuries across three continents: North America, Australia, and Africa. He

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<sup>7</sup> "Part 3: Historical and Current Context for Māori Education," Office of the Auditor-General New Zealand, accessed December 15, 2023, <https://oag.parliament.nz/2012/education-for-maori/part3.htm>.



argued that Britain employed either *terra nullius* (inhabited) or *vacuum domicilium* (vacancy) as the legal foundation for its expansionist policies that ultimately resulted in the dispossession of the Indigenous population.<sup>8</sup> Applying his methodology to the New South Wales case, the doctrine of *terra nullius* undermined Aboriginals' property rights and sovereignty by refusing to recognize native claims to Australia. However, Aotearoa fits neither the *terra nullius* nor *vacuum domicilium* structure.

To explore the British Crown's treaty-making precedent, attention should be directed toward North America. As Britain's first settler colony, America established the legal and governing framework for overseeing Indigenous-settler land ownership and transaction. Earlier charters first denied Native Americans claims of land and property due to their alleged lack of civilization. However, by the late seventeenth century, British custom evolved and no longer supported dispossessing Native Americans off their land based on prior claims.<sup>9</sup> Rather, land was acquired through purchase. Colonial authorities have enforced Indian property rights against settlers. For instance, the 1763 Royal Proclamation prohibited private purchases and westward expansion.<sup>10</sup> Some of the reasons for recognizing Indigenous land rights were the lack of military strength to conquer, the necessity to ally with Native Americans to combat the French, and the separate operating system of property among the Indigenous tribes.<sup>11</sup> However, the British colonial institution was simultaneously recognizing Indigenous land rights and accepting illegal occupation of

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<sup>8</sup> David Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2009), 76.

<sup>9</sup> "Indigenous Law Resources Reconciliation and Social Justice Library," Bringing them Home - 3 New South Wales and the ACT, accessed December 15, 2023, <https://www.austlii.edu.au/au/other/IndigLRes/stolen/stolen09.html>.

<sup>10</sup> King George, "1763 Royal Proclamation," n.d., accessed December 15, 2023.

<sup>11</sup> Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge, MA: Belknap, 2007), 107-111.

Indian territories. From an early stage, the British Empire maneuvered and achieved its goals through strategizing and minimizing costs. In the arena of colonialism, their strategy was cultivating relationships with Native Americans and adjusting their diplomatic and governance policies according to Indigenous actions and reactions. Given its structural similarities with the two Oceanian colonies, the British American colony offers an effective and impartial comparison regarding Indigenous-settler relationships and colonial diplomatic policies. Upon this framework, this thesis will explore British colonialism in New South Wales and Aotearoa New Zealand in the eighteenth and nineteenth centuries.

While there are numerous works that focus on colonial establishment history in specific colonial contexts of America, Australia, and Aotearoa New Zealand, there has been relatively little comparative analysis that explores the similarities and differences between these different contexts. Existing scholarship often focuses on the pre-nineteenth-century periods, emphasizing either transnational connections, the settler colonialism framework, or transcolonial legal institutions. For instance, Alan Lester employs a racial lens to cross-examine the nineteenth century colonization in Cape Town, Australia, and New Zealand while Shurlee Swain et al. explore Indigenous disenfranchisement in nineteenth century British settler colonies.<sup>12</sup> Both works make substantial contributions to the colonial history field but the lack of emphasis placed on pre-settlement encounters and the post-colonial decolonization period in the twentieth century has undermined analysis of long-term patterns of Indigenous dispossessions. Hence, this thesis will employ both a transcolonial and settler-colonial lens to examine how post-colonial states inherited and

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<sup>12</sup> Alan Lester, "Colonial Settlers and the Metropole: Racial Discourse in the Early 19th-Century Cape Colony, Australia and New Zealand," *Landscape Research* 27, no. 1 (2002): 39–49, <https://doi.org/10.1080/01426390220110757>; Shurlee Swain et al., *Equal Subjects, Unequal Rights: Indigenous People in British Settler Colonies, 1830-1910* (Manchester University Press, 2003).

perpetuated colonial systems, which sustained the institutional marginalization of Indigenous peoples. The New South Wales colony was selected instead of the South Australia colony despite the latter being the standard choice of comparison with Aotearoa. This is because the study will closely investigate how differences in first encounters transformed into colonial establishment principles. Incorporating twentieth century decolonization and reconciliation with eighteenth and nineteenth colonial history, this thesis will explore the continuities and transformations in colonial systems.

This paper will investigate the inconsistency of the British treaty-making approach in settler-colonial territories by examining the abandonment of treaty-making in New South Wales, Australia in the 1780s and the reinstatement of treaty-making diplomacy in Aotearoa New Zealand between the 1830s to 1840. By narrating both the Indigenous and colonial perspectives on a transnational scale, it compares how first encounter and geopolitical factors contributed to a shift in colonial diplomatic strategies which subjugated Indigenous sovereignty and land rights in New South Wales and Aotearoa New Zealand.

Chapter 1 examines why Britain shifted its colonial strategy when establishing a colony in New South Wales. Following the Pacific expedition of Captain Cook, it will analyze why New South Wales was chosen as the new penal colony and its founding principle. Additionally, it will navigate the instructions that shaped early colonial institutions and policies. The narrative unravels the treatment of Aboriginal communities during this period, shedding light on the impact of colonial practices and policies on Indigenous populations.

Chapter 2 explores the treaty-making process in Aotearoa from the official diplomatic appointment of James Busby in 1831 to the signing of the Treaty of Waitangi

in 1840. It will connect and explore why British authorities revived their treaty-making practice in 1840 by analyzing why they perceived Aborigines and Māori differently as well as other factors that influenced their decision to establish a treaty with Māori chiefs. Building upon previous research on the significant differences in translation, disagreements over the understanding of sovereignty and land rights, and the Māori-Pākehā relationship, this chapter will then examine the negotiations and signing of The Treaty of Waitangi in Aotearoa New Zealand which formalized the Māori-settler relationship.

Chapter 3 focuses on the implications of colonialism in New South Wales and Aotearoa. Ironically, the trajectory of British colonialism in Aotearoa resembled Australia. Conflicts and violence subjugated the colony following its establishment. The aftermath of this is still being felt in contemporary societies. Despite the inconsistencies in British colonial treaty-making, the Indigenous peoples in the two colonies experienced similar treatment under colonial encroachment. This section examines land and reconciliation policy in the nineteenth and twentieth centuries. It explores how the absence and presence of treaty-making influenced land rights, sovereignty, and assimilation policies.

Ultimately, the thesis argues that Indigenous-settler interaction in Oceania determined colonial policies during the rise and expansion of the Second British Empire. Through an examination of the establishment of the colonies in New South Wales and Aotearoa, I illustrate that the colonial policies induced similar impairments on the Indigenous population in the short term. However, the absence and presence of the treaty-making process resulted in divergent outcomes on Indigenous rights and the reconciliation process in the long run.

## Chapter 1: New South Wales, Australia and the Lack of Treaty-Making

Given the 16<sup>th</sup> and 17<sup>th</sup> century precedent of treaty-making in colonial America, it was expected that Britain would replicate the process in the newly discovered territories. Continuing an established and relatively successful colonial policy would be the optimal way to promote the interests of the British Empire. The Admiralty Victualling Office (Royal Navy) shared this vision. Upon hearing about the Royal Society's scientific commission to the Pacific in 1768, the Admiralty eagerly reached out and contrived a joint expedition to the Southern Hemisphere. In the Secret Instructions for Lieutenant James Cook, the Admiralty conveyed the imperial objectives of the mission:

“You are also with the Consent of the Natives to take Possession of Convenient Situations in the Country in the Name of the King of Great Britain: Or: if you find the Country uninhabited take Possession for his Majesty by setting up Proper Marks and Inscriptions, as first discoverers and possessors.”<sup>13</sup>

Before reaching New South Wales, Cook generally abided by the instruction in Tahiti and Aotearoa. However, on August 22<sup>nd</sup> of 1770, Cook claimed the east coast for the Crown. So, what prompted Britain to abandon its previous colonial approach at the inception of an era subsequently recognized as the Second British Empire?

### *The First Encounter*

When the *Endeavour* approached Botany Bay on April 28<sup>th</sup> of 1770, three distinct sources confirmed the sighting of Indigenous peoples. Cook, the captain of the ship, provided a brief description in his journal. He stated that five natives withdrew to the woods

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<sup>13</sup> Great Britain Admiralty, ms, *Secret Instructions for Lieutenant James Cook Appointed to Command His Majesty's Bark the Endeavour*, (1768).

while another four carried two canoes that he believed would approach the ship.<sup>14</sup> However, Cook's prediction was misguided, and it can be speculated that the canoes serve the purpose of defense or inspection. Botanist Joseph Banks's entry provides more support for the canoes serving the second purpose, considering the four men did not initiate an attack on the British crew whom natives would perceive as intruders. Banks also noted that there were about ten people who retreated from their original position by the fire to observe the ship from afar.<sup>15</sup> The differences in the estimation of numbers were trivial as the crew members were observing from a distance. The essential takeaway from their observation and wording is that both Cook and Banks identified Indigenous populations in Botany Bay.

Although the landing was unsuccessful on April 28<sup>th</sup> due to inclement weather, the British and Indigenous groups built up a preconceived notion of each other, which contributed to the subsequent violence. Banks detected that the "Indians [were] threat[e]ning and menacing with their pikes and swords" toward the ship that sailed along the coast.<sup>16</sup> Similarly, artist Sydney Parkinson conveyed the Indigenous group's hostile attitude and bespoken displeasure. They yelled "*warra warra wai*", which colonizers and historians assumed would translate into go away or begone in hindsight.<sup>17</sup> At the time, none of the crew members understood the language of the Dharawal tribes. However, it was evident that the British understood the connotation of the phrase. Ironically, the crew expected the Dharawal to be peaceful and welcoming as they approached the shore. When the Dharawal exhibited an uninviting demeanor, the crew turned to their weapon to scare

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<sup>14</sup> James Cook, ms, *Journal of H.M.S. Endeavour* (1768), April 28<sup>th</sup> Entry.

<sup>15</sup> Joseph Banks, ms, *Joseph Banks' Endeavour Journal* (1768), April 28<sup>th</sup> Entry.

<sup>16</sup> Joseph Banks, ms, *Joseph Banks' Endeavour Journal* (1768), April 28<sup>th</sup> Entry.

<sup>17</sup> Sydney Parkinson, ms, *Journal of a Voyage to the South Seas, in His Majesty's Ship, The Endeavour* (1784), April 28<sup>th</sup> Entry; Gujaga Foundation, "Voices Heard but Not Understood," Gujaga Foundation, April 28, 2020, <https://www.gujaga.org.au/stories/voices-heard-but-not-understood>.

them into complying.<sup>18</sup> British expeditioners initiating aggression toward native inhabitants facilitated a successful landing while constructing an impression of misunderstanding and conflict between the Europeans and Aborigines. The crew's violent approach foreshadowed the tragic fate of the Aborigines who would be subjected to brutal and discriminatory policies throughout the colonial period.

Only recently, the Aboriginal perspective of the encounter was uncovered. The Gadhungal Research Group continued the work of the La Perouse Aboriginal community protesting the mischaracterization of the Indigenous communities.<sup>19</sup> Dharawal scholar Shane Ingrey revealed that “*warra warra wai*” needs to be translated with cultural context in mind. The phrase originated from stories of the arrival of a *barangga* (big vessel) and “the return of *guwinj* (spirit or ghost) from the afterlife.”<sup>20</sup> Considering the spiritual backstory, “*warra warra wai*” translates to “you’re all dead.”<sup>21</sup> The spiritual angle shaped the Aboriginal perspective on the encounter. When the Dharawal spotted the *Endeavour*, they believed the ship was a cloud-carrying *guwinj*.<sup>22</sup> They perceived the British as ghosts and intended to protect their communities and lands from the ghost. Hence, Dharawal’s reaction was not an aggressive war cry, as the British expeditioners interpreted. This prompted the question of whether the British would have adhered more closely to the secret instruction and sought Indigenous consent.

To examine the potentiality, the interactions following the first encounter need to be considered. In his journal entry on the 29<sup>th</sup>, Cook stated that four members attempted to

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<sup>18</sup> James Cook, ms, *Journal of H.M.S. Endeavour* (1768), April 28<sup>th</sup> Entry.

<sup>19</sup> Gujaga Foundation, “Voices Heard but Not Understood,” Gujaga Foundation, April 28, 2020, <https://www.gujaga.org.au/stories/voices-heard-but-not-understood>.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

communicate with the natives before reaching the shore but were unsuccessful because of the language barrier.<sup>23</sup> Mistakenly believing the natives welcomed their landing, the *Endeavour* approached Silver Beach. However, the natives opposed the crew's approach toward their lands. Cook recognized the opposition and fired his musket regardless.<sup>24</sup> The British prevailed with their mission while the Dharawal threw darts to counter their landing. Cook then fired more shots and the Dharawal retreated from the scene. The expeditioners began their exploration of the island following the violent landing. On the 30<sup>th</sup>, Cook noted that the natives were retrieving their canoes from the water and did not move any British item.<sup>25</sup> When Hicks, a Royal Navy officer who was second-in-command, offered presents to the Dharawal men, they refused. Banks recounted Hicks's encounter with the Aboriginals while visiting the watering place on the next day. While a group of approximately twenty natives closely followed Banks and never attacked him, they immediately threw lances at Hicks when he approached them, prompting Hicks to swiftly run away.<sup>26</sup> The contrasting Dharawal reaction toward the two British crew members could be due to Hicks' gift giving act. The tribe might have perceived it as an act of hostility or as a warning that the intruders would overstay their welcome. Either interpretation would suggest that the Dharawal were attempting to drive Hicks off their lands.

Based on the unpropitious interaction, the crew on board the *Endeavour* deduced that Aboriginals wished for the British to depart. Yet, Cook disregarded their wish and proceeded with the mission to interact with the Indigenous population in an attempt to establish a relationship. On May 4<sup>th</sup>, he sent out another group of crew members to “form

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<sup>23</sup> James Cook, ms, *Journal of H.M.S. Endeavour* (1768), April 29<sup>th</sup> Entry.

<sup>24</sup> Ibid.

<sup>25</sup> James Cook, ms, *Journal of H.M.S. Endeavour* (1768), April 30<sup>th</sup> Entry.

<sup>26</sup> Joseph Banks, ms, *Joseph Banks' Endeavour Journal* (1768), May 1<sup>st</sup> Entry.



some connection with the natives”.<sup>27</sup> The Dharawal group collecting food on the canoes appeared to be frightened when approached by a midshipman while another group threw a dart toward Dr. Munkhouse and another midshipman who journeyed into the woods.<sup>28</sup> This interaction mirrored the first encounter: the Dharawal cautiously observed the British and did not initiate the attack while the British instigated a violent confrontation. In both instances, the Dharawal quickly disengaged with the British. It can be inferred that they did not hold aggressive intention toward these unfamiliar intruders. Due to the lack of Aboriginal documentation of the events, it would be difficult to conclude whether they were opposed to engaging with the British due to the misconception of their identities as spirits returning from the afterlife. Despite the gap in understanding Aboriginal motivations behind the swift retreats, it could be concluded that they were non-bellicose and only intended to protect their native lands. There also remained the possibility that if they were able to communicate with the Tahitian navigator, Tupaia, or the British, the Aborigines would have facilitated understanding and promoted amicable relationships. Instead, misunderstanding and aggression characterized the first Aboriginal-British encounter. Such dynamic provided justification for the expeditioners to disregard treaty-making precedents and explore alternative territorial acquisition strategies.

#### *Justification for Colonization: Terra Nullius*

In the three months following the first encounter, the *Endeavour* explored the east coast of Australia. During this period, Cook and Banks had repeatedly spotted Indigenous inhabitants in New South Wales, stating in their journals that there were “many Indian

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<sup>27</sup> James Cook, ms, *Journal of H.M.S. Endeavour* (1768), *May 4<sup>th</sup> Entry*.

<sup>28</sup> *Ibid.*

houses and places where they had slept upon the grass without the least shelter” and “huts and places where the natives had been.”<sup>29</sup> Given the Admiralty’s secret instruction, Cook would need to seek consent from the Dharawal communities if he wished to take possession of their land. However, Cook claimed New South Wales for King George III without the consent of the Aborigines in August of 1770:

“I had in the Name of his Majesty taken possession of several places upon this Coast, I now once More hoisted English Colours, and in the Name of His Majesty King George the Third took possession of the whole Eastern coast from the above Latitude down to this place by the Name of New Wales together with all the Bays, Harbours, Rivers, and Islands, situated upon the said Coast.”<sup>30</sup>

In the declaration, Cook justified the land possession without Aboriginal consent upon the conclusion that the land was uninhabited. Two factors that could have contributed to Cook’s deduction was language barrier and failure to recognize Aboriginal land entitlements. The interactions between the British expeditioners and Dharawal demonstrated the lack of linguistic understanding between the two groups. Without a translator, it would be impossible to facilitate a mutual agreement in 1770. Yet, the two parties lacked any form of symbolic acknowledgement. Hence, it was unlikely that Cook even attempted to overcome the language barrier to secure consent from the Aborigines.

Given the Eurocentric perspective toward the Indigenous communities which was reinforced during the first encounter, it seemed more plausible that Cook based his justification on the assumption that Aboriginal land ownership were invalid. From observation that “the Natives do not appear to be numerous neither do they seem to live in

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<sup>29</sup> Joseph Banks, ms, *Joseph Banks’ Endeavour Journal* (1768), *May 1<sup>st</sup> Entry*; James Cook, ms, *Journal of H.M.S. Endeavour* (1768), *May 1<sup>st</sup> Entry*.

<sup>30</sup> James Cook, ms, *Journal of H.M.S. Endeavour* (1768), *August 22<sup>nd</sup> Entry*.

large bodies,” Cook surmised that the Aborigines did not inhabit the lands.<sup>31</sup> The native presence in the nation did not constitute a legitimized occupation that would deter the British Crown from claiming and later colonizing the land. Furthermore, it could be deduced that if Cook disobeyed his instruction, there would have been written communication between him and the Admiralty regarding the situation.

Although the term *terra nullius* was never directly mentioned, Cook’s claim reflected the principle which provided justification for the British colonization of New South Wales in 1788. The legal concept of *terra nullius* originated from Roman law, translating into land without owners.<sup>32</sup> European empires had employed the concept to justify expansion and settlement. For instance, Samuel Purchas and John Locke respectively stated that native inhabitants in North America did not possess title or ownership of their lands.<sup>33</sup> Their arguments were based on the European concept of property which connected ownership to cultivation and labor.<sup>34</sup> Applying Purchas and Locke’s argument to the New South Wales case, the Aborigines could not be classified as cultivators. This is because they relied heavily on hunting in the pre-encounter periods.<sup>35</sup> Consequently, the British navigators did not observe any signs of agriculture or animal domestication during the Pacific voyages.<sup>36</sup> Hence, when they applied the European

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<sup>31</sup> James Cook, ms, *Journal of H.M.S. Endeavour* (1768), May 6<sup>th</sup> Entry.

<sup>32</sup> Lauren Benton and Benjamin Straumann, “Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice,” *Law and History Review* 28, no. 1 (2010): 1–38, <https://doi.org/10.1017/s0738248009990022>, 1.

<sup>33</sup> Bruce Buchan, “Traffick of Empire: Trade, Treaty and *Terra Nullius* in Australia and North America, 1750–1800,” *History Compass* 5, no. 2 (2007): 386–405, <https://doi.org/10.1111/j.1478-0542.2007.00392.x>, 389.

<sup>34</sup> Bruce Buchan, “Traffick of Empire: Trade, Treaty and *Terra Nullius* in Australia and North America, 1750–1800,” *History Compass* 5, no. 2 (2007): 386–405, <https://doi.org/10.1111/j.1478-0542.2007.00392.x>, 388.

<sup>35</sup> Josephine Flood, *The Original Australians: Story of the Aboriginal People* (Sydney; Melbourne; Auckland; London: Allen et Unwin, 2019), 20.

<sup>36</sup> *Ibid.*

perception of land ownership and cultivation in the nation, they concluded that the land could not be perceived as occupied and was open to settlement.

The principle of *terra nullius* was instrumental to the shift in colonial strategy in New South Wales. It provided a legal justification for the British Empire to claim ownership of lands without seeking Indigenous consent. Combined with the lack of pre-existing Aboriginal-British relationship, it was evident that British officials were content to relinquish its treaty-making practices.

### *The Establishment of the Penal Colony*

Following the loss of the Thirteen Colonies in 1776, the Crown confronted the urgency of securing new territories to maintain imperial strength and influence. In response to the dilemma, the officials evaluated geopolitical and economic factors when strategizing for the acquisition of the next colony. To facilitate the search, the House of Commons established the Bunbury Committee in 1779. In the Secretary of State Lord Sydney's 1786 letter to the Lords Commissioners of the Treasury, it was revealed that the Bunbury Committee initially considered the southern coast of Africa as the eligible colony.<sup>37</sup> To secure an alternative location to transport its convicts, the Parliament dispatched Richard Bradley to secure consent from local chiefs. However, negotiations for land purchases were unsuccessful in both the island of Lemane (MacCarthy Island, Gambia) and Das Voltas Bay (Namibia).<sup>38</sup> The failure to establish a colony in Africa prompted the parliament to turn its attention to New South Wales, a location once overlooked.

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<sup>37</sup> Robert McNab, ed., *Historical Records of New Zealand*, vol. I (Wellington, 1908), 49.

<sup>38</sup> Stuart Banner, *Possessing the Pacific: Land, Settlers, and Indigenous People From Australia to Alaska* (Cambridge: Harvard University Press, 2021), 15.

In 1779, the Bunbury Committee called upon Banks to present expertise on the suitability and likelihood of success of transporting convicted felonies to the Pacific. In his testimony, Banks recommended Botany Bay and stated that he expected minimal resistance from the native population.<sup>39</sup> Despite the numerous advantages listed by Banks, the Committee was more convinced by the Governor of Cape Coast Castle's testimonies and prepared for the establishment of a penal colony in Africa. This was a strategic decision, considering the limitations of British naval resources. As Britain devoted most of its navies to transatlantic affairs, it lacked the capacity to assemble a fleet to travel to Botany Bay.<sup>40</sup> Hence, a penal colony in Africa would be the most cost and time efficient solution to Britain's urgent problem of convict overflow.

While the Committee was examining of the potentiality of the southern coast of Africa, another advocate for the New South Wales colony aboard the *Endeavour*, James Mario Matra, presented his proposal to Lord Sydney. Born into a New York loyalist family, Matra's primary concern was relocating the American loyalists. This was evident throughout his proposal as Matra noted how the settlement could benefit both the British government and loyalists "in time atone for the loss of our American colonies."<sup>41</sup> The geographic advantages presented by Banks were reiterated in this proposal. More importantly, Matra outlined the commercial and geopolitical advantages. New South Wales would secure a trading route to East Asian nations, like China and Korea, which were previously unfavorable to the British Empire due to distance.<sup>42</sup> Additionally, the colony

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<sup>39</sup> Currey John E B., ed., *Report of the Select Committee on Convicts 1779* (Melbourne: Colony Press, 1992).

<sup>40</sup> Andrew Tink, "The Role of Parliamentary Committee Witnesses in the Foundation of Australia," *Australasian Parliamentary Review* 20, no. 2 (2005), 35.

<sup>41</sup> Robert McNab, ed., *Historical Records of New Zealand*, vol. I (Wellington, 1908), 36.

<sup>42</sup> *Ibid.*

would reduce British reliance on the Dutch East Indies and provide scarce commodities from New Zealand. Its geographic proximity to Dutch and Spanish colonies would also grant Britain a significant tactical advantage in restricting Dutch and Spanish naval activities during times of war.<sup>43</sup> This would extend British influence on a previously unclaimed region, consolidating the imperial agenda while constraining its major competitors.

Another factor that distinguished Botany Bay was the lack of Indigenous resistance. Matra's proposal referred to New South Wales as a nation with "no sovereign" where natives would not pose any dangers to the settlers.<sup>44</sup> It should be noted that the attempt to establish a penal colony in Africa confirmed the British practice of purchasing inhabited lands from native populations. Yet, by characterizing New South Wales as an uninhabited land with the justification of *terra nullius*, the British government was not legally bound to seek consent from the Indigenous people. Although the lack of Aboriginal presence in the nation was later proven untrue, the British parliament recognized the grave benefits of bypassing the negotiation procedures. Together, the various factors persuaded Lord Sydney that New South Wales would be a suitable alternative. When the committee's original plan for an African settlement failed, he presented New South Wales as the new convict destination.

On August 31<sup>st</sup>, 1786, Lord Sydney confirmed King George's plan to transport the convicts to New South Wales in his letter to the Lords of Admiralty. He noted that the King would dispose of one hundred and sixty private marines alongside suitable numbers of

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<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

officers to transport seven hundred and fifty offenders to the new settlement.<sup>45</sup> There was no mention of whether to establish a relationship with the native inhabitants. The only mention of Aboriginals was when Lord Sydney discussed the necessity for a military establishment that would “enforce due subordination and obedience” from the convicts and act as “the defence of the settlement against incursions of the natives.”<sup>46</sup> The absence of land leasing or purchasing agreements demonstrated Britain’s determination to bypass negotiation with the Indigenous community.

After notifying the military administration, Lord Sydney issued his appointment for Arthur Philip as the first governor of the penal colony in September. Philip’s attitude toward the Aboriginals converged with Lord Sydney’s. He stated that he intended to instill defense against them and minimize interferences from the population while he set up the colony.<sup>47</sup> Similar to Cook, Banks, and other British imperialists’ ideology, Philip intended to “civilize” the Indigenous community by giving “them a high opinion of the new guests.” From the context of his account, it was difficult to determine whether the new guests referred to British officers, convicts, or all new arrivals. Nonetheless, the spirit of the message was aimed at distinguishing the British and the Aboriginals by signifying the former group was more “civilized” and advanced in their thinking and governing.

Prior to departure, King George III sent his instruction to Philip, which outlined the governing structure for the colony. The document was mainly focused on the management of the convicts and the cultivation of lands. He discussed the distribution of land without delineating a plan for acquisition. Colonial officials would simply “mark out in Lots such

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<sup>45</sup> Robert McNab, ed., *Historical Records of New Zealand*, vol. I (Wellington, 1908), 57.

<sup>46</sup> *Ibid.*

<sup>47</sup> Robert McNab, ed., *Historical Records of New Zealand*, vol. I (Wellington, 1908), 67.

Lands upon the said Territory as may be necessary for their use” and allocate the lands to discharged convicts.<sup>48</sup> Respectively, male inhabitants, their partners, and children would acquire thirty, twenty, and ten acres of land supposing they reside on and cultivate the properties for the following ten years. Throughout the six pages document, Indigenous-settler interactions were mentioned only three times. King George acknowledged the necessity of maintaining a friendly relationship with the natives of the territory. He recommended caution over “any attacks or interruptions of the Natives of that country” and encouraged trading with the Aboriginals alongside inhabitants of adjacent islands.<sup>49</sup> Similar languages were seen in Lord Sydney’s letters, but the instruction expanded upon the governance of Aboriginal inhabitants:

“You are to endeavour by every possible means to open an Intercourse with the Natives and to conciliate their affections, enjoining all Our Subjects to live in amity and kindness with them. And if any of Our Subjects shall wantonly destroy them, or give them any unnecessary Interruption in the exercise of their several occupations. It is our Will and Pleasure that you do cause such offenders to be brought to punishment according to the degree of the Offence.”<sup>50</sup>

The British intended to offer some extent of legal protection toward the Indigenous communities by punishing the convicts who would impair the Indigenous-settler relationship. It could be argued that this protection was arbitrary because the instruction lacked guidance over creating a legal system. Even if Arthur successfully instituted a judiciary branch in the penal colony, the language barriers between the two parties would hinder the legal procedure as the Aboriginals would be unable to sue or testify. Additionally, there was no mention of recognizing Aboriginal lands in the instruction which conformed

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<sup>48</sup> Courtesy British Public Records Office, ts, *Draught Instructions For Governor Phillip*. (1787).

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.



to the principle of *terra nullius*. The foundational document of the penal colony suggested that the Aboriginal communities lacked the rights to govern their ancestral lands, foreshadowing their unjust treatment throughout the colonial period.

On May 13<sup>th</sup>, 1787, Philip and the First Fleet commenced their journey to Botany Bay. After eight months of sailing, the fleet arrived at Botany Bay in January 1788. Upon sighting the British intruders, various Gweagals waved their spears while shouting “*whurra whurra*” (go away).<sup>51</sup> Both the British and the Aboriginals were armed, and no major violent disputes occurred because Philip soon discovered Botany Bay lacked the stream and abundant grass reported by Cook and Banks. The unsuccessful landing prompted Philip to abandon Botany Bay and search for a new site to establish the penal colony. On January 21<sup>st</sup>, the British explored Port Jackson (Sydney Harbour) which was previously unexamined by expeditioners.<sup>52</sup> Five days later, the British flag was raised, and a new penal colony was established, barring any consultation with the Aboriginal community. It seemed that Philip closely followed the spirit of King George’s instruction. At minimal costs to the British, a new settlement was created. The penal colony would serve as a replacement for the forfeited Thirteen Colonies, expanding the interests of the British Empire at the expense of the Aboriginal communities.

### *The Aftermath of the Absence of Treaty-Making*

Colonial documents in the 19<sup>th</sup> century confirmed that the principle of *terra nullius* was employed to justify the settlement in New South Wales. In the 1837 Report from the

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<sup>51</sup> The phrase has also been transcribed as “*warra warra*”. Peter Turbet, *First Frontier: The Occupation of the Sydney Region 1788-1816* (Rosenberg Publishing, 2011), 19.

<sup>52</sup> Josephine Flood, *The Original Australians: Story of the Aboriginal People* (Sydney; Melbourne; Auckland; London: Allen et Unwin, 2019), 32-33.

Select Committee on Aborigines, the British Select Committee stated that when they established the colony, “it does not appear that the territorial rights of the natives were considered.”<sup>53</sup> Such failure to recognize territorial rights formed the grounds for the dispossession of Indigenous lands without negotiation or compensation. The implications extended beyond land dispossession as the convicts committed numerous murders and violence in the colony. The Select Committee noted that the Aboriginal population diminished significantly as a result, yet they did not recommend British withdrawal nor compensation toward the Indigenous communities. Instead, they suggested that the Protectors of Aborigines should be appointed in New Holland (Australia).

Ironically, the Report also assured that native inhabitant possessed incontrovertible rights to their lands. Yet, the colonial governance issued policies and perpetuated injustice reflected in the following remarks:

“Such, indeed, is the barbarous state of these people, and so entirely destitute are they even of the rudest forms of civil polity, that their claims, whether as sovereigns or proprietors of the soil, have been utterly disregarded. The land has been taken from them without the assertion of any other title than that of superior force and by the commissions under which the Australian Colonies are governed by her Majesty’s sovereignty over the whole of New Holland is asserted without reserve.”<sup>54</sup>

British hypocrisy was evident as it recognized Indigenous entitlement in spirit but implemented policies in New South Wales that contradicted such acknowledgement. To the British, the subjugation of Indigenous sovereignty and land rights were a byproduct of advancing colonial expansion and securing imperial interests. Similar to Cook and Banks’ stance in 1780, the colonial administration perceived the Aborigines as “uncivilized”

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<sup>53</sup> Great Britain Parliament House of Commons Select Committee on Aborigines (British Settlements), *1837 Report from the Select Committee on Aborigines* (London, 1837), 10.

<sup>54</sup> *British Parliamentary Papers*, vol. VI (1837), 76.

people who were incapable of governance. They justified their settlement by rendering the native inhabitants incapable of recognizing sovereignty or land titles.

The underlying reasons behind the justification were rooted in European superiority and desires for colonial expansion. Cook repeatedly emphasized the “uncivilized” and aggressive nature of the Aborigines during his Pacific expedition. His inability to communicate with the groups consolidated his perception that the Aborigines often resort to violence and mutual agreements cannot be reached with them. Consequently, he deemed the “uncivilized” population could not be viewed as occupiers of the territory and claimed the nation on the legal principle of *terra nullius* for the Crown. Despite the fact that the British crew was responsible for instigating violent confrontation during the first encounter, the Aborigines were painted as the vicious perpetrators who could not cultivate and govern their land. The British Empire deemed swift colonial expansion necessary for the advancement and welfare of the New South Wales territories. It disguised its national interests under humanitarian agenda, portraying land dispossession as a “civilizing” mission. In reality, the inadequate recognition of Indigenous rights resulted in a lack of formalized treaty-making process between the Crown and the Aborigines. This laid the foundation for systemic dispossession of lands and sovereignty in New South Wales for the following centuries.

## Chapter 2: Aotearoa New Zealand and the Revival of Treaty-Making

Before arriving at Botany Bay, Cook sailed the *Endeavour* to Aotearoa as commanded by his Secret Instruction. After a two-month journey in the Pacific, his crew landed at *Tūranganui-o-Kiwa* (Poverty Bay) on October 8<sup>th</sup>, 1769. In order to navigate the island, Cook led some of the expeditioners to explore the shore. While the primary team explored abandoned huts, the four men who were attending the pinnace were being pursued by the “Indians”.<sup>55</sup> Feeling threatened by the lances, the coxswain fired two muskets which killed a chief.<sup>56</sup> The British retreated to the *Endeavour* after the incident and approached the shore attempting to communicate with the Indigenous inhabitants. Cook stated in his journal entry that when they spoke the Georges Islands Language to the natives, the response was a demonstration of weapons and war dances.<sup>57</sup> Banks and Cook’s account of British reception of the threats differed. While Cook suggested that their men retreated and approached again with the Tahitian navigator, Tupaia, Banks stated that Tupaia was among the original team that advanced to the shore.<sup>58</sup> Despite the discrepancies, both expeditioners acknowledged the importance of Tupaia’s ability to communicate with the natives. For instance, Tupaia conveyed the British’s willingness to exchange iron for provisions, which resulted in an agreement between the British and the Māori. Despite the positive outlook, Tupaia repeatedly warned the British by stating the Māori were not their friends. Tupaia’s caution created an environment of fear in which both parties refused to unarm. Tension escalated as the British and Māori grew suspicious of whether the

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<sup>55</sup> James Cook, ms, *Journal of H.M.S. Endeavour* (1768), October 9<sup>th</sup> Entry.

<sup>56</sup> Joseph Banks, ms, *Joseph Banks’ Endeavour Journal* (1768), October 8<sup>th</sup> Entry.

<sup>57</sup> James Cook, ms, *Journal of H.M.S. Endeavour* (1768), October 9<sup>th</sup> Entry.

<sup>58</sup> James Cook, ms, *Journal of H.M.S. Endeavour* (1768), October 9<sup>th</sup> Entry; Joseph Banks, ms, *Joseph Banks’ Endeavour Journal* (1768), October 9<sup>th</sup> Entry.

agreement would be honored. To assert control over the situation and protect their belonging, Banks and Tupaia fired their muskets which injured three Māori men.<sup>59</sup> Similar to the first encounter in New South Wales, violence seemed to be a common factor among Indigenous-European interactions. So, why did the colonial process unfold differently in the two nations, leading to the revival of the treaty-making practice in Aotearoa?

The divergence initiated its course in the aftermath of the confrontation when Cook decided to land at another point on the Bay. He intended to search for provisions and potentially “surprise some of the natives and to take them on board and by good treatment and presents endeavour to gain their friendship.”<sup>60</sup> The diplomatic approach closely aligned with Cook’s Secret Instruction and if successful, would create a strong foundation to advance the Crown’s agenda in acquiring possessions in the nation. While the strategy proved to be successful in facilitating communication and fostering a relationship, it was violent in nature. On the morning of October 10<sup>th</sup>, the expeditioners spotted two canoes sailing toward the *Endeavour*. The crew speculated that unarmed fishermen were on board, yet Cook ordered firing a musket shot over their heads to minimize resistance.<sup>61</sup> Contrary to Cook’s expectation, the Māori groups resisted by throwing stones and paddles toward the British. In response, the British fired at the Māori, resulting in four deaths and three survivors being taken on board. Cook stated that the three young natives were “clothed and treated with all imaginable kindness” and a friendship was fostered between the two parties.<sup>62</sup> It was perplexing how the Māori would grow so warmly toward the British men who were attempting to murder them just minutes ago. In comparison to the Aboriginals,

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<sup>59</sup> Joseph Banks, ms, *Joseph Banks’ Endeavour Journal* (1768), October 9<sup>th</sup> Entry.

<sup>60</sup> James Cook, ms, *Journal of H.M.S. Endeavour* (1768), October 9<sup>th</sup> Entry.

<sup>61</sup> Joseph Banks, ms, *Joseph Banks’ Endeavour Journal* (1768), October 10<sup>th</sup> Entry.

<sup>62</sup> James Cook, ms, *Journal of H.M.S. Endeavour* (1768), October 10<sup>th</sup> Entry.

who remained vigilant and refused gifts from the British, the Māori appeared more forgiving to the intruders and open to engaging in exchange.

Although multiple factors could have resulted in the discrepancies in New South Wales and Aotearoa, Tupaia's role as an intermediary was essential. His translation skills bridged the language barriers which could exacerbate misunderstandings between the Māori and the British. Historiography of Indigenous-settler relationships in North America also confirmed the pivotal role of a mediator in shaping perceptions and facilitating understanding between the two parties. Richard White employed the term "the middle ground" to frame how the French and Algonquians negotiated and compromised in colonial America.<sup>63</sup> The dynamic interaction promoted cultural exchange among people who had distinctive values and customs. Although creative misunderstanding could arise during the process, mutually acknowledged meanings and practices emerged.<sup>64</sup> White's framework is applicable to the initial encounter and colonial relationship between the Māori and the British. Tupaia's contribution to establishing peace in Aotearoa conveyed the effectiveness of searching for "a middle ground." Such practice had the potential to foster shared understanding and collaboration.

Mutual understanding underscored the agency of Indigenous people in an era of imperial expansion. Yet, the journals of the British expeditioners created a one-sided perspective on the encounter. The lack of Māori sources on the encounter presented challenges to reconstructing the Indigenous perception of the British visit to the island. One written account was given by Te Taniwha (Te Horetā), a *Ngāti Whanaunga* chief. During

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<sup>63</sup> Richard White, *Middle Ground - Indians, Empires, and Republics in the Great Lakes Region*, (Cambridge University Press, 2010), 54.

<sup>64</sup> Richard White, *Middle Ground - Indians, Empires, and Republics in the Great Lakes Region*, (Cambridge University Press, 2010), XXVI.

Cook's first visit, he was a young child living in *Whitianga* (Mercury Bay).<sup>65</sup> Te Taniwha referred to the British as "goblin" and Cook as the "goblin chief" searching for a geographical stretch of the *Ika-a-Maui* (North Island).<sup>66</sup> However, he noted that the British lacked the spiritual knowledge that the tribal leaders were trying to communicate. Consequently, the parties developed their understanding on a misguided account of the other's culture and concepts. Peace built upon misunderstanding might not consolidate into a potential alliance in the future. But, in 1769, it was sufficient for Cook to fulfil the Royal Navy's objective by taking "formal possession of the place in the name of His Majesty" on November 15<sup>th</sup>.<sup>67</sup> The Māori received some short-term benefits from the exchange of goods and quickly put the British intruders in their wake as the *Endeavour* set sail.

While Cook attempted to cultivate a friendship with the Māori, the motivation behind it seemed strategic. He was advancing the interests of the Crown and avoiding resistance. The method would be repeatedly employed in the British colonies as justification for certain policies that appeared to benefit the Indigenous tribes on the surface. John Hawkesworth, who the Admiralty commissioned to synthesize the five journals from the Pacific voyages between 1764 and 1768, surmised his impression of the Māori:

"The situation and circumstances, however, of these poor people, as well as their temper, are favourable to those who shall settle as a colony among them. Their situation sets them in need of protection, and their temper renders it easy to attach them by kindness; and whatever may be said in favour of a savage life, among people who live in luxurious idleness upon the bounty of Nature, civilization would certainly be a blessing to those whom her parsimony scarcely furnishes with the bread of life, and who are

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<sup>65</sup> John White, *The Ancient History of the Māori, His Mythology and Traditions. Tai-Nui*, vol. V (Hamilton: University of Waikato Library, 2001), 122.

<sup>66</sup> John White, *The Ancient History of the Māori, His Mythology and Traditions. Tai-Nui*, vol. V (Hamilton: University of Waikato Library, 2001), 124.

<sup>67</sup> James Cook, ms, *Journal of H.M.S. Endeavour* (1768), November 15<sup>th</sup> Entry.

perpetually destroying each other by violence, as the only alternative of perishing by hunger.”<sup>68</sup>

Similar to Hawkesworth, Cook likely regarded the Māori communities as “uncivilized”. His consistent resort to violence towards engaging with the Māori reflected his belief that the use of force was necessary to assert authority over the native inhabitants. Comparatively, Cook referred to the Aborigines as “savages...who perhaps were some of the most rude and uncivilized upon the earth.”<sup>69</sup> His contrasting comments on two Indigenous groups could be attributed to his respective encounters and perceptions. Despite both nations requiring British influence to advance civilization, Cook would argue that the foundational approach should differ because the two groups were at different stages of development with the Māori presenting more modern characteristics. Indigenous people, even the more “civilized” groups, could not be viewed as potential partners as one European nation would see another. Instead, they were subjects who would benefit from a more “advanced” British framework of governance. The paternalistic stance rooted in European supremacy would shape the colonial governance and Treaty of Waitangi.

Despite Cook’s informal claim over the territory during the first Pacific expedition, the British legislation did not mention New Zealand in any official document until the Murders Abroad Act of 1817:

“All murders and manslaughters committed or that shall be committed on land at the settlement in the bay of Honduras by any person or persons residing or being within the said settlement, and all murders and manslaughters committed or that shall be committed in the islands of New Zealand and Otaheite or [Rep. 36 & 37 Vict. c. 91. (S.L.R.)] within any other islands, countries, or places not within his Majesty's dominions, nor

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<sup>68</sup> John Hawkesworth et al., *An Account of the Voyages Undertaken by the Order of His Present Majesty for Making Discoveries in the Southern Hemisphere: And Successively Performed by Commodore Byron, Captain Wallis, Captain Carteret and Captain Cook in the Dolphin, the Swallow and the Endeavour: Drawn up from the Journals Which Were Kept by the Several Commanders, and from the Papers of Joseph Banks, Esq.*, vol. III (London: Printed for T. Strahan and T. Cadell ..., 1773), 45.

<sup>69</sup> John Hawkesworth et al., 145.



subject to any European state or power...shall and may be tried, adjudged and punished in any of his Majesty's islands, plantations, colonies, dominions, forts or factories..."<sup>70</sup>

In the criminal act, the parliament did not refer to New Zealand as a British colony. During the next decade, Britain's action seemed to convey that the island was independent but in friendly standing with the Crown. For over half a century, the British Crown remained uninterested in establishing a colony in Aotearoa. Yet, twenty-two years later, the Treaty of Waitangi was signed. Aotearoa became New Zealand, the last British settler colony ever formed. This chapter will explore the revival of the treaty-making process in British colonial governance and how the treaty undermined Māori sovereignty.

### *Pre-Treaty Relationship*

Two decades after Cook's first voyage to Aotearoa, the Māori, the Indigenous communities, and Pākehā, the European settlers, established contact after the founding of the New South Wales colony. This era consisted of economic exchanges, missionary works, and occasionally conflicts. Often intertwined, the three elements constructed "a middle ground" that shifted Māori and Pākehā customary and practices. For instance, the arrival of British traders introduced changes to the traditional ceremonial exchange. While Māori's exchange of goods usually served some transactional purpose, the emphasis was on social objectives. The European concept of trade reinforced the economic interests, introducing more explicit terms for exchange and reaffirming the abandonment of the deferred repayment.<sup>71</sup> As the tribes adopted some European commercial principles, they

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<sup>70</sup> Great Britain, ms, *An Act For The More Effectual Punishment of Murders And Manslaughters Committed in Places Not Within His Majesty's Dominions* (1817).

<sup>71</sup> Vincent O'Malley, *The Meeting Place: Maori and Pakeha Encounters, 1642-1840* (Auckland: Auckland University Press, 2014), 113.

also maintained their custom by using imported goods to fulfill uniquely Māori purposes.<sup>72</sup> The exchange, although appearing mutually beneficial, had its drawbacks. Rapid acquisition of muskets and unequal distribution of profits between Northern and Southern tribes fueled tension, escalating to a full-scale war across the nation.<sup>73</sup> The long-lasting warfare was a direct consequence of the continuous supply of weapons. When the war ceased in 1837, many tribal territorial boundaries underwent significant alternation. The violence alarmed both the Māori and the British authorities, consequently prompting the need for a formalized treaty. The former desired protection from the Crown during instabilities while the British believed a treaty would legitimize intervention and facilitate land purchases. Both parties would refer to this agenda during the treaty-making process.

Beyond transactions, the relationship between the two groups could be characterized by protection and alliance. Wary about the French seeking revenge for the murder of Marion du Fresne and his crew and other European nations intending to claim Aotearoa as a colony, thirteen northern Māori chiefs drafted the 1831 petition to King William IV, seeking protection from the British Crown.<sup>74</sup> In the petition, the chiefs referred to themselves as “a people without possession” with “only thy land which is liberal towards us”.<sup>75</sup> They intended for the British Crown and subjects to become the “friend and guardian” of Aotearoa in the face of French aggression.<sup>76</sup> In the petition, they did not seek for governance but rather alliance. In response, the crown appointed James Busby to Aotearoa

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<sup>72</sup> Vincent O’Malley, *The Meeting Place: Maori and Pakeha Encounters, 1642-1840* (Auckland: Auckland University Press, 2014), 134.

<sup>73</sup> For more on the Musket Wars, refer to S. Percy Smith, *Maori Wars of The Nineteenth Century: The Struggle of The Northern Against The Southern Maori Tribes Prior To The Colonisation of New Zealand In 1840* (Christchurch: Whitcombe & Tombs, 1910).

<sup>74</sup> Edward Duyker, ts, *With A French Accent At The National Library* (1994).

<sup>75</sup> New Zealand Ministry for Culture and Heritage Te Manatu Taonga, ms, *1831 Māori Petition to King for Protection* (1831).

<sup>76</sup> Ibid.

as the British Resident in 1833. Tasked with establishing a framework of law and order, Busby consolidated British influence and formalized the Indigenous-settler relationship in the pre-treaty era. For instance, after another French attempt to declare Aotearoa under the self-proclaimed Sovereign Chief of New Zealand, Baron Charles de Thierry, in 1835, Busby coordinated a meeting between thirty-four Māori chiefs to sign the 1835 Declaration of the Independence of New Zealand (*He Whakaputanga o te Rangatiratanga o Nu Tireni*). This is the first document that recognized Māori sovereignty. Its second clause conveys that *Kīngitanga* (sovereignty) and *mana* (power) belong to the *Tino Rangatira* (true leaders).<sup>77</sup> It also prohibited other groups to frame *wakarite ture* (laws) and *Kawanatanga* (governorship) on this land.<sup>78</sup> The fourth clause acknowledges its friendly relationship with the British settlers and the crown's position as the *matua* (protector).<sup>79</sup> An additional eighteen signatures were appended to the document by 1839, acknowledging Aotearoa as an independent Māori state. In response to other empires' interests in Aotearoa, the British Crown recognized Aotearoa's independence on an international stage with the declaration. However, increasing numbers of British settlers and desires to control resources in the nation eventually shifted the British approach. Five years after the issuing of the declaration, the British would initiate a treaty-making process five years later to establish Aotearoa as a colony. This further consolidated the paternalistic protection, that was evident since Cook's first Pacific voyage. Britain would maintain its harmonious relationship with the Māori by placing the tribes under protection from foreign powers while advancing its

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<sup>77</sup> ms, *He Wakaputanga [Whakaputanga] o Te Rangatiratanga o Nu Tireni [The Declaration of Independence of the United Tribes of New Zealand, Made to the British Resident in New Zealand on 28 October 1835 - Signed Manuscript]* (1835).

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

interests in undermining rival claims, securing resources and lands, and advancing colonial expansion.

Toward the end of the pre-treaty era, conflicts between Māori tribes and the Musket War troubled Busby. To seek guidance from other colonial authorities, Busby reached out to William Hobson, who was a British naval officer stationed in Australia in 1837. Their correspondence marked the beginning of a pivotal chapter in Aotearoa's history, ultimately leading to the signing of the Treaty of Waitangi in 1840. William Hobson was a key settler representative in the treaty-making process and similarly began his diplomatic career like his predecessor, Governor Philip, in New South Wales. Hobson commenced his military career with the Royal Navy in the West Indies. In 1836, Hobson was dispatched to Australia and assisted with the establishment of Williamstown (Melbourne).<sup>80</sup> Following Busby's contact, Hobson initiated a voyage to the Bay of Islands to address the security concerns surrounding British settlers imposed by the tribal war. During the month in Aotearoa, Hobson met with British subjects and Māori chiefs. In his letter to Sir Richard Bourke, the Governor of New South Wales on August 8th, 1837, Hobson conveyed that the Indigenous communities were "capable of becoming a useful and industrious race under a wise government".<sup>81</sup> In comparison to Philip's perception of the Aboriginal communities, Hobson was confident that implementing the British legal framework would foster a peaceful and economically beneficial coexistence among the Māori and Pākehā. Although he advocated for the inclusion of Māori in the development of the potential colony, he was embedded in the mindset that European settlers remained superior to

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<sup>80</sup> W. H. Oliver and Claudia Orange, *The Dictionary of New Zealand Biography*, vol. I (Wellington: Bridget Williams Books and Department of Internal Affairs, 1990), 196-199.

<sup>81</sup> Vincent O'Malley, Wally Penetito, and Bruce Stirling, *The Treaty of Waitangi Companion: Maori and Pakeha from Tasman to Today* (Auckland: Auckland University Press, 2011), 31-32.

Indigenous subjects, and only through the introduction of a British framework and British values could the nation move toward progress and order.

On a more general level, Hobson inferred that maintaining a solid relationship with the tribes was essential to the success of British colonization. The proposed approach was one of respect and collaboration rather than control and domination. Recognizing the potential for industrialization, Hobson favored economic interventions and advocated for treaty-making to recognize British properties. While the goal of establishing British authority over the region was clear, there was also recognition of the importance of working with the Indigenous population and respecting their customs and practices. Hobson submitted a proposal that partially invoked his initial approach. He acknowledged the need to secure a treaty with the Māori for land transactions and implement a factory system similar to the Indian colony.

Following Hobson's proposal, the Secretary of the Colonies, Lord Glenelg, requested the British Foreign Office to reexamine its diplomatic position with Aotearoa. In Hobson's letter to Governor George Gipps in 1839, he noted Glenelg's suggestion that the government was initially reluctant to interfere in New Zealand affairs but was convinced that prevailing circumstances, like the vast acquisition of land by British subjects, forced them to intervene in order to protect both the Indigenous and British subjects through a colonial legal framework.<sup>82</sup> Geopolitics was also instrumental in reaching the final decision. After learning that the French commander Jean François Langlois purchased settlements on the South Island with the support of King Louis-Philippe, the British authorities

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<sup>82</sup> Constantine Henry Phipps, ms, *Instructions of William Hobson, Writing to George Gipps, 1839* (1839).

accelerated their debates.<sup>83</sup> Consequently, the Crown appointed Hobson as the Lieutenant Governor in February 1839 and commenced their process of treaty-making.

### *Lord Normanby's Instruction and the British Agenda*

British colonial authorities' mandate to Hobson signaled the end of the pre-treaty era. In Lord Normanby Constantine Henry Phipps's August 1839 instruction to Hobson, he recounted the justifications for colonization and objectives in treaty-making. He first acknowledged that the Crown's intervention in Aotearoa was reluctant and due to "circumstances entirely beyond our control have at length compelled us to alter our course".<sup>84</sup> As past documents have explicitly and implicitly illustrated, the British government asserted that Māori's "title to the soil and to the sovereignty of New Zealand is indisputable".<sup>85</sup> By recognizing the sovereignty and independence of the nation, the Secretary of State for the Colonies established the necessity of gaining consent from the Māori before formalizing their relationship. The colonial office knew that without proper consent, the acquisition of Aotearoa would be unjust and inappropriate. Hence, Hobson would "treat with the aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any part of those islands which they may be willing to place under Her Majesty's dominion".<sup>86</sup> This procedure seemed paradoxical as it involved simultaneous recognition of sovereignty and intention of subjugation.

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<sup>83</sup> Peter Tremewan, *French Akaroa: An Attempt to Colonise Southern New Zealand* (Christchurch: University of Canterbury Press, 2018), 178.

<sup>84</sup> Constantine Henry Phipps, ms, *Marquis of Normandy - Instructions to Captain Hobson Preceding the Treaty of Waitangi* (1839).

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

So, why would the British concede the rights of the Indigenous communities when its ultimate objective was establishing New Zealand as a colony? In New South Wales, they refused to acknowledge the rights of Aboriginal peoples and established a colony without any form of governorship transition. Accordingly, the British colony officials envisioned different initial frameworks for the two nations and employed respective mechanisms. Examined in a broader historical geopolitical context of the time, the diplomatic approach was both pragmatic and strategic. Acknowledging Māori's sovereignty could be perceived as a symbolic gesture to signal good faith. The colonial office wanted to ensure that the Māori chiefs would continue treating the British as allies and remain cooperative and peaceful during the negotiation process. This would minimize conflicts and reduce difficulties in reaching agreements. Additionally, the recognition increased the legitimacy of the treaty-making process. By placing the Māori on an equal footing, it suggested to the other colonial power who were interested in colonizing New Zealand that the British was not the aggressor in the situation and deter other empires from interfering and pursuing their ambitions in the region. Normanby's cautious wording in his instruction could be perceived as an acknowledgement that failure to maintain a friendly relationship with the Māori would have grievous consequences since "the acquisition of New Zealand would be a most inadequate compensation for the injury which must be inflicted on this Kingdom itself by embarking in a measure essentially unjust".<sup>87</sup> Considering the multifaceted implications, the British needed an approach that would be deemed both morally and legally justifiable. The advantage of respecting the will and

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<sup>87</sup> Ibid.

gaining consent from the Māori was the most streamlined scheme for establishing a British colony.

Regardless of whether the Crown intended to sustain Aotearoa as a Māori state in the early 1830s, its attitude toward New Zealand in 1839 had shifted to domination as it believed that there was “probably no part of the earth in which colonization could be effected with a greater or surer prospect of national advantage.”<sup>88</sup> They disguised their interests in Aotearoa’s geopolitical positions and natural resources among concerns over conflicts between British settlers and the Indigenous communities and the potential dangers of a lawless nation. But essentially, what truly concerned Hobson was how he could convince the Māori to grant the rights to establish a civil government and settle lands to the Crown.

Normanby’s decree was general and left much to Hobson’s discretion upon his arrival. This is because he was aware that Indigenous reactions could not be fully anticipated, and flexible decision-making was necessary to adapt to unforeseen diplomatic challenges. However, the document illustrated two ideologies central to the British colonial authorities.

Their existing framework on land and property manifested in a colonial strategy that could only be perceived as hypocritical. The Crown indicated that land deals with the Māori “must be conducted on the same principles of sincerity, justice, and good faith” yet the settler government must be granted full control over land acquisition.<sup>89</sup> The reasons for land purchases would be disguised as resource management, conflict prevention, and economic development. The subjugation of land rights from the Indigenous tribes, who did

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<sup>88</sup> Ibid.

<sup>89</sup> Ibid.



not share similar property values would be overlooked. Moreover, British supervision of land-related inquiries made it doubtful that the negotiation process would reflect “mildness, justice, and perfect sincerity”<sup>90</sup> since any article that invoked such a paternalistic principle would distort the power dynamic of the two parties. More importantly, they emphasized the Indigenous community was incapable of governing their own land and the necessity for a colonial government to maintain order. Similar to the colonial officials’ view in New South Wales half a century previously, the British institution did not perceive Māori as active and civilized agents. Normanby’s strategy to “frankly and unreservedly explain to the natives, or their chiefs, the reasons which should urge them to acquiesce in the proposals” showed that the British would use coercion to convince the Māori chiefs that colonization was the best resolution.<sup>91</sup> The foreshadowing of the external and internal dangers of the absence of British protection would ignite fear among the population, especially considering the ambitions of other colonial powers in the region. British colonial policy would appear to be contradictory on paper, much like the context and language of this instruction appeared to be on the surface. Yet, the fundamental principle never altered: colonization and complete domination at minimal costs to the British.

Although the formal instruction was not issued until August 14<sup>th</sup>, Hobson received a copy of the letter in July. He wrote to the Parliamentary Under-Secretary Henry Labouchere for further guidance on certain aspects of the instructions in early August.<sup>92</sup> Normanby’s follow-up letter on August 15<sup>th</sup> provided supplements on the framework of colonial governance. The additional instructions were listed in nine different points.

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<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> William Hobson, ms, *Hobson to Labouchere* (1839).

Normanby reflected the British attitudes toward various Māori tribes according to geographical factors. The indented treaty-making subjects were the Northern tribes while the South lands can be proclaimed “by treaty, if that be possible, or if not, then in the assertion, on the ground of discovery, of Her Majesty’s sovereign rights over the island.”<sup>93</sup> This diplomatic stance excluded Southern chiefs from treaty negotiations which resulted in a delay in their treaty signing until May 1840. If the purpose of the treaty was to protect Māori tribes, marginalizing Southern tribes who were previously disadvantaged by inequitable trade profits distribution seemed hypocritical. Their exclusion would expedite the negotiation and signing of the treaty, aligning with British interests. Additionally, the pronouncement noted that the Protector of Aborigines would report to Hobson and act as alternatives and supplements to missionaries to support religious needs. Finance-related matters should be determined in cooperation with the Governor and Council of New South Wales. Normanby also voiced his firm objections against establishing a penal colony for its nature as a “short-sighted policy”, its “effect of that measure on the aborigines”, and its obstruction on “the administration of the criminal law in this Kingdom.”<sup>94</sup> The colonial office’s concerns for Māori welfare suggested that certain Indigenous rights might be considered during the treaty-making process, as long as they did not interfere with the broader British interests.

Most notably, Normanby concluded on the potential of employing military forces to ensure diplomatic success. Despite the inability to divert troops from the New South Wales colony, Normanby suggested raising a militia or armed police force to assist the

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<sup>93</sup> Constantine Henry Phipps, ms, Additional Instructions from Lord Normanby to Captain Hobson 15 August 1839 (1839).

<sup>94</sup> Ibid.

process if Hobson deemed it necessary after he arrived in the nation. The final note demonstrated the Crown's determination to incorporate Aotearoa as a colony in the British Empire. If civil negotiations would not result in a treaty that legitimized the British domination of the island, military actions could be enacted as a last resort.

On June 15th, 1839, the British colonial authority made their official claim on Aotearoa by incorporating the island under New South Wales territories. They intended the relationship to terminate after the newly appointed Lieutenant Governor, William Hobson, acquired sovereignty in Aotearoa. Contradictorily, the British authorities also affirmed the 1835 declaration on Māori sovereignty, and one of William Hobson's tasks after arriving at the Bay of Islands on January 29th, 1840, was “[obtaining] land from Māori by fair and equal contracts.”<sup>95</sup> The paradox in colonial policy left room for ambiguity and potential conflicts in understanding and interpreting the nature of the Indigenous-settler relationship. The treaty-making approach had the potential to serve as a mechanism to address and reconcile the tensions arising from disparities between British colonization and Māori sovereignty.

#### *Drafting of Te Titiri o Waitangi*

Despite the absence of a pre-drafted treaty and the lack of dedicated legal experts, the process of formulating the treaty was swift. Over a span of three to four days, Hobson collaborated closely with James Busby and James Freeman, drawing upon their collective expertise and insights, to craft the Treaty of Waitangi. There are four surviving drafts of the English version of the treaty in the following order: the Freeman draft, the unpublished

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<sup>95</sup> Ibid.

Busby draft (discovered in 1933 while the rest were published together by Reverend Henry Hanson Turton in 1877), the published Busby draft, and the Hobson preamble. Freeman, Hobson's secretary, was with him during his visit to New South Wales. Whether he began the drafting process on the voyage back to Aotearoa or once they arrived in the Bay of Islands was up to debate. There was no concrete evidence pointing to either timing.

However, Hobson's intention to visit *Waimate* and *Hokianga* indicated that the process most likely commenced during the journey so that Hobson would have materials to present during those meetings. Due to the harsh weather and Hobson's illness, the visits did not take place so there was no confirmation on whether Hobson would have introduced Freeman's draft treaty on January 31<sup>st</sup>. Moreover, the lack of contribution from local colonial officers suggested that Freeman was the sole writer of the preliminary draft. The structure of this version was similar to the final copy with a preamble and three articles. The preamble echoed the diplomatic sentiments of Hobson's instruction, stating that the Queen was concerned about the circumstances and British settlers in Aotearoa to justify the intervention. With a colonial agenda embedded in the language, the three articles expanded on how the Crown intended to govern Aotearoa. The first article ceded "full Sovereignty of the whole Country" to the Queen; the second article yielded the Queen "the exclusive right" to purchase "waste Lands"; and the third article extended the rights enjoyed by British subjects to Māori.<sup>96</sup>

Busby amended Freeman's draft and submitted his fair copy to Hobson on February 3<sup>rd</sup>. He made minor structural changes by substituting the preamble for a subscription and extending the treaty subjects to all chiefs throughout New Zealand, but the content of

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<sup>96</sup> ms, *Drafts of the Treaty of Waitangi* - Freeman's Draft Sheet (1839).

Busby's two drafts was similar to Freeman's version. The first article ceded "all the rights and Sovereignty which the said Confederation or individual chiefs respectively exercise or possess or may be supposed to exercise possess" to the Queen "absolutely and without reservation".<sup>97</sup> The change in wording affirmed the Crown's intention to assert unconditional authority over Aotearoa, leaving no room for Māori chiefs to retain any inherent rights over their territories. Busby added that tribes and individuals could retain possession of their lands if they desired in the second article. The third article underwent slight grammatical editing but otherwise remained unchanged.

Hobson's draft of the treaty closely reflected his instruction from the previous year. In comparison to the previous three drafts, his wording was more strategic and tailored toward the Māori audiences. He deleted references toward the protection of British settlers and assured the protection of "just Rights and Property" of the Māori.<sup>98</sup> It also drew upon the previous harmonious relationship between the Crown and the tribes during the pre-treaty era, attempting to convince the chiefs to enter into the treaty. The dating of adjustments was subject to debates due to the possibility of missing drafts and uncertainty regarding whether this or another amended preamble was translated on February 4<sup>th</sup>.

The final draft of the treaty was translated by missionary Henry Williams and his son Edward Marsh Williams on February 4<sup>th</sup>. On the subsequent day, as specified in Hobson's invitation to the Māori chiefs to assemble at Waitangi, Hobson formally presented both the English and Māori versions of the treaty to the gathered chiefs. He commenced with a speech, in which he repeatedly referred to the importance of consent and the benefits of signing, stating that "Her Majesty the Queen asks you to sign this treaty,

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<sup>97</sup> ms, *Drafts of the Treaty of Waitangi* - Busby's Draft Fine Copy (1839).

<sup>98</sup> ms, *Drafts of the Treaty of Waitangi* - Hobson's Preamble (1839).

and to give her that power which shall enable her to restrain them”.<sup>99</sup> Then the treaty was read and explained article by article.

According to William Colenso’s recording, fourteen chiefs spoke after Hobson’s remarks on the treaty. They represented two distinct attitudes toward the settlers. Chiefs, like Te Kemara of the Ngati Kawa tribe and Rewa of the Ngati Taweke tribe, voiced their dismay and urged the colonial officials to leave Aotearoa.<sup>100</sup> They were concerned about ownership of their lands, governorship of the tribes, and Māori-Pākehā relationships. For instance, a chief of the Ngaitawake Tribe, Wai, questioned whether the governor would “remedy the selling, the exchanging, the cheating, the lying, the-stealing of the whites?”<sup>101</sup> They believed that the relinquishment of their authority to the colonial officers would only diminish the power and further exacerbate the issues. Their concerns were not shared by other chiefs, like Hoani Heke of the Matarahurahu Tribe and Rawiri of the Ngatitautahi Tribe, who pleaded for the settlers to remain. The chief of the Ngatihao Tribe, Tamati Waka Nene, referred to the governor as “a father, a judge, a peacemaker”.<sup>102</sup> They believed that the treaty would secure the British as an ally and a protector. The final English version mirrored the structure of the initial draft with a preamble and three articles. The language in the preamble conferred Normanby’s August 1839 instruction to Hobson, which outlined the necessity for establishing a civil government under the sovereignty of the Queen. The following three articles were identical in content to Hobson’s final draft. Examining the progression throughout the drafts underscored the persistence of the British paternalistic

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<sup>99</sup> Williams Colenso, “The Authentic and Genuine History of The Signing of The Treaty Of Waitangi,” The Trail Of Waitangi, accessed October 23, 2023, <https://waitangi.com/colenso/colhis1.html>.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

notion. Despite decades of Māori-Pākehā interaction, Britain still justified its expansionist motives by portraying Indigenous communities as incapable of governance. Their cautious and strategic word choice concealed some of its imperial agenda by framing the treaty as beneficial to the Māori. However, a closer contrast between the English and Māori versions of the treaty would expose British hypocrisy.

### *Contention Over Translation*

Historians did not thoroughly examine the development of the treaty texts until the 1970s when Ruth Ross's research identified different versions of the treaty. She contested the validity of the treaty as she believed the English and Māori versions of the treaty differed significantly. Most scholars agreed with her conclusion that the treaty was "hastily and inexpertly drawn up, ambiguous and contradictory in content, chaotic in its execution."<sup>103</sup> Seemingly, this would support the notion that the Treaty of Waitangi was an idealistic improvement on earlier British colonial practices. Tom Bennion and James Rodger Miller examined the similarities in treaty-making between colonial powers and Indigenous communities from a legal lens. They argued that ceding sovereignty for British protection was recurring from Canada to Sierra Leone to the Pacific islands.<sup>104</sup> Opponents of the view, Peter Adams and Claudia Orange, instead argued that the purpose of treaty-making in Aotearoa was to place Māori under a civil government alongside the settlers.<sup>105</sup>

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<sup>103</sup> R. M. Ross, *Te Tiriti o Waitangi* (Wellington: N.Z. Govt. Printer, 1958), 154.

<sup>104</sup> Tom Bennion, *Treaty-Making in the Pacific In the Nineteenth Century and the Treaty of Waitangi*, 1987; 1. J. R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009).

<sup>105</sup> Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830-1847* (Bridget Williams, 2013); Claudia Orange, *The Treaty of Waitangi = Te Tiriti O Waitangi: An Illustrated History* (Wellington: Bridget Williams Books, 2020).

The British, to some extent, honored the spirit of the treaty despite doubts and ambiguities surrounding its interpretation.

The contradictions in the English and *Te Reo Māori* versions of the treaty centered around sovereignty and property. To examine the discrepancies in interpretation, the original translation will be compared with the contemporary translation of the Māori treaty by former Waitangi Tribunal member Professor Sir Hugh Kawharu. This revealed that the British Crown and Māori chiefs held incompatible perceptions about what they had accomplished during the treaty-making process.

In both the preamble and Article One of the 1840 English version, *Kāwanatanga* was translated to “sovereign authority” and “government.”<sup>106</sup> However, the contemporary translation of *Kāwanatanga* is government. It derived from *kāwana* (governor) which was invented in the Māori language because they lacked an accurate term for the British administrators. Although Kawharu translated it as government, it has commonly been understood as governorship and governance.<sup>107</sup> Additionally, Busby, who was involved in the drafting of the Declaration of the Independence of New Zealand, employed *Kāwanatanga* as governorship, *Kīngitanga* as sovereignty, and *mana* as power in 1835. Hence, there was a precedent of differentiating governorship and sovereignty. The usage of the term in the 1840 treaty did not seem to convey to the Māori chiefs the concept of sovereignty. While the Māori and Pākehā’s understanding of sovereignty and system of governance did not align, it was evident, however, the chief did not interpret the clauses as a ceding of *Kīngitanga* (sovereignty) and *mana* (power).

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<sup>106</sup> ms, *The Treaty of Waitangi* (1840); ms, *Te Titiri o Waitangi* (1840).

<sup>107</sup> Paul Meredith and Rawinia Higgins, “Kāwanatanga – Māori Engagement With The State,” *Te Ara: The Encyclopedia of New Zealand*, accessed November 22, 2023, <http://www.TeAra.govt.nz/en/kawanatanga-maori-engagement-with-the-state/print>.



Contemporary Māori translation of Article Two further exemplified the differentiating views over authority and governance in the post-treaty era. Kawharu interpreted the clause as a guarantee of British protection, recognition of Indigenous property rights, and ratification for agents to act on behalf of the queen to purchase land at an agreed-upon price. Rangatiratanga originated from the Māori word for chief, *rangatira*, and the suffix of -tanga transferred the word into an adjective, describing the characteristic of chieftainship while *тино* has the connotation of “quintessential”.<sup>108</sup> *Te тино rangatiratanga* was used to signify that the extension of protection and governorship should only occur during the unqualified exercise of the highest chieftainship. This indicated that the Crown would not intervene and intended to grant the Māori “complete control according to their customs.”<sup>109</sup>

However, the original translation overlooked *te тино rangatiratanga* and primarily focused on the property rights of the Crown. Yielding “the exclusive right of preemption over such lands” to the Queen, the Article fulfilled Normanby’s instruction.<sup>110</sup> The choice to employ exclusive rights of “preemption” rather than “purchases” (Normanby’s exact wording) was perplexing. Since the legal meanings of the two words differed, Hobson or Freeman might have been intentional with the choice, despite successive colonial officials treating them as synonymous.

Moreover, the chiefs interpreted this clause as a guarantee of rights beyond land and resources. The contemporary translation confirmed chieftainship over “land, villages,

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<sup>108</sup> Michael Belgrave, Merata Kawharu, and David V. Williams, *Waitangi Revisited: Perspectives On The Treaty Of Waitangi* (Auckland: Oxford University Press, 2004).

<sup>109</sup> Bruce Biggs, “Humpty-Dumpty and the Treaty of Waitangi,” essay, in *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, ed. Ian Hugh Kāwharu (Auckland: Oxford University Press, 1989), 300–311.

<sup>110</sup> ms, *The Treaty of Waitangi* (1840); R. M. Ross, *Te Tiriti o Waitangi* (Wellington: N.Z. Govt. Printer, 1958), 143.

and treasures” while the original only included rights and possessions over “Lands and Estates Forests Fisheries and other properties.”<sup>111</sup> Differences between the two versions were due to the incorporation of *taonga* which means treasure. The symbolic and legal notion of *taonga* referred to all material and non-material tribal ownership, including “heirlooms, *wahi tapu* (sacred places), ancestral lore, and *whakapapa* (genealogies).<sup>112</sup> Through retaining physical, social, and cultural aspects of properties and possessions, the modern translation recognized a broader range of rights. Undeniably, this indicated that Māori chieftainship encompassed the continual governing of their lands, considering that in customary law, the rights and authority to land were ingrained in the land itself.

One of the reasons behind the change in the property rights clause was due to a failed treaty. George Gipps’s 1839 unsigned draft proclamations explicitly stated that the Indigenous population would surrender the rights to “sell” or “alienate” lands to entities other than the Queen.<sup>113</sup> Although Gipps did not supply Hobson with a copy of the draft, it was likely that he communicated this concern in person when Hobson visited Sydney. If so, the vagueness in Article Two can be perceived as calculated. Since chiefs, like Tuhawaiki, refused to sign the treaty with the aforementioned terms, the colonial officers in Aotearoa probably anticipated rejection of the treaty if the Māori perceived it as a ceding of transfer rights. Hence, the real intention was concealed under the inherently vague phrase “exclusive right of preemption.” A missionary witness of the Waitangi meeting, Colenso, writing to the Church Missionary Society, conveyed that the Māori chiefs were

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<sup>111</sup> Bruce Biggs, “Humpty-Dumpty and the Treaty of Waitangi,” essay, in *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, ed. Ian Hugh Kāwharu (Auckland: Oxford University Press, 1989), 300–311; ms, *The Treaty of Waitangi* (1840).

<sup>112</sup> Ms, *Te Titiri o Waitangi* (1840).

<sup>113</sup> Edward Sweetman, *The Unsigned New Zealand Treaty: A Publication for the New Zealand Centenary 1840-1940*(Christchurch: Kiwi Publishers, 2005).

unaware that they restricted the sales and transactions of their lands to the discretions of the Crown. He noted that in the post-treaty era, there was at least one known attempt at land sales in accordance with the Māori understanding of their rights.<sup>114</sup> In 1843, two Māori groups, Te Kawau, Tinana, and others of Ngatiwhatua and Te Wherowhero Kati and others of Waikato, addressed the new governor, Robert FitzRoy, regarding the colonial office's enjoinder on land sale to non-government subjects.<sup>115</sup> Their letters confirmed that their interpretation of *Te Tiriti o Waitangi* granted the Queen the first offer. However, "in the event of Her Majesty not being able to bargain with us, we should then be able to bargain with any other Europeans."<sup>116</sup> The original English translation overlooked the latter part of the Māori understanding and strictly limited the direct purchases of lands at the settler's will. The discrepancies in understanding over land rights between colonial authorities and Māori chiefs foreshadowed future tensions and conflicts over land acquisitions and dispossession.

One of the unwritten consequences of the original English translation of Article Two was that it undermined, or even to some extent nullified, Article Three. The rights and privileges enjoyed by British citizens were not extended to Māori individuals. For instance, whereas Chapter 39 of the Magna Carta provided that no free man should be seized or dispossessed of his property,<sup>117</sup> Article two contravened the legal principle by transferring partial, and later on full, property rights to the British without the consent of the Māori. In FitzRoy's correspondence with Lord Stanley in October 1844, he stated that the Indigenous communities felt the inability to sell their lands rendered them as "no better than slaves

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<sup>114</sup> R. M. Ross, *Te Tiriti o Waitangi* (Wellington: N.Z. Govt. Printer, 1958), 145.

<sup>115</sup> R. M. Ross, *Te Tiriti o Waitangi* (Wellington: N.Z. Govt. Printer, 1958), 146.

<sup>116</sup> G. Clarke, "True Copy," *Southern Cross*, December 30, 1843.

<sup>117</sup> John King of England and Stephen Langton, ms, *Magna Carta* (1215).

(*taurekareka*) taken in war” as part of the occupation by “conquerors”.<sup>118</sup> Grievances arose from British hypocrisy. They applied Article Three to their interests by considering Māori as British citizens for the purpose of subjecting them to colonial governance under British common law. Yet, the government failed to uphold the rights to self-governance and property because it would undermine colonial authority in Aotearoa. To the Māori, *tikanga* meant protection over their traditional practices and customs. At the time, they lacked an understanding of *tikanga* in the British framework, which encompassed rights and obligations. The inconsistency in the application of the treaty clauses reflected the differing interpretations among the two signatory parties, highlighting the imbalance between the fulfillment of Indigenous and settler agendas during the process.

#### *The Aftermath of Treaty-Making*

Initially, Hobson planned the signing for February 7<sup>th</sup>. External pressure from the French and trust toward advice from The Church Mission Society convinced the Māori chiefs to move up the signing date. On the afternoon of February 6<sup>th</sup>, 1840, the signing of the Treaty of Waitangi commenced. Only the Māori version (*Te Tiriti o Waitangi*) was signed. On the same ground where the 1835 Declaration of the Independence of New Zealand was announced, Hobson and approximately forty-three chiefs signed the document that symbolized the transfer of sovereignty from the Māori to the Crown. Although the majority of the chiefs represented were from the Bay of Plenty, Hobson recognized the February 6<sup>th</sup> version as the de facto treaty with a majority signing of the

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<sup>118</sup> Henry Hanson Turton, ms, *Copy of A Despatch From Governor Fitzroy To Lord Stanley*, (1844).

treaty and subsequent signatures in the following months as further confirmation and ratification.

The exact signing date of the official English treaty was not documented but it was signed after February 6<sup>th</sup>, 1840. On May 21<sup>st</sup> of the same year, Hobson announced in the Sovereignty Proclamation for New Zealand that the Northern and Southern Islands had “ceded” “Sovereignty to Her Majesty.”<sup>119</sup> This reaffirmed British colonial intention from the Crown's perspective and its unchallenged sovereignty over Aotearoa. In comparison to New South Wales, Aotearoa was never subjected to the notion of *terra nullius*. When planning settlement, the British parliament treated the nation like previous or potential colonies by attempting to negotiate with the native inhabitants for land purchases. The reasons behind the differences can be attributed to competing colonial interests in the region, perception developed during Cook's First Pacific Expedition, and the pre-treaty Indigenous-settler relationship. Friendly conversations between the British navigators and Māori tribes differentiated them from complete “savages” and characterized them as communities that required British assistance to achieve full “civilization” and development.

Despite being treated differently from Aborigines, Māori were unable to establish themselves as equals to the British as the latter group had always indulged in settler and expansionist agenda. The colonial office maneuvered the British objective to colonize Aotearoa through the diplomatic and legal mechanism of treaty-making since the appointment of Hobson. Beyond the political formality, the treaty can also be perceived as an amiable gesture to ensure that the Māori maintained a sense of goodwill in the evolving colonial landscape. The British disguised their ambition under a document of partnership

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<sup>119</sup> Sovereignty proclamation for New Zealand by William Hobson, on behalf of Her Majesty Queen Victoria, 1840. Alexander Turnbull Library (1/2-081956-F).

and mutual benefits, but they were the sole benefactor in acquiring sovereignty over Aotearoa without any financial or military ramifications.

At the time of the signing, most chiefs did not view it as a surrender of sovereignty and the commencement of British colonial rule. A Northern chief from the Te Rarawa iwi, Nōpera Panakareao, best summarized the Māori's understanding of treaty: "*Ko te atarau o te whenua i riro i a te kuini, ko te tinana o te whenua i waiho ki ngā Māori*" (*the shadow of the land will go to the Queen [of England], but the substance of the land will remain with us*).<sup>120</sup> The Māori thought they would retain full rights over their ancestral lands while the British had the rights to govern their nation, severing more of a protectory role. In reality, the substance of the land never remained with the Māori. This disconnection in treaty understanding and expectations between the Indigenous and the British would fuel ongoing tension over the next decades and an ongoing legacy of grievances that continue to be addressed in Aotearoa's modern history.

The initial settler colonial process in New South Wales and Aotearoa differed regarding the diplomatic procedure and treatment of the Indigenous population. Building upon the initial encounter, the Māori and the British established an amiable pre-treaty relationship. Although the interaction centered around commerce and geopolitical interests, Britain seemed to recognize the independence of Aotearoa. This acknowledgement resulted in the inapplicability of the principle of *terra nullius* in Aotearoa, prompting the British to explore alternative colonial approach. Over the decade, increasing threats from French expansion in the Pacific drove Māori and the British to formalize their alliance through a treaty. Considering some British recognition of Māori independence between the first

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<sup>120</sup> Claudia Orange, *The Treaty of Waitangi = Te Tiriti O Waitangi: An Illustrated History* (Wellington: Bridget Williams Books, 2020), 83.

counter and the 1830s, the revival of treaty-making could establish a colony that promoted Māori sovereignty and fostered a more equal Indigenous-settler relationship. However, the triumph of British hypocrisy seemingly ensured that the presence of treaty-making would not guarantee tribal authority or a legal basis for governance. Treaty of Waitangi consolidated British control over its new Pacific colony, while the promise of *Te Titiri o Waitangi* remained unfulfilled during the colonial era. The disparities in colonial establishment strategies in New South Wales and Aotearoa, in turn, resulted in similar impairment upon Aborigines and Māori sovereignty. At the core of British empire-building was still land occupation and the subjugation of Indigenous rights.

### Chapter 3: Legacy of the Colonial Era—Indigenous Sovereignty, Land Rights, and Application of the Treaty

On September 14<sup>th</sup>, 1975, *hīkoi* (stepping out) protesters embarked on a six hundred miles march from Te Hāpua, Northland to Wellington. One month later on October 13<sup>th</sup>, over five thousand Māori and Pākehā marchers gathered in front of the Parliament to protest Indigenous land dispossessions.



*Participants in the Māori Land March crossing Auckland Harbour Bridge, September 23<sup>rd</sup>, 1975, Waitematā Harbour. Alexander Turnbull Library.*

The movement was organized by Te Roopu Ote Matakite (The Māori Land Rights Group), which was led by seventy-nine-year-old Dame Whina Cooper. Their petition characterized the event as “a climax to over a hundred and fifty years of frustration and anger over the continuing alienation of their lands.”<sup>121</sup> Demands for abolishing monocultural laws over Māori lands and drafting of new laws regarding communal

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<sup>121</sup> Whina Cooper, *Māori Land March 1975 - Petition Sheet* (Archive New Zealand, 1975).



ownership mark the beginning of decolonization and embrace of biculturalism in Aotearoa. Almost half a century later, the sentiment still resonates. This chapter traces Indigenous policies in New South Wales and Aotearoa New Zealand after the establishment of the colonies. Recognizing the atrocities and progress in the past two centuries, it examines how the two nations' pasts contributed to contemporary public policy and the effectiveness of reconciliation.<sup>122</sup>

### *Imperial Land Strategies: From Titles to Sovereignty*

Despite the different acquisition approaches of the two colonies, the Indigenous population experienced land dispossessions in both settlements. This was because the fundamental principle behind colonialism was land occupation and settlers implemented legislation to secure their control over land. Accordingly, colonial authorities enacted strategies to acquire native lands in New South Wales and Aotearoa. Both the Aboriginals and Māori resisted colonial encroachment. Yet, the latter group successfully secured land titles and political rights under colonial governance while the Aboriginal land rights remained unrecognized until the late twentieth century. The following section will argue that the absence and presence of a treaty influenced land policy and Indigenous sovereignty.

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<sup>122</sup> It should be acknowledged that the scopes of legislations and movements concerning Indigenous rights in the past two centuries in both Australia and Aotearoa are numerous and this chapter focuses on the land and reconciliation policies. For more on Australian Aboriginal policies, please refer to 1. Peter Sutton, "The Politics of Suffering: Indigenous Policy in Australia Since the 1970s," *Anthropological Forum* 11, no. 2 (2001): 125–73, <https://doi.org/10.1080/00664670125674>; 1. Janet Hunt et al., *Contested Governance: Culture, Power and Institutions in Indigenous Australia* (Canberra: Centre for Aboriginal Economic Policy Research, ANU, 2008); and 1. Elizabeth Strakosch, "The Technical Is Political: Settler Colonialism and the Australian Indigenous Policy System," *Australian Journal of Political Science* 54, no. 1 (2018): 114–30, <https://doi.org/10.1080/10361146.2018.1555230>. For more on Aotearoa Māori policy, please refer to 1. *Ko Aotearoa Tenei a Report Into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity* (Wellington, 2011); 1. Richard S. Hill, *Māori and the State: Crown-Māori Relations in New Zealand/Aotearoa, 1950-2000* (Wellington: Victoria University of Wellington Library, 2015); and 1. Julia de Bres, "Promoting the Māori Language to Non-Māori: Evaluating the New Zealand Government's Approach," *Language Policy* 10, no. 4 (2011): 361–76, <https://doi.org/10.1007/s10993-011-9214-7>.

In New South Wales, British settlers claimed their entitlement through land grants according to the Crown's 1787 instruction. The status of the settlers determined the allocation with military officers, convicts, and other settlers receiving lands that ranged from ten to one hundred and thirty acres.<sup>123</sup> The practice continued in the following decades to encourage migration to the settlement. For the Aboriginal tribes, the issuing of the land grants marked the commencement of their centuries of land struggles. Under Governor Lachlan Macquarie, the colonizers gradually commenced westward settlement in 1825.<sup>124</sup> As a strategic move to maintain Indigenous-settler harmony, Macquarie limited the settlement to one hundred and fourteen colonizers in a five-year period. This approach seemed to acknowledge that Aborigines were inhabitants of the lands and would be displeased if their territories became overcrowded. Yet, it by no means constituted a legitimate recognition of native land titles. The colonial officers neither issued deeds to acknowledge their entitlement nor compensation for the Aboriginals' dispossessions. Consequently, there was no resolution to the Wiradjuri tribes' displacement as settler expanded their presence. This was challenging because one Wiradjuri nation would remain landless as they recognized that the territory was "their country and the water belonged to them, and if was taken away they could not go to another country, for they would be killed."<sup>125</sup> Contradictory to British settlers' beliefs of *terra nullius*, the Aboriginal communities were occupiers of the lands as evidenced by the clear divisions of territories among the Wiradjuri nations. The lack of legal recognition of native entitlements prompted the free distribution of their lands among colonists.

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<sup>123</sup> Courtesy British Public Records Office, ts, *Draught Instructions For Governor Phillip*. (1787).

<sup>124</sup> Josephine Flood, *The Original Australians: Story of the Aboriginal People* (Sydney; Melbourne; Auckland; London: Allen et Unwin, 2019), 98.

<sup>125</sup> *British Parliamentary Papers*, vol. XXXIV (1844), 282.

The westward expansion escalated after Macquarie's resignation in 1821 with encouragement from the British Colonial Office. Tension heightened as droughts and food shortages further threatened the survival of the displaced Aborigines. Between 1822 and 1824, British settlers employed military raids to counter the Wiradjuri people's defense of their lands.<sup>126</sup> Increasing violence and murder in the region alarmed the colonial officials in Sydney and London. To address the pressing concerns, King George IV appointed Ralph Darling, a general with extensive military expertise. In the Crown's 1825 instruction, the King ordered the governor to protect Aborigines "in person and in the free enjoyment of their possessions", preserve them from violence and injustice, convert them to the Christian faith, and advance the educational measure to "civilize" the communities.<sup>127</sup> The order echoed British humanitarian sentiments that gained more prominence in the 1830s after the end of the slave trade. However, Darling's administration placed more emphasis on Christianization and "civilization" as part of the instruction than on protection and securing justice. While the institution failed to prevent disputes over territories, it continued to disguise its colonial policy under a humanitarian agenda.

Following the appointment of the new Secretary of State for the Colonies, Lord Glenelg, humanitarian influence on colonial affairs reached a new height. In an 1834 address to the King, Thomas Buxton read the following motion, which was later circulated to the colonial Governor Richard Bourke:

"[T]hat an humble Address be presented to His Majesty...deeply impressed with the duty of acting upon the principles of justice and humanity in the intercourse and relations of this Country with the native inhabitants of its Colonial Settlements, of affording the protection in the enjoyment of their

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<sup>126</sup> Josephine Flood. "The original Australians: The story of the aboriginal people." (*No Title*) (2006), 99-100.

<sup>127</sup> *Historical Records of Australia*, vol. XII (Canberra: W.G. Murray, Govt. Printer, Commonwealth of Australia, 1971), 107-125.

civil rights, and of imparting to them that degree of civilization and that religion with which Providence has blessed this Nation, and humbly pray that His Majesty's Colonies, Settlements and Plantations, shall secure to the natives the due observance of justice, and the protection of their rights, promote the spread of civilization amongst them, and lead them to the peaceful and voluntary reception of the Christian religion.”<sup>128</sup>

The language of the motion exemplified paternalistic and European superiority while suggesting that the colonial government should implement policies to advance Indigenous rights. Unfortunately, violence towards Aborigines and governmental statements disregarding native entitlements to lands demonstrated the motion was another instance of British hypocrisy.

The colony's frontier relentlessly shifted westward during the decade of 1830-1840. Armed Aboriginal resistance and colonizers confronted each other on the frontiers, resulting in unimaginable casualties for the Indigenous population. Contemporary estimation suggested that over twenty thousand Aborigines were slaughtered on the frontier between 1788 and 1928 across the entire continent.<sup>129</sup> They suffered a disproportional death rate of 10:1. Some historians, like Richard Broome, concluded that instead of tribal resistance against intruders, the violence on the frontiers was a result of “whites [slaughtering] Aborigines indiscriminately.”<sup>130</sup> Their analysis was based on statistical evidence from the colonial state of Victoria, which suffered an Aborigine-settler loss ratio of 12.5:1. Despite the more disparate statistical evidence, a similar conclusion can be

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<sup>128</sup> Henry Reynolds and Jamie Dalziel, “Aborigines and Pastoral Leases-Imperial and Colonial Policy 1826-1855,” *UNSW Law Journal* 19 (1996), 323.

<sup>129</sup> Henry Reynolds, *The Other Side of the Frontier; Aboriginal Resistance to European Invasion of Australia* (University of New South Wales Press, 2006), 121-125.

<sup>130</sup> Richard Broome, “Aboriginal Victims and Voyagers, Confronting Frontier Myths,” *Journal of Australian Studies* 18, no. 42 (1994): 70–77, <https://doi.org/10.1080/14443059409387188>.

reached regarding the colonial government's failure to fulfill the goals outlined in the 1834 address to the King.

In 1835, Governor Bourke issued a proclamation reaffirming the principle of *terra nullius* as a response to colonizers who engaged in treaty-making to obtain territories from natives on Van Diemen's Land (Tasmania). In a brief statement, Bourke delegitimized any "treaty, bargain, and contract" negotiated between the Aborigines and settlers on the ground that New South Wales was unoccupied before the British Crown acquired possession of it.<sup>131</sup> Despite the proclamation rejected the notion of Aboriginal land rights, this was the only direct mention of Indigenous land ownership in a New South Wales colonial document since the establishment of the colony. Once again, native inhabitants' entitlement to their lands was overlooked and the British claim on the land was reinforced with a consistent principle. One year later, *R v. Murrell* (1836) established that *terra nullius* was the foundation for common law in the colony. The Supreme Court case overturned the precedent in *R v Ballard or Barrett* (1829), which did not subject Aboriginal peoples to British common law. In *Murrell's* opinion, Judge Burton stated that "the English nation has obtained and exercised for many years the rights of Domain and Empire over the country thus possessed and it is particularly designated by an Act of the Imperial Parliament."<sup>132</sup> He then concluded that Aborigines would be amended to British law and that there were no legally recognizable native laws.<sup>133</sup> Essentially, Aborigines were regarded as British subjects when it benefited the colonial government's management yet they were not entitled to equal rights enjoyed by other citizenry. The denial of land acknowledgement

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<sup>131</sup> Richard Bourke, ms, *Governor Bourke's Proclamation* (1835).

<sup>132</sup> Forbes CJ, Dowling, and Burton JJ, "Miscellaneous Correspondence Relating to Aborigines, State Records of NSW" (Decisions of the Superior Courts of NSW 1788-1899, April 11, 1836).

<sup>133</sup> *Ibid.*

consequently alienated Aborigines from any form of territorial sovereignty. Not only were they not allowed to abide by their customary laws before the ruling of *R v. Murrell* (1836), but their voting rights were also restricted when the legislation placed a property requirement since Aboriginal male subjects were the only group not entitled to the land grants.

As a result of the legal principle of *terra nullius* and the lack of treaty-making, the Aborigines were deprived of foundational justification to secure their land rights and sovereignty. They experienced violence, displacement, alienation, and disenfranchisement under the colonial governance. The question of Indigenous land title was not resolved until the passage of the 1976 Aboriginal Land Rights Act, which allowed Aborigines to claim rights to their ancestral lands. Although this was a substantial step toward reconciliation in land rights and Indigenous sovereignty, historians have criticized the act for being premised on the assumption that “the Crown holds underlying title to all lands and resources in the Australian continent.”<sup>134</sup> Such concern highlights the questionable mechanism by which the act of proof falls upon the Aborigines. As the native inhabitants of the nation, the Aborigines should not be constrained in a Eurocentric framework to reclaim their sovereignty and lands. Hence, the journey to correct the past injustices concerning lands in New South Wales demands ongoing efforts.

In comparison to the New South Wales colony, the New Zealand colony recognized Māori land titles under specific circumstances. Following the signing of the treaty, Hobson declared sovereignty in May, building up to the establishment of the colony in November:

“I, William Hobson, Lieutenant-Governor of New Zealand, in the name and on the behalf of Her Majesty, do hereby proclaim and declare to all men

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<sup>134</sup> Angela Pratt, “Treaties vs. Terra Nullius: Reconciliation, Treaty-Making and Indigenous Sovereignty in Australia and Canada,” *Indigenous Law Journal* 3 (2004), 57-58.

that, from and after the date of the above-mentioned Treaty, the full sovereignty of the Northern Island of New Zealand vests in Her Majesty Queen Victoria, her heirs and successors, for ever.”<sup>135</sup>

Beyond securing sovereignty over the nation, the British Empire gained the rights of pre-emption, which restricted the selling of native lands to the Crown and its representatives. The signing of the treaty recognized Māori land titles and suggested the land could only be acquired through purchasing. The justification for the British Crown’s exclusive rights was that it would presuppose the position of a mediator to protect Māori interests against hostile buyers. However, colonial officers in Aotearoa lacked the resources to facilitate land deals, resulting in discontent among both Māori sellers and Pākehā buyers.<sup>136</sup> Governor FitzRoy responded by waiving the pre-emption clause in the treaty and granting direct land sales between individuals in 1844.<sup>137</sup> The colonial government also overlooked other aspects of the treaty, allowing settlers to occupy lands that had ambiguous ownership. The ineffective regulations combined with growing objections against British rulings induced conflicts. From 1843 to 1872, a series of conflicts, later known as the New Zealand War, embarked.<sup>138</sup> The newly introduced parliamentary system in the 1850s and governmental acts in response to the conflicts shaped the land policies for the next decades.

Similar to New South Wales’s oblique disenfranchisement strategy, the New Zealand parliament restricted voting to male property owners over the age of twenty-one. As most Māori possessed communal land ownership, they were prohibited from practicing

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<sup>135</sup> William Hobson, “Proclamation of Sovereignty over the North Island 1840,” August 21, 2017.

<sup>136</sup> Claudia Orange, *The Treaty of Waitangi = Te Tiriti O Waitangi: An Illustrated History* (Wellington: Bridget Williams Books, 2020), 86.

<sup>137</sup> Claudia Orange, *The Treaty of Waitangi = Te Tiriti O Waitangi: An Illustrated History* (Wellington: Bridget Williams Books, 2020), 502.

<sup>138</sup> As the New Zealand War is not the main concern of the chapter, refer to James Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland: Auckland University Press, 2015); and Brian James Dalton, *War and Politics in New Zealand 1855-1870*, 1967 for more.

in the political sphere. However, colonial officials were still concerned about their demographic presence as they constituted over fifty-six percent of the population in the 1850s. To limit their political influence and advance the settler agenda, the General Assembly required Māori to possess property that was first alienated by the Crown and then purchased back.<sup>139</sup> The existence of the Crown grant during a time of political and social unrest symbolized their loyalty to the Aotearoa colonial institution and hence decreased the possibility of the voters seeking reforms. Seemingly, Māori were marginalized in a political system because the former party, the Queen, and her colonial representative, with whom entered into a treaty were no longer in power. Facing often unsympathetic politicians, the Māori tribes navigated how to increase their influence on native affairs.

An opportunity was presented when an open war erupted in Taranaki. For a smoother truce negotiation, Māori representation was proposed but rejected by a narrow margin in 1862.<sup>140</sup> The attempt prompted several Māori chiefs to form an alliance with Members of Parliament. For the next five years, they advocated for equal citizenship and representation. After another failed proposal of an 1865 Māori Provinces Bill, the Indigenous population finally secured political citizenship through the 1867 Māori Representation Bill. All Māori men over twenty-one, regardless of property ownership, were eligible voters in one of the four electorates.<sup>141</sup> The four seats in parliament were a

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<sup>139</sup> Keith Sinclair, *Kinds of Peace Maori People After the Wars, 1870-85* (Auckland University Press, 2013), 86.

<sup>140</sup> Shurlee Swain et al., *Equal Subjects, Unequal Rights: Indigenous People in British Settler Colonies, 1830-1910* (Manchester University Press, 2003), 79.

<sup>141</sup> Shurlee Swain et al., *Equal Subjects, Unequal Rights: Indigenous People in British Settler Colonies, 1830-1910* (Manchester University Press, 2003), 80.



compromise and Pākehā politicians expected the special representation to be temporary.<sup>142</sup> The arrangement was later extended in 1876 into permanent seats in parliament.

Māori Members of Parliament were radical in the British Empire for granting direct representation to the Indigenous subjects and lifting the property requirement. The passage of the bill could be partially attributed to the constitutional obligations associated with the Treaty of Waitangi. However, the four Māori seats were insufficient in guaranteeing equal political and legal treatment was not the resolution to all the challenges the native inhabitants faced in the colony. It was a starting point for correcting the Indigenous-settler imbalance power dynamic and more sustainable adjustments were necessary to advance toward equality on an institutional level.

While the land disputes resulted in gaining direct representation, they also resulted in legislation that undermined Indigenous land rights. The New Zealand Settlements Act of 1863 allowed for the confiscation of native lands if owners were suspected of rebellious acts during the New Zealand War and for the Governor to acquire Māori lands for the purpose of settlement.<sup>143</sup> Both clauses of the act encouraged colonization at the expense of honoring the spirit of the treaty. Moreover, the government established the Native Land Court as a mechanism to oversee land transactions and titles. For the Māori, the court symbolized detribalization by “[encouraging] the extinction of such [native] proprietary customs”.<sup>144</sup> With land titles being limited to a maximum of ten names, communal ownership diminished. The act promoted greater convivence for the Crown and settlers to purchase

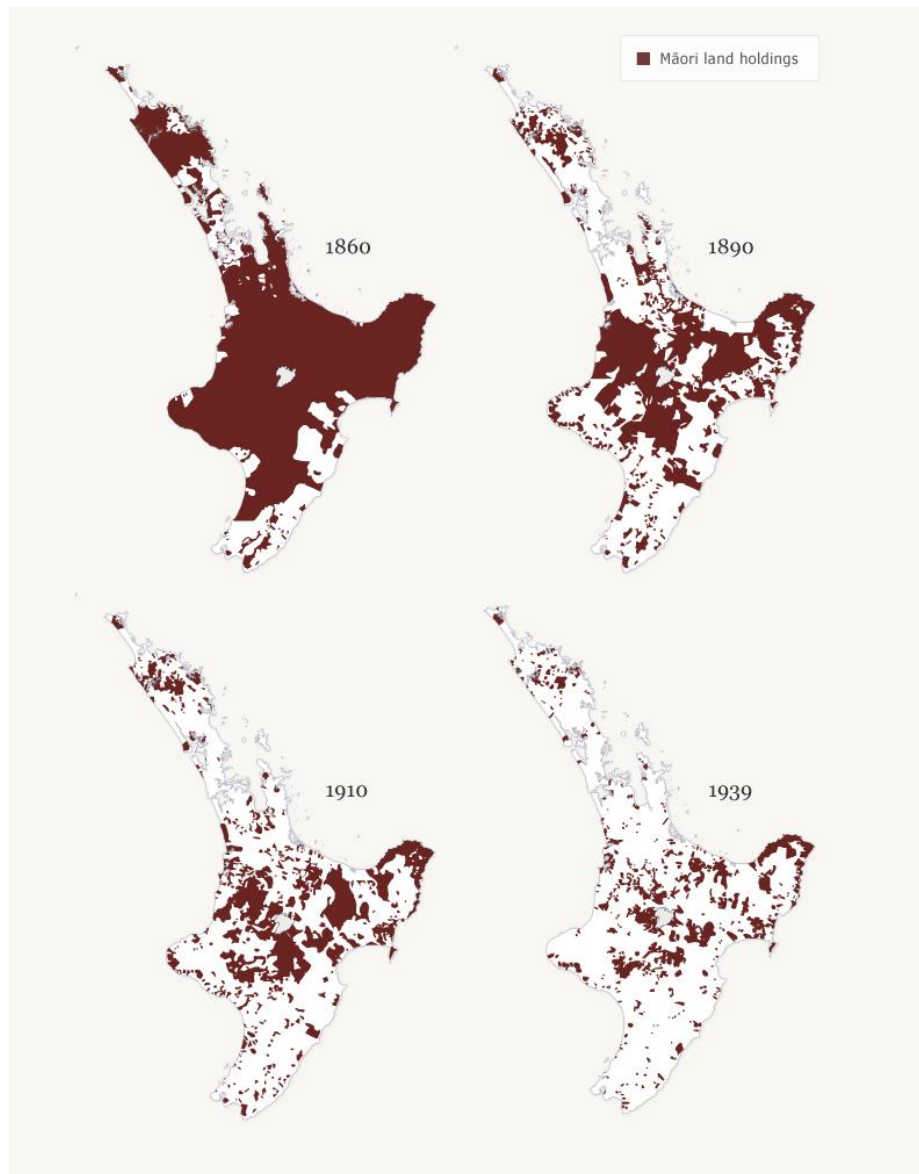
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<sup>142</sup> ms, *New Zealand Settlements Act* (1863).

<sup>143</sup> “Maori Representation Act 1867,” n.d., accessed October 9, 2023.

<sup>144</sup> Alexander Mackay, *A Compendium of Official Documents Relative to Native Affairs in the South Island* (Wellington: The Government of New Zealand, 1872), 364.

lands but alienated Māori from their custom and ancestral land. Consequently, since the 1860s, Māori began losing lands at a disturbing rate from confiscation and purchase.



*Māori land holdings throughout 1860-1939*<sup>145</sup>

As demonstrated by the above graph, land ownership decreased from 80 percent (23.2 million acres) to 40 percent in 1890.<sup>146</sup> The government confiscated over 4 million acres

<sup>145</sup> Ibid.

<sup>146</sup> Claudia Orange, *The Treaty of Waitangi = Te Tiriti O Waitangi: An Illustrated History* (Wellington: Bridget Williams Books, 2020), 318-319.

of land while the Native Land Court induced 8 million acres of land transactions.<sup>147</sup> In 1939, Māori held around 9 percent of the North Island. Visualizing the impacts of land policies on native land ownership throughout the process of colonial settlement conveys that British colonial governance successfully achieved its pre-treaty objectives of acquiring settlement with minimal costs.

Post-1840 colonial land policies subjugated Indigenous connections to ancestral lands, yet the Māori tribes resisted land dispossessions. Their efforts were successful to some extent and the Treaty of Waitangi (*Te Tiriti o Waitangi*) contributed to the legitimacy of their justification. Contemporary legislation, like the 1993 Te Ture Whenua Māori Act, contributed to reconciling Māori with their alienated land. The Aotearoa government also reformed policies governing Māori representation. Like New South Wales, reconciliation efforts in Aotearoa are ongoing. The notable difference is the treaty has been addressed during the process. Legislatures and judges would refer back to the content and spirit of the treaty and honor its spirit like politicians did when they implemented legislation in favor of Māori interests in the nineteenth century. Through examining the two colonies' historical land policy, it was evident that treaty-making served as a justification to promote Indigenous interests in some instances. However, colonial governance undermined Indigenous land rights and sovereignty in general cases. Yet, observable differences in the treatment of native inhabitants in the two colonies foreshadowed the relative progress and success of reclaiming Indigenous heritage and promoting biculturalism in contemporary society.

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<sup>147</sup> Ibid.

*Reconciliation: From The Council for Aboriginal Reconciliation to the Waitangi Tribunal*

Undeniably, the Indigenous population in both nations suffered from land dispossession and sovereignty subjugation. Both governments have initiated policies to address the past and ongoing impacts of colonialism. New South Wales commenced its reconciliation process in the 1990s while Aotearoa commenced in the 1970s following the protest.<sup>148</sup> Many factors could account for the discrepancy, ranging from governmental structure to the extent of grassroots protests to colonial history. This section will examine how the absence and presence of treaty-making influenced the reconciliation approaches in post-colonial society.

In 1991, the Commonwealth Parliament established a statutory body, CAR, under The Council for Aboriginal Reconciliation Act of 1991. Consisting of twenty-five members from the Aboriginal, Torres Strait Islander, and wider Australian communities, the council was tasked to advance the reconciliation of marginalized groups:

“This process is based on an appreciation of indigenous cultures and achievements and of the unique position of Aboriginal and Torres Strait Islander peoples as the indigenous peoples of Australia. The means employed in the process include the fostering of an ongoing national commitment to cooperate to address Aboriginal and Torres Strait Islander disadvantage.”<sup>149</sup>

The Bill recognized the disparities Aboriginal peoples encountered in employment, housing, education, and communication. However, neither land, reparations, nor settlements were mentioned throughout the legislation. While many factors could have

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<sup>148</sup> In this section, most of the examined policy are enacted on the federal level. Hence, analysis will focus on national policy, but this is not to undermine the focus on the state throughout the historical analysis.

<sup>149</sup> Council for Aboriginal Reconciliation, accessed December 1, 2023, [http://www5.austlii.edu.au/au/orgs/car/council/sp198\\_20/council.htm#:~:text=The%20Council%20for%20Aboriginal%20Reconciliation%20was%20established%20by%20the%20Commonwealth,Islander%20and%20wider%20Australian%20communities.](http://www5.austlii.edu.au/au/orgs/car/council/sp198_20/council.htm#:~:text=The%20Council%20for%20Aboriginal%20Reconciliation%20was%20established%20by%20the%20Commonwealth,Islander%20and%20wider%20Australian%20communities.)

resulted in the Council's selection of areas of focus. For instance, welfare and improvement of the immediate standard of living could have taken priority over other political and socio-economic interests. Nevertheless, the question of how the Indigenous population can achieve reconciliation after the Lost Generations persisted. Addressing the question of how the Indigenous population can achieve reconciliation after the Lost Generations requires confronting the root causes of historical injustices and generational trauma. Over the span of a decade, the Council's progress revolved around identifying problems at national, regional, and local levels.<sup>150</sup> Additionally, there was an increase in public support for reconciliation strategies. The Council did not achieve concrete commitments for policy reforms, financial compensations, or tangible action plans for the Aboriginal communities. Seemingly, the project was ineffective in correcting past wrongs. One of the reasons could be attributed to a lack of legal recognition tracing back to the British settler colonial era. The absence of treaty-making left the Aboriginal communities in a vulnerable position. Their sovereignty was not recognized in the Australian Constitution.

Comparatively, the treaty-making process in Aotearoa has been increasingly recognized as the foundation for the uncodified New Zealand constitution. In 1975, the Treaty of Waitangi Act established the Waitangi Tribunal to address claims that arose due to the language differences in the Māori and English versions of the treaty. The tribunal would make recommendations on whether certain practice is consistent with the treaty's principle, addressing questions that:

“(a) concerning Maori custom or usage; and

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<sup>150</sup> *Reconciliation, Australia's Challenge: Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament* (Canberra: Commonwealth of Australia, 2000), Chapter 8.

- (b) relating to the rights of ownership by Maori of any particular land or fisheries according to customary law principles of “take” and occupation or use; and
- (c) calling for the determination, to the extent practicable, of Maori tribal boundaries, whether of land or fisheries”<sup>151</sup>

The original statute limited the jurisdiction to contemporary cases, but the scope was extended in 1985, allowing the tribunal to examine all treaty-related issues dating back to 1840.<sup>152</sup> This expansion provided a platform to address historical grievances between the Crown and Māori. With the establishment of the Treaty of Waitangi Policy Unit in 1988, the treaty settlement process commenced under the supervision of the Department of Justice. The following table demonstrates the ten largest settlements in the tribunal’s history.

**Financial redress, historical Treaty claims: ten largest settlements**

Amount \$million	Group	Year of Legislation
170	Ngāi Tahu	1998
170	Waikato/Tainui Raupatu	1995
170	Commercial Fisheries	1992
169	Ngāti Tūhoe	2014
161	Central North Island Forests Iwi Collective	2008
90	Ngāti Porou	2012
70	Ngāti Toa Rangitira	2014
50	Raukawa	2014
42.39	Ngāti Awa	2005
41	Ngāti Ruanui	2003

*Sources: New Zealand Parliament (Pāremata Aotearoa), Office of Treaty Settlements.*

The first settlement was issued in 1989 over the transfer and loan of Waitomo Caves. The tribunal granted financial compensation, rights to transfer and purchase, and changes to

<sup>151</sup> Bill, 6A Power of Tribunal to state case for Maori Appellate Court or Maori Land Court § (1975).

<sup>152</sup> Ibid.

geographical name.<sup>153</sup> Since then, there have been over fifty-four settlements. Notably, the settlement emphasized reconciliation measures beyond financial means. Similar to the Waitomo Caves settlement, the tribunal incorporated cultural and symbolic gestures to foster an environment of healing and empower tribal members to reconnect with ancestral lands. Although the impacts of the settlement cannot be fully examined due to limited data, the institutional efforts toward amending colonial dispossession of cultural identity and land ownership demonstrated that Aotearoa has been navigating a more equitable future.

Evidently, New South Wales's reconciliation approach was temporary and focused more on raising awareness for the impairments Aborigines experienced. The lack of treaty-making established no expectations for the Australian government to address past colonial harms and failure to recognize Indigenous rights. Consequently, the nation has struggled to achieve substantial progresses in addressing systemic inequalities faced by the Aboriginal communities. The impairments caused by colonial policies are still evident today, reflected in the ongoing lack of political representation and the socio-economic disparities. On the other hand, the New Zealand government created the tribunal to secure long-term support for reclaiming and reconnecting with ancestral lands. The Treaty of Waitangi was an instrumental foundation for the establishment of the tribunal, illustrating that the effect of treaty-making in the colonial period prevailed in contemporary society.

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<sup>153</sup> “The Waitangi Tribunal in the Matter of the Treaty of Waitangi Act 1975 and in the Matter of the Waitomo Claim (a Claim by Josephine Huti Anderson on Behalf of the Hapu of Ruapuha and Uekaha)” (Wellington Central: Crown Law Office, January 19, 1996).

## Conclusion

The British Empire adopted different colonial strategies when they established their colonies in New South Wales and Aotearoa, respectively. The prominent reason behind the shift in policy was the drastically different Indigenous-settler relationships. Through comparing the initial contact with the *Endeavour* in the two nations, the thesis explores why British settlers developed different characterizations for Aborigines and Māori. Combined with geopolitical factors, the loss of the American colonies, and expansionist agendas, the British colonial officials employed the principle of *terra nullius* in New South Wales and the principle of treaty-making in Aotearoa. The selected approaches influenced how the two colonial institutions recognized native rights. Although both colonial governments enacted legislation to undermine Indigenous land entitlement and sovereignty, the Treaty of Waitangi served as a justification for advancing Māori interests from the colonial to the contemporary era. As exemplified by the Māori Members of Parliament and the Waitangi Tribunal, treaty-making projected a relatively positive trajectory for Indigenous communities to reconcile with historical injustice.

However, it should be acknowledged that treaty-making was still a product of colonialism and reflected the British imperial agenda. This was most evident in the contention over the translation of the Treaty of Waitangi and *Te Titiri o Waitangi*. During the colonial period, the legislature referred to the English version of the treaty to navigate Indigenous-settler affairs. Many of the promises reached during the treaty negotiation process were therefore not taken into account during the nineteenth century. It was not until the popularity attained by contemporary Indigenous rights movements like the Māori Land March that prompted the Aotearoa government to correct the colonial wrongdoings. Even



then, reconciliation projects require a lengthy and complicated process that remains challenging for various tribes. Additionally, the project should not be framed as a completion or achievement, which has often been the case in the media. Reconciliation is an ongoing process for Indigenous communities to reclaim their previously denied rights and sovereignty. Hence, governments should strategize long-term policies and constantly seek guidance from the Indigenous tribes.

The scope of my thesis is limited as it only compared two colonial states and overlooked the majority of the Indigenous policies in other Australian states. Such transnational research could provide further reasoning for the history behind insufficient reconciliation projects in the nation. Moreover, current scholarship rarely compares former British America with the other British settler colonies. As the colony served as a precedent for colonial governance in later settlements, it could be useful to compare the treaty-making process and Indigenous policies in British America. Additional research focusing on eighteenth-century geopolitics in the Pacific would be beneficial to further understand why colonial powers were interested in Aotearoa but not New South Wales. It would also be interesting to cross-examine the governance of Pacific colonies under the regime of different European Empires. This could provide a guide to the development and reconciliation in the region as nations reevaluate how colonial legacy has perpetuated into contemporary society.

One of the purposes of this project was to connect colonial governance and principles to contemporary policies in order to better understand the legacy of colonialism. While researching for the project, Australia and Aotearoa both encountered opportunities that could redirect their current reconciliation movements. In October, the referendum on

“whether to change the Constitution to recognize the First Peoples of Australia by establishing a body called the Aboriginal and Torres Strait Islander Voice” failed.<sup>154</sup> If passed, the Indigenous population in Australia would secure a political voice in Parliament. This would be instrumental to the healing of the Stolen Generation and the reclaiming of Aboriginal lands. The setback points to the detrimental effects of colonial legacies, especially regarding the perception of Aborigines. On the other hand, Aotearoa’s newly elected coalition government reversed Indigenous policies introduced during Jacinda Arden’s administration. Decades of efforts to reinterpret the Treaty of Waitangi were overlooked.<sup>155</sup> Similar to the land march protestors, advocates swiftly mobilized and demanded governmental actions. Unfortunately, the current trajectory foreshadows a perpetuation of colonial injustices.

The hopes for gaining Indigenous sovereignty and reconciling with the past can be surmised in *Kīngitanga* (the Māori King movement) supporter Rewi Maniapoto’s word “*Ka whawhai tonu mātou! Ake! Ake! Ake!*”, which translates into “*We will still fight, we will always fight! Forever more! Forever more! Forever more!*”<sup>156</sup> Two hundred years ago, Rewi employed the phrase to protest against Indigenous subjugation during the New Zealand War. Considering the state of affairs and the context of colonial history research, “*Ka whawhai tonu mātou! Ake! Ake! Ake!*” can still be used today to advocate for incorporating Indigenous perspectives into academic research and decolonization policy.

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<sup>154</sup> Prime Minister and Cabinet, “Referendum on an Aboriginal and Torres Strait Islander Voice,” National Indigenous Australians Agency, August 9, 2022, <https://www.niaa.gov.au/indigenous-affairs/referendum-aboriginal-and-torres-strait-islander-voice>.

<sup>155</sup> “New Zealand: Thousands March against New Government’s Reversal of Indigenous Policies,” BBC News, December 5, 2023, <https://www.bbc.com/news/world-asia-67621800>.

<sup>156</sup> “We will fight on for ever and ever!” accessed December 17, 2023, <https://www.waipadc.govt.nz/your-waipa/about-waipa/waipa-history/we-will-fight-on-for-ever-and-ever>.

## Appendix 1: Glossary

<b>Term</b>	<b>Definition</b>
Barangga	Big vessel
Guwinj	Spirit or ghost
Kāwanatanga	In treaty-sovereign authority; contemporary-government/governorship
Kīngitanga	Sovereignty
Mana	Power
Matua	Protector
Pākehā	European
Rangatira	Chief
Tikanga	Protection over their traditional practices and customs
Tino Rangatira	True leaders
Wahi tapu	Sacred places
Wakarite ture	Laws
Warra warra wai/whurra whuraa	Originally-go away; contemporary-you are all dead
Whakapapa	Genealogies

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