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Final Settlement Clauses: The Rise of Tikanga Māori and Te Tiriti o Waitangi in Aotearoa New Zealand's Legal Fabric Suggests a Change in the Tide

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Abstract

Aotearoa New Zealand is slowly browning by integrating, accepting and discussing the first laws of Aotearoa New Zealand, tikanga Māori and its place within our legal system and lives at large. Concurrently, there is a rise in the enforcement and emphasis on the Crowns obligations to uphold what was promised under te Tiriti o Waitangi / the Treaty of Waitangi. Settling historical grievances between Māori and the Crown that arose from colonisation and breaches of te Tiriti o Waitangi / the Treaty of Waitangi has been a goal of the Crowns since the late 1900's. The Treaty settlement process was established to reach this goal. One of the final steps in this process is to transform the reached agreement into legislation. One of the Crown policies in resolving these historical claims is the result that these settlements are final. Final settlement clauses reflect this policy. Final settlement clauses discharge the Crown from their duties and prohibit any court or tribunal from making any recommendation on or inquiring into what was settled. My paper analyses whether final settlement clauses are consistent with tikanga Māori and te Tiriti o Waitangi / the Treaty of Waitangi, and considers how they should be interpreted by those who have the power and discretion to do so. When placing tikanga Māori values up against final settlement clauses, in particular the value of whanaungatanga (centrality of relationships), I argue that final settlement clauses are inconsistent with tikanga Māori. Similarly, upon a consideration of the principles of te Tiriti o Waitangi / the Treaty of Waitangi such as partnership, active protection and more importantly viewing the Crown-Māori treaty relationship as an ongoing one, final settlement clauses are also inconsistent with te Tiriti o Waitangi / the Treaty of Waitangi. Finally, notwithstanding parliamentary sovereignty, by drawing on the judicial orthodoxy of privative provisions, final-settlement clauses are similarly capable of being read down so that they are of no effect. In addition to this, recent case law that establishes that tikanga Māori is now part of the common law supports that we can look at final settlement clauses and legislation more sceptically particularly if they are inconsistent with these frameworks.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 11,350 words.

Subjects and Topics

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Te Tiriti o Waitangi / The Treaty of Waitangi
Privative provisions

I Introduction

Mahia te mahi, hei painga mo te iwi
Do the work for the betterment of the people

Māori were the first to call this land home.[1] Tikanga Māori (tikanga) are the first laws of Aotearoa New Zealand.[2] Despite Māori being *tangata whenua* (people of the land)[3] and the signing of te Tiriti o Waitangi (te Tiriti) / the Treaty of Waitangi (the Treaty), colonisation imposed many injustices that are still felt and experienced by Māori. However, we are now at a time where Aotearoa New Zealand is slowly browning. There has been a gradual shift where Aotearoa New Zealand has started integrating, accepting, discussing and acknowledging tikanga. One of the values underpinning tikanga is that tikanga rests heavily on *whanaungatanga* (centrality of relationships) and the collective.[4] This is a marked difference from the individualised Western approach. The contrast in worldviews is most obvious when considering the differences between tikanga values and western values and how they translate into how we treat *tāngata* (people), *whenua* (land), and even how we construct *whakaturetanga* (legislation).[5]

The Crown holds obligations to Māori in accordance with te Tiriti / the Treaty. Due to the differing texts, in order for te Tiriti / the Treaty to be interpreted, understood and applied a list of "treaty principles" were developed such as partnership and active protection. Similarly to the value of whanaungatanga, the treaty partnership is an ongoing relationship between Māori and the Crown.[6] The Crown has been aiming to settle historical grievances with Māori that arose due to colonisation and breaches of te Tiriti / the Treaty since the 1900's. The Treaty settlement process was established to reach this goal. Once a settlement agreement is reached by the *iwi* (tribe)[7] or claimant group and the Crown, it is transformed into legislation.[8] One of

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1 Jacinta Ruru and Leo Watson "Should Indigenous Property be Relationship Property?" in J Palmer et al (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge, 2017) at 207.

2 Ani Mikaere "Seeing Human Rights Through Māori Eyes" (2007) NZ Jur 10 53 at 54.

3 John Moorfield "Te Aka: Māori English, English-Māori Dictionary and Index" (2005) Māori Dictionary Te Aka: Māori English, English-Māori Dictionary and Index <https://maoridictionary.co.nz/>.

4 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori law* (UBC Press, Vancouver, 2016) at 68.

5 John Moorfield "Te Aka: Māori English, English-Māori Dictionary and Index", above n 3.

6 Legislation Design and Advisory Committee *Legislation Guidelines: 2018 Edition* (Legislation Design and Advisory Committee, Legislation Guidelines, March 2018).

7 John Moorfield "Te Aka: Māori English, English-Māori Dictionary and Index", above n 3.

8 New Zealand Government "Settling historical Treaty of Waitangi claims" New Zealand Government

the policies that the Crown adopted in resolving historical claims is the result that these settlements are final.[9] Final settlement clauses (final-settlement clauses) reflect this policy. Final-settlement clauses establish that in exchange for redress, the Crown's duties are discharged and courts and tribunals are prohibited from inquiring into what was settled.[10] The iwi or claimant group gets redress, and the Crown gets finality and certainty. This may seem understandable and fair, but what happens, if anything, when we look at final-settlement clauses from a tikanga and treaty lens? Legislation should reflect the legal system in which it is constructed and the society that it serves. Not only do final-settlement clauses bring the Crown and iwi or claimant group relationship to an end, but they go further and prohibit any court or tribunal from inquiring into or making any recommendation on what is settled. I argue that final-settlement clauses are inconsistent with tikanga and te Tiriti / the Treaty and require an appraisal.

There is existing scholarship in this area, including Benjamin Bielski's dissertation on final-settlement clauses.[11] Bielski's paper aims to provide insight into how final-settlement clauses are likely to be interpreted by the courts in light of competing approaches, and how Treaty settlements may promote reconciliation between the Crown and Māori.[12] Bielski studies final-settlement clauses and identifies what they settle, who they operate against, how they achieve their desired ends and, if anything, what they leave outstanding.[13] Bielski's paper also points to the interpretation of final-settlement clauses with reference to judicial decisions, controversies and hypothetical scenarios where these clauses could be relevant.[14] My paper adds to the existing scholarship by engaging with tikanga and te Tiriti / the Treaty and how final-settlement clauses may be interpreted in light of those frameworks.

Before we board the *waka* (vehicle, for our purposes a canoe)[15] and set off on our journey, it is helpful to map out where we are heading. First, I lead with a description of final-settlement clauses and briefly discuss the treaty settlement process. Then, I take a step back and attempt the difficult but necessary task of describing tikanga before considering whether final-settlement clauses are consistent with tikanga. The same method follows in relation to te Tiriti

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Te Kāwanatanga o Aotearoa <https://www.govt.nz/>.

9 Office of Treaty Settlements *Healing the past, building a future. A Guide to Treaty of Waitangi Claims and Negotiations with the Crown. Summary Edition* (Office of Treaty Settlements, July, 2004) at 15.

10 At 15.

11 Benjamin Bielski "Final Settlement Clauses in Treaty Settlement Legislation" (LLB (Hons), Dissertation, University of Otago, 2016).

12 At 5.

13 At 4.

14 At 4.

15 John Moorfield "Te Aka: Māori English, English-Māori Dictionary and Index", above n 3.

/ the Treaty. Finally, I explore the question of how these clauses should be interpreted by those who have the power and discretion to do so.

My argument is two-pronged. Firstly, when placing tikanga values, in particular, whanaungatanga,[16] up against final-settlement clauses, I argue that these clauses are inconsistent with tikanga. Likewise, upon a consideration of the principles of the te Tiriti / the Treaty such as partnership, active protection and the ongoing treaty relationship, I argue that final-settlement clauses are also inconsistent with te Tiriti / the Treaty. Second, I argue that notwithstanding parliamentary sovereignty, when drawing on the leading judicial orthodoxy on privative provisions and recent case law that reflects how tikanga applies in our legal system today, final-settlement clauses can and should be read down by those who have the discretion and power to do so.

Tikanga and the treaty are distinct frameworks and are therefore addressed accordingly. Tikanga is organic, whereas the origin of Tiriti / Treaty principles is a top-down judicial creation. As we will see, in some circumstances the frameworks may demand the same outcome and in others, different. In the context of tikanga and te Tiriti / the Treaty, there are different opinions on what cases, values and the like are the most important. However, it is not my place nor is there scope to include them all and I have therefore included what is necessary to equip us for the journey. My paper adopts the terminology used in Te Paparahi o Te Raki Inquiry report where 'te Tiriti' is used to refer to the Māori text and 'the Treaty' to refer to the English text.[17] 'The treaty' is used to refer to both texts together or in instances where I am not specifying either text.[18] Lastly, 'the treaty principles' is used to refer to the principles that have been derived from the differing texts.

The *whakataukī* (Māori proverb)[19] that opens this section is used to ground our analysis, with other reflective whakataukī included throughout. The Treaty settlement process and therefore Treaty legislation is made by whom we elect for the purposes of resolving historical grievances and upholding a treaty obligation. Not only are final-settlement clauses inconsistent with the treaty and treaty obligations, but they are also inconsistent with tikanga. Although these frameworks have suffered years of being ignored and denied, they are undoubtedly entering the room and establishing a seat at the table. This will not be the only circumstance where

16 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, above n 4, at 28; and John Moorfield "Te Aka: Māori English, English-Māori Dictionary and Index", above n 3.

17 Waitangi Tribunal *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 11.

18 At 11.

19 John Moorfield "Te Aka: Māori English, English-Māori Dictionary and Index", above n 3.

tension exists between clauses within legislation and these two frameworks as they continue to solidify their place in Aotearoa New Zealand's legal system.

II Final Settlement Clauses

He waka eke noa
A canoe which we are all in with no exception

The settlement of ..... is final, and the Crown is released and discharged in respect of those claims....no court or tribunal has jurisdiction to inquire or further inquire into, or to make any finding or recommendation in respect of [what was settled][20]

Final-settlement clauses are clauses that lie within Treaty settlement legislation. Treaty settlement legislation is one of the final stages of the Treaty settlement process. In order to steer this waka in the correct direction, it is necessary to provide an overview of the settlement process which will be nodded to in the following sections.

A Treaty Settlement Process

Until the establishment of the Waitangi Tribunal in 1975, there was virtually no process for which Māori could raise and resolve grievances.[21] The settlement process was a 'deliberate strategy' by the Crown to respond to the pressure from Māori successes in the courts and regain political control over the treaty claims.[22] Treaty settlements are defined as agreements between the Crown and Māori claimant groups that "settle all of [a] claimant group's historical claims against the Crown".[23] The process is almost entirely controlled by the Crown – the Crown holds the power.[24]

The Waitangi Tribunal jurisdiction is a "mix of investigation into long standing historical grievances and investigation into current Crown action, policy and legislation".[25] The Waitangi

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20 Ngai Tahu Claims Settlement Act s 461; and Ngāti Hinerangi Claims Settlement Act s 15.

21 Treaty of Waitangi Act 1975. Generally grievances only came to be raised by virtue of commissions of inquiry. See, for example, Sir Willliam Alexander Sim, *Confiscated Native Land and Other Grievances: Royal Commission to inquire into confiscations of native lands and other grievances alleged by natives* (Government Printer, Wellington, 1928).

22 Nicola Wheen and Janine Hayward, *Treaty of Waitangi Settlements* (Bridget William Books, New Zealand, 2014) at [19].

23 At [14].

24 At [14].

25 David Baragwanath, Hekia Parata and Jon Williams "Treaty of Waitangi – the last decade and the next century" (New Zealand Society seminar, New Zealand, April 1993) at 35.

Tribunal has retrospective power to hear claims about Crown acts and omissions since 1840.[26] The Office of Treaty Settlements was established in 1995 to negotiate and implement historical Treaty settlements on behalf of the Crown.[27] The Waitangi Tribunal is therefore not directly involved in the settlement of claims; however, their reports often provide a starting point for settlement negotiations. A claim must be lodged with the Waitangi Tribunal before it can inquire into it or the Crown can negotiate with the claimant group.[28] The Treaty of Waitangi Amendment Act 2006 set a cut-off date of 1 September 2008 to lodge historical claims with the Waitangi Tribunal.[29] From 2000 onwards, "claims" settled are referred to as "historical claims" to distinguish them from "contemporary claims".[30]

There are broadly four stages of the Treaty settlement process.[31] Although, the process is not identical in all settlements.[32] The first stage is pre-negotiation where the iwi or claimant group decides who will represent them in negotiations and the Crown and representatives sign a Terms of Negotiation.[33] This document sets out the rules for negotiations and what the iwi or claimant group and Crown would like to achieve.[34] The second stage is the negotiation stage where the Crown and the representatives *kōrero* (talk / speak)[35] and negotiate a Deed of Settlement.[36] When the representatives and the Crown have come to an initial agreement about a settlement, they will write an Agreement in Principle document.[37] This can usually take around 12-18 months.[38] This sets out the redress that will be agreed on in the final settlement but does not describe what the claimant group will get in detail.[39] Working through the details of a settlement is the most time-consuming part of the process.[40] Once signed it becomes public.[41] Discussions between the negotiators and the Crown are confidential, and once the negotiators work out a proposed settlement for the claimant group they will put it into a Draft

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26 Jan Palmowski *A Dictionary of Contemporary World History* (3rd ed, Oxford University Press, Oxford, 2008) at 233.

27 Nicola Wheen and Janine Hayward, *Treaty of Waitangi Settlements,* above n 22, at [21].

28 Office of Treaty Settlements *Healing the past, building a future. A Guide to Treaty of Waitangi Claims and Negotiations with the Crown. Summary Edition,* above n 9, at 17

29 New Zealand Parliament Pāremata Aotearoa "History Treaty settlements" New Zealand Parliament Pāremata Aotearoa < https://www.parliament.nz/en/>.

30 Benjamin Bielski "Final Settlement Clauses in Treaty Settlement Legislation", above n 11, at 20.

31 New Zealand Government "Settling historical Treaty of Waitangi claims", above n 11.

32 Benjamin Bielski "Final Settlement Clauses in Treaty Settlement Legislation", above n 11.

33 New Zealand Government "Settling historical Treaty of Waitangi Claims", above n 11.

34 New Zealand Government "Settling historical Treaty of Waitangi Claims", above n 11.

35 John Moorfield "Te Aka: Māori English, English-Māori Dictionary and Index", above n 3.

36 New Zealand Government "Settling historical Treaty of Waitangi claims", above n 11.

37 New Zealand Government "Settling historical Treaty of Waitangi claims", above n 11.

38 New Zealand Government "Settling historical Treaty of Waitangi claims", above n 11.

39 New Zealand Government "Settling historical Treaty of Waitangi claims", above n 11.

40 New Zealand Government "Settling historical Treaty of Waitangi claims", above n 11.

41 New Zealand Government "Settling historical Treaty of Waitangi claims", above n 11.

Deed of Settlement document which then has to be voted on.[42] The Crown cannot sign the Deed of Settlement until it is certain that the entire claimant group accepts it.[43]

The third stage of the Treaty settlement process and the most crucial phase to my analysis is the legislation stage.[44] The settlement becomes law to "confirm that the settlement is final, and make the settlement legally binding".[45] The bill is usually drafted up simultaneously to the Deed of Settlement so that representatives and the Crown can check that the legislation has everything they agreed to in it.[46] The legislation follows the same legislative process as standard legislation before receiving royal assent.[47] Consequently, the settlement does not take effect until Parliament has passed an Act.[48] The settlement legislation itself can be split into three. There is a crown apology to the claimant group, provision of cultural redress and financial and commercial redress.[49] The Ngai Tahu and Waikato Raupatu settlements also contain relativity clauses.[50] These clauses acknowledge that the groups settled their claims on the assumption that the total value of assets available for the settlement of historical claims was $1 billion.[51] The relativity clauses, therefore, allow the settlements to be "topped up" if necessary to maintain relativity with other groups.[52] Relativity clauses no longer appear in recent settlements. The final stage of the settlement process is the implementation stage where the Crown and iwi or claimant group aim to ensure that everything agreed to in the Deed of Settlement is adhered to.[53]

In reaching a settlement, there are various guidelines and principles that the Crown is meant to follow. This sheds light on the context in which final-settlement clauses are made. I argue that the settlement process undermines Crown guidelines and principles applied in the resolution of historical claims. One of the overarching principles that guides the settlement of claims is

42 New Zealand Government "Settling historical Treaty of Waitangi claims", above n 11.
43 New Zealand Government "Settling historical Treaty of Waitangi claims", above n 11.
44 New Zealand Government "Settling historical Treaty of Waitangi claims", above n 11.
45 New Zealand Government "Settling historical Treaty of Waitangi claims", above n 11.
46 New Zealand Government "Settling historical Treaty of Waitangi claims", above n 11.
47 New Zealand Government "Settling historical Treaty of Waitangi claims", above n 11.
48 Office of Treaty Settlements *Healing the past, building a future. A Guide to Treaty of Waitangi Claims and Negotiations with the Crown. Summary Edition,* above n 9, at 55.
49 Nicola Wheen and Janine Hayward, *Treaty of Waitangi Settlements,* above n 22, at [14].
50 Ngai Tahu Claims Settlement Act, above n 20; and Waikato Raupatu Claims Settlement Act 1995.
51 Damian Stone "Financial and commercial dimensions of settlements" in Nicola Wheen and Janine Hayward, *Treaty of Waitangi Settlements,* above n 22, at [144].
52 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, above n 4.
53 New Zealand Government "Settling historical Treaty of Waitangi claims", above n 11.

the aim to achieve "fair, comprehensive and lasting settlements".[54] The Crown guidelines include but are not limited to:[55]

- The Crown will explicitly acknowledge historical injustices – that is, grievances arising from Crown actions or omissions before 21 September 1992
- Treaty settlements should not create further injustices
- The Crown has a duty to act in the best interests of all New Zealanders
- As settlements are to be durable, they must be fair, achievable and remove the sense of grievance
- The Crown must deal fairly and equitably with all claimant groups
- Settlements do not affect Māori entitlements as New Zealand citizens, nor do they affect their ongoing rights arising out of the Treaty or under the law.

Complimenting these are six principles to ensure that settlements are fair, durable, final and occur in a timely manner.[56] The most relevant are provided below:[57]

1. Good faith: The negotiating process is to be conducted in good faith, based on mutual trust and cooperation towards a common goal
2. Restoration of relationship: The strengthening of the relationship between the Crown and Mäori is an integral part of the settlement process and will be reflected in any settlement. The settlement of historical grievances also needs to be understood within the context of wider government policies that are aimed at restoring and developing the Treaty relationship.

After traversing through the settlement process and what should motivate a settlement, we can return our waka back to final-settlement clauses. The very purpose of final-settlement clauses is to make clear that the deed is final, accompanied by the ousting of courts and tribunals jurisdiction to inquire into or make any finding or recommendation on what is settled.[58] As can be seen from the following examples, final-settlement clause wording includes "the deed of settlement and this Act is final, and the Crown is released and discharged in respect of those claims".[59] Section 461 of the Ngai Tahu Claims Settlement Act 1998 states:[60]

> (1) The settlement of the Ngai Tahu claims to be effected pursuant to the deed of settlement and this Act is final, and the Crown is released and discharged in respect of those claims.

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54 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 91.

55 Office of Treaty Settlements *Healing the past, building a future. A Guide to Treaty of Waitangi Claims and Negotiations with the Crown. Summary Edition,* above n 9, at 24.

56 At 13.

57 At 13.

58 For example, Ngai Tahu Claims Settlement Act, above n 20, s 461; and Ngāti Hinerangi Claims Settlement Act, above n 20, s 15

59 Ngai Tahu Claims Settlement Act, above n 20.

60 Ngai Tahu Claims Settlement Act, above n 20.

(2) Subsection (1) does not limit the deed of settlement.
(3) Despite any other enactment or rule of law, no court or tribunal has jurisdiction to inquire or further inquire into, or to make any finding or recommendation in respect of,—
(a) Any or all of the Ngai Tahu claims; or
(b) The validity of the deed of settlement; or
(c) The adequacy of the benefits provided to Te Runanga o Ngai Tahu and others under this Act or the deed of settlement; or
(d) This Act.
(4) Subsection (3) does not exclude the jurisdiction of a court or tribunal in respect of the interpretation or implementation of the deed of settlement or this Act.
(5) This section does not limit the jurisdiction of the Maori Land Court in the implementation of sections 14 and 15 of the deed of settlement

Similarly, in the Ngāti Hinerangi Claims Settlement Act 2021, s 15 states:[61]

(1) The historical claims are settled.
(2) The settlement of the historical claims is final, and, on and from the settlement date, the Crown is released and discharged from all obligations and liabilities in respect of those claims.
(3) Subsections (1) and (2) do not limit the deed of settlement.
(4) Despite any other enactment or rule of law, on and from the settlement date, no court, tribunal, or other judicial body has jurisdiction (including the jurisdiction to inquire or further inquire, or to make a finding or recommendation) in respect of—
(a) the historical claims; or
(b) the deed of settlement; or
(c) this Act; or
(d) the redress provided under the deed of settlement or this Act.
(5) Subsection (4) does not exclude the jurisdiction of a court, tribunal, or other judicial body in respect of the interpretation or implementation of the deed of settlement or this Act.

Section 15(5) of the Ngāti Hinerangi Claims Settlement Act is an example of how in more recent settlements a further section has been added that clarifies despite the ousting of jurisdiction, this does not exclude the jurisdiction of a court or tribunal to inquire in respect of the interpretation or implementation of the Deed of Settlement.[62] In simple terms, final-settlement clauses clarify that in turn for the iwi or claimant group getting the settlement, the Crown's obligations are discharged. Bielski states that; "each final-settlement clause identifies what is settled, how it is settled, who the settlement is between and what is left outstanding from settlement...specificity and certainty, is thus paramount".[63]

61 Ngāti Hinerangi Claims Settlement Act, above n 20.
62 Ngai Tahu Claims Settlement Act, above n 20.
63 Benjamin Bielski "Final Settlement Clauses in Treaty Settlement Legislation", above n 11, at 23.

For the purposes of this appraisal, I consider the following example. A particular iwi or claimant group has reached a settlement and legislation has been passed. In the future, it is supposed or found that there has been some sort of error or grievance in relation to what was settled. If final-settlement clauses were interpreted on face value, the Crown's obligations are discharged, and no court or tribunal has jurisdiction to inquire into or make any recommendation in respect of what was settled. In other words, nothing can be done. To assist in pushing the waka towards this deeper analysis of final-settlement clauses in this context I ask that you keep these questions in mind as we go forward: Where does the merit in final-settlement clauses lie that justifies their place in Treaty settlement legislation? Settlement legislation is said to be "needed" to "ensure the finality of the settlement by removing the ability of the courts and Waitangi Tribunal to re-open the historical claims or the Deed of Settlement".[64] However, does the Crown's certainty justify placing another burden on tangata whenua when it is the Crown who is the author of this entire process?

III Tikanga Māori and Final Settlement Clauses

Ko te tino o te tikanga ko te tika, arā ko te mahi i ngā mahi, ahakoa te aha, i runga te tika

Tikanga is about doing what is right, and whatever that may be is to be done with integrity

The first framework against which we can appraise final-settlement clauses is tikanga Māori. Tikanga Māori derives from the word *tika* (correct) and has been translated to the correct way of doing things.[65] Tikanga Māori has also been interpreted as what one understands as law.[66] For clarity, when referring to "tikanga" I am referring to the latter definition, tikanga Māori.

Kupe and his people brought tikanga to Aotearoa New Zealand when they arrived from the Pacific.[67] Tikanga was the sole system of law that existed in Aotearoa New Zealand pre-1840.[68] Tikanga reflects the belief, values and systems of tangata whenua[69] and has been statutorily defined as "Māori customary values and practices".[70] However, tikanga encompasses much

64 At 55.

65 Hirini Moko Mead *Tikanga Māori (Revised Edition): Living by Māori Values* (Huia (NZ) Ltd, Wellington, 2016) at 14.

66 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law,* above n 4, at 1.

67 At 1.

68 *Edwards (deceased) (obh of Te Whakatōhea) (No 2), Re* [2021] NZHC 1025 at [110].

69 At [110].

70 Law Commission *Review of the Property (Relationships) Act 1976* (NZLC R143, 2019) at 341.

more than that and cannot be restricted to one definition. Sir Hirini Moko Mead provides a well-respected and endorsed definition which expresses that tikanga is:[71]

> … a set of beliefs and practices associated with procedures to be followed in conducting the affairs of a group or an individual. These procedures are established by precedents through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or an individual is able to do…

Justice Williams frames tikanga as being "essentially the Māori way of doing things – from the very mundane to the most sacred or most important fields of human endeavour".[72] Tikanga has been recognised to be flexible and ever-changing, capable of adapting to different circumstances.[73] In order to grasp an understanding of tikanga, one must dive into its origins and extract the underlying philosophy of Māori legal tradition.[74] Scholars vary in terms of what they believe are the most important values underpinning tikanga, however, there is a common consensus that the following are considered foundational.[75] Similarly to tikanga, it is difficult to strictly define these values. Nevertheless, these values are a helpful tool in assessing whether final-settlement clauses are indeed consistent with this framework.

A Tikanga Values

Dr Carwyn Jones states that "as a whole, these values reflect the importance of recognizing and reinforcing the interconnectedness of all living things and maintaining balance within communities".[76] Although tikanga is susceptible to change, it is protective of these values that underpin it.[77]

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71 Hirini Moko Mead "The Nature of Tikanga" (paper presented at Mai I te Ata Hāpara Conference, Te Wānanga o Raukawa, Otaki, 11-13 August 2000) as cited in the Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2011) at [72].

72 Joseph Williams "He Aha te Tikanga Māori?" (paper presented to the Mai I Te Ata Hāpara Hui, Te Wānanga o Raukawa, Otaki, New Zealand, 2000) [un-published] at 2.

73 Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Māori Law,* above n 4, at 3 – 5.

74 At 38.

75 See for example Hirini Moko Mead, *Tikanga Māori: Living by Māori,* above n 65, at 28-32; and Joseph Williams, *He Aha te Tikanga Māori?,* above n 72; and Law Commission, *Māori Custom and Values in New Zealand Law,* above n 71, at 28-40.

76 Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Māori Law,* above n 4, at 38.

77 Ani Mikaere "The Treaty of Waitangi and the Recogniiton of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams *Waitangi revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) at 331.

Whanaungatanga can be understood as the rights and obligations of kinship[78] and the "centrality of relationships to Māori life".[79] The value of whanaungatanga is believed by Williams J and Professor Margaret Mutu[80] to be the glue that holds this system together and makes sense of how Kupe's people organised themselves and their ideas.[81] Wrongs are seen as collective wrongs and therefore the responsibility of the perpetrator's wider kin group.[82] Whanaungatanga does not just relate to genealogical relationships but has adapted so that it applies to those without a blood link.[83]

Mana can be understood as the rights that underlie Māori leadership and accountability.[84] There are several types of mana, including *mana Atua* (authority deriving from the gods), *mana tupuna* (authority that comes from someone's *whakapapa* (genealogy)[85] and is passed down through ancestors), *mana whenua* (the right of a Māori tribe to a particular area of land), *mana tangata* (authority, status and power from actions that show leadership qualities) and *mana moana* (authority that comes from and is exercised in relation to the ocean).[86] Mana is said to have resonance in the context of the treaty because of the promise of *te tino rangatiratanga* (Māori chieftainship) under art 2.[87]

The tikanga values of *manaakitanga* and *kaitiakitanga* are distinct concepts however both resonate with the concept of nurturing and taking care of others.[88] Manaakitanga is centred around selflessness and generosity, an example of a manaakitanga relationship being one of a host with their guest.[89] Mead suggests that manaakitanga has remained relevant and that Māori practices and protocols are focused on taking care of how others are treated and relationships are nurtured.[90]

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78 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato L Rev 1 at 3.

79 At 3.

80 McCully Matiu and Margaret Mutu, *Te Whānau Moana: ngā kaupapa me ngā tikanga = customs and protocols* (Reed Books NZ, Auckland, 2003) at 162.

81 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law", above n 78, at 3.

82 At 3.

83 Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Māori Law,* above n 4, at 68.

84 At 69.

85 John Moorfield "Te Aka: Māori English, English-Māori Dictionary and Index", above n 3.

86 At 69, citing McCully Matiu and Margaret Mutu, *Te Whānau Moana: ngā kaupapa me ngā tikanga = customs and protocols,* above n 80, at 156-57.

87 At 70.

88 At 71.

89 Hirini Moko Mead *Tikanga Māori (Revised Edition): Living by Māori Values,* above n 65, at 29.

90 Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Māori Law,* above n 4, at 71.

Kaitiaki stands for guardian, and kaitiakitanga can be understood as guardianship, particularly in relation to, but not exclusively, the environment.[91] There are obligations of kaitiakitanga to those who are granted rights to land to protect and maintain the land for future generations.[92] Justice Williams acknowledges that "no right in resources can be sustained without the right holder maintaining an ongoing relationship with the resource".[93] Under tikanga, whenua and Māori proprietary rights are held collectively by Māori *hapū* (subtribe) and *whānau* (family), with the permanent transfer of property rights only occurring through a blood link.[94] Professor Mutu believes that there is a powerful connection between mana and kaitiakitanga.[95] Importantly:[96]

> Each whānau or hapū is kaitiaki for the area in which they hold mana whenua, that is, their ancestral lands and seas. Should they fail to carry out their kaitiakitanga duties adequately, not only will mana be removed but harm will come to the members of whānau and hapū.

Tapū can be understood as sacred and a social control on behaviour.[97] It is respect for the spiritual character of all things.[98] Tapū is understood to have both religious and legal aspects.[99] When tapū is invoked, the person or thing is set aside and takes on a sacred state.[100] The concept of *noa* has a direct relationship with tapū.[101] Noa restores something to a normal state and is also an important tool for social control.[102]

Finally, *utu* can be understood as the obligation to give and the right to receive ongoing reciprocity.[103] Utu can also be understood as the maintenance of balance particularly where

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91 At 71; Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law", above n 78, at 3.

92 Ruru and Watson "Should Indigenous Property be Relationship Property?", above n 1, at 206.

93 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law", above n 78, at 3.

94 Ruru and Watson "Should indigenous Property be Relationship Property?", above n 1, at 206.

95 Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Māori Law,* above n 4, at 73.

96 Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Māori Law,* above n 4, at 73.

97 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law", above n 78, at 3.

98 At 8.

99 Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Māori Law,* above n 4, at 74.

100 At 74.

101 At 74.

102 At 74.

103 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New

mana has been lost, focusing too on whanaungatanga and the centrality of relationships.[104] The ultimate goal is to ensure that relationships are restored.[105]

B Tikanga in the Law

As tikanga is integrating itself into our legal system we must be ready to tackle obstacles and challenge processes, legislation and the like that appear inconsistent with this framework. This section provides insight into how tikanga is understood and applied in our legal system. The purpose is not only to provide context but also to provide substance that is later engaged with in the final section of this paper.

Initially, tikanga was only recognised for the purpose of extinguishment so that land could be granted to colonial settlers.[106] However, more recently, in what Williams J calls the "third law of Aotearoa New Zealand", we see the law in its incremental way browning and responding to a deeper need of identity and finding a place.[107] The courts can no longer ignore issues that relate to injustices felt by Kupe's people. Recent cases that illustrate this shift include *Takamore v Clarke.*[108] The Court had to determine who had the right to decide where the deceased Māori man could be buried – his whānau or his executor, his wife who is *Pākēha* (English or more broadly understood as a foreigner).[109] Although the Māori whānau were unsuccessful, all Justices in the Supreme Court readily accepted that tikanga was relevant to determining the custom around the burial of a Māori individual.[110] This case is regularly cited for the proposition that tikanga is part of the values of the common law and that reference to the tikanga must form part of the court's evaluations. Very recently, in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board,*[111] the Court of Appeal observed that it is, or should be:[112]

Zealand Law", above n 78, at 3.

104 Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Māori Law,* above n 4, at 75 – 76.

105 At 75.

106 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law", above n 78, at 8.

107 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law", above n 78.

108 *Takamore v Clarke* [2012] NZSC 116.

109 *Takamore v Clarke,* above n 108; and John Moorfield "Te Aka: Māori English, English-Māori Dictionary and Index", above n 3.

110 *Takamore v Clarke,* above n 108.

111 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86.

112 *Edwards (deceased (obh of Te Whakatōhea) (No 2) Re,* above n 68; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 111, at [177].

> …axiomatic that the tikanga Māori that defines and governs the interests of tangata whenua in the taonga protected by the Treaty is an integral stand of the common law of New Zealand.

In *Ellis v R (Ellis)*,[113] although the judgment has not been released, the Supreme Court on the basis of tikanga allowed the continuation of an appeal despite the fact that the appellant had passed away.[114] More importantly, before the construction of written submissions, a two-day *hui* (meeting / gathering)[115] was facilitated which brought together several *pūkenga* (experts)[116] to discuss what the tikanga / custom was around the subject matter at issue.[117] This is a fresh, contemporary approach that is alien to the Western common law approach. In *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Limited*[118] Ngāti Whatua claimed that they had mana whenua over a particular area.[119] Justice Whata in interpreting the Resource Management Act stated that tikanga is "a body of principles, values and law that is cognisable by the courts".[120] This marks the first time a High Court Justice has stated that in some cases tikanga Māori is the law. Moreover, in *Mercury New Zealand Ltd v Waitangi Tribunal*[121] Cooke J stated that it is accepted that tikanga is part of New Zealand's common law.[122] His Honour also said that there will be times where tikanga "forms a key part of the law to be applied rather than merely being a relevant consideration".[123] Justice Cooke, therefore, acknowledges that in some instances tikanga will be the law.

Outside of case law, there are other things that are going on in the background that reflects tikanga making its stance in our legal system. Chief Judge Taumaunu of the District Court established the Te Ao Mārama model (meaning "the enlightened world").[124] This model is carried out in partnership with iwi-based communities and instead of being penal aims to be therapeutic. It is a completely different way of approaching these types of issues. Perhaps this model will be used as future inspiration for other models and / or strategies outside of a criminal justice context. Additionally, the New Zealand Council of Legal Education has recently decided to make the teaching of content on te ao Māori and tikanga Māori compulsory for all

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113 *Ellis v R* [2020] NZSC 89.

114 *Ellis v R,* above n 113.

115 John Moorfield "Te Aka: Māori English, English-Māori Dictionary and Index", above n 3.

116 John Moorfield "Te Aka: Māori English, English-Māori Dictionary and Index", above n 3.

117 *Ellis v R* SC 49/19, 31 January 2020 (Agreed Statement of Facts) at 2.

118 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Limited* [2020] NZHC 2768.

119 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Limited*, above n 118.

120 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Limited,* above n 118.

121 *Mercury New Zealand Ltd v Waitangi Tribunal* [2021] NZHC 654.

122 At [103].

123 At [103]-[104].

124 Heemi Taumaunu "Mai te Po ki te Ao Mārama" (paper presented at the Norris Ward McKinnon Annual Lecture, November 2020).

core law subjects.[125] We are now entering an era where knowledge of te ao Māori and tikanga Māori will be an expectation of up-and-coming-lawyers.

C Final Settlement Clause's Inconsistencies with Tikanga Māori

After traversing the values that underpin tikanga and placing them against final-settlement clauses, it is apparent that final-settlement clauses do not align with a tikanga approach. Perhaps most importantly, "the fundamental organizing principle of Māori philosophy is whakapapa (genealogy), supported by the associated concepts of whānau (extended families) and whanaungatanga (relationships)".[126] This is irreconcilable with final-settlement clauses wording that "the Crown is released and discharged" and "no court or tribunal has jurisdiction to inquire or further inquire into, or make any finding or recommendation...".[127] Final-settlement clauses and tikanga are diametrically opposed as final-settlement clauses explicitly bring part of the Crown-Māori relationship to an end.

As described, kaitiakitanga and manaakitanga are values that are premised on nurturing relationships, selflessness and generosity. It can be reasonably said that final-settlement clauses are in conflict with kaitiakitanga and manaakitanga. These clauses are for the very benefit of the Crown in return for the settlement. This is the opposite of selflessness. Moreover, the notion that whānau or hapū is kaitiaki for areas in which they hold mana whenua is not considered in the making of these clauses. When considering the example, iwi or hapū fail to carry out their kaitiakitanga duties appropriately, mana will be removed, and harm will come to members of the whānau and hapū.[128] Limiting courts and tribunals' jurisdiction post-settlement can be viewed as diminishing or interfering with one's mana as it is yet another limitation placed on to Māori and restricting them. Indeed, final-settlement clauses can have broader implications.

Tā Hirini Moko Mead suggests a three-stage framework that illustrates the motivating factors that underpin Māori legal traditions which is applicable here – *take-utu-ea*[129] A *take* is a reason for action, something has happened that requires a response.[130] *Utu*, which has already been

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125 New Zealand Council of Legal Education "Te Ao Māori and Tikanga Māori" (7 May 2021) New Zealand Council of Legal Education <https://nzcle.org.nz>.

126 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, above n 4, at 28.

127 Ngai Tahu Settlement, above n 20; and Ngāti Hinerangi Claims Settlement Act, above n 20.

128 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, above n 4. at 173.

129 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, above n 4. at 75; and Hirini Moko Mead *Tikanga Māori (Revised Edition): Living by Māori Values,* above n 65, at 1.

130 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, above n 4.

mentioned is the principle and value of balance and reciprocity.[131] Finally, once appropriate action has been completed a state of *ea* is reached.[132] The state of resolution should reflect the restoration of relationships.[133] Final-settlement clauses can be seen as consistent with this framework in that the *take* is a breach of the treaty, the appropriate *utu* is the redress given under the settlement and the final-settlement clause reflects the achievement of a state of *ea*. However, Natalie Coate's submission as counsel for Mr Ellis in *Ellis* suggests an alternative way of applying this framework.[134] Coates submitted that because the Court had allowed the appeal before Mr Ellis passed, to close the door just because of his death precluded a state of *ea* being reached.[135] When considering the example, if there is a possible or actual grievance that involved the Treaty settlement, a state of *ea* may need to be reached as the iwi or claimant group would have been prejudiced. However, this state of *ea* would not be able to be reached due to the ousting operation of final-settlement clauses as no court or tribunal has jurisdiction to inquire into or make any recommendation on what was settled.

In conjunction, this suggests that final-settlement clauses are inconsistent with tikanga. What this may mean on a practical level in light of how tikanga is being treated in contemporary Aotearoa New Zealand's legal system is discussed in due course.

IV Te Tiriti o Waitangi / The Treaty of Waitangi and Final Settlement Clauses

Ma whero ma pango ka oti ai te mahi
With red and black the work will be complete
The need for collaboration

Te Tiriti o Waitangi / The Treaty of Waitangi was signed on 6 February 1840.[136] There were two versions, the Māori language version (te Tiriti o Waitangi) and the English language version (the Treaty of Waitangi).[137] Both texts were drafted by English speakers.[138] The translator certified that te Tiriti was a true and accurate translation of the Treaty, the English language version.[139] This marks one of many early letdowns of the Crown. Only approximately

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at 75.

131 At 75.

132 At 75.

133 At 76.

134 *Ellis v R,* above n 113.

135 *Ellis v R,* above n 113.

136 At 7.

137 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, above n 4, at 7.

138 At 7.

139 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, above n 4. at 7.

39 *rangatira* (chiefs)[140] signed the Treaty, the English text.[141] Indeed it was te Tiriti, the Māori text, which was signed and understood by approximately 500 rangatira.[142] Notwithstanding the differences between the two texts, it has been acknowledged by the Waitangi Tribunal and the courts that te Tiriti, the Māori language version is given considerable weight.[143] Te Tiriti has been referred to as "the most important document in New Zealand's history".[144]

Te Tiriti envisioned a future when non-Māori would join Maori as citizens of the country. It was intended to be a partnership between the British and Māori,[145] however, what followed fell far short of that. The treaty had three articles which will now be described in brief. Article 1 of the Treaty was the giving up of "sovereignty" (supreme authority) vs the term that was used in te Tiriti, *kāwanatanga*, a Māori term thought to mean a limited form of administrative government.[146] Under art 1 iwi and hapū were interested in good government for control instituted over the new migrants.[147] Māori would have understood this to mean that rangatira would keep their independence and authority and would be the "Governor's equal".[148] Article 2 in the Treaty stated that rangatira had "full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties" (active protection) vs in te Tiriti, *te tino rangatiratanga* (Māori chieftainship / sovereignty) over all *taonga* (valuable / sacred).[149] Under art 2, the iwi and hapū were interested in the maintenance of their sovereignty over their people, institutions and properties.[150] Finally, art 3 guaranteed to Māori the rights and privileges of British subjects, including rights to property and individual freedom.[151]

In summary, te Tiriti communicated that Māori nations would retain te tino rangatiratanga over their lands and treasures but give kāwanatanga rights to the Crown.[152] What Māori agreed to

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140 John Moorfield "Te Aka: Māori English, English-Māori Dictionary and Index", above n 3.

141 Waitangi Tribunal *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* above n 17, at 386.

142 At 386; and Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, above n 4, at 7.

143 Waitangi Tribunal *Report of the Waitangi Tribunal on The Orakei Claim* (Wai 9, 1987) at 208.

144 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, above n 4, at 7.

145 Claudia Orange *The Treaty of Waitangi* (Bridget Williams Books Ltd, 1998) with assistance from the Historical Publications Branch, Department of Internal Affairs.

146 David Baragwanath, Hekia Parata and Jon Williams "Treaty of Waitangi – the last decade and the next century", above n 25, at 18.

147 At 18.

148 Waitangi Tribunal *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* above n 17, at 523.

149 At 14.

150 David Baragwanath, Hekia Parata and Jon Williams "Treaty of Waitangi – the last decade and the next century", above n 25, at 18.

151 New Zealand Law Commission, *Māori Customs and Values,* above n 71, at 71.

152 At 69.

was power-sharing.[153] The English version on the other hand said something very different, namely, that Māori ceded sovereignty to the Crown but retained exclusive and undisturbed possession of their lands, estates, forests, fisheries and other properties.[154] The British viewed the Treaty as holding the primary purpose of acquiring:[155]

> …Māori consent to a cession of sovereignty. Crucially, they saw such a cession as permanent, so that Māori could never legitimately seek to renegotiate the agreement made, still less reclaim the political authority which, according to the British, they had surrendered.

Throughout negotiations between the Crown and Māori, there were no clarifications of terms, leading to discrepancies and issues around interpretation and understanding of the document among its signees.[156] However, the ultimate agreement in both versions is that the Crown has the authority to establish some form of government in New Zealand and that Māori property and other rights and the authority of chiefs is protected.[157] The Waitangi Tribunal found that Māori possessed sovereignty and did not cede sovereignty to the English.[158] Chief Judge Taumaunu stated that:[159]

> On an objective assessment, the promises exchanged between the parties to the Treaty, at least on their face, created a vision of hope for the future. On one view of it, the Treaty imagined the creation of an enlightened world, te ao mārama, where Māori and Pākehā could live peacefully alongside one another and both parties could have opportunities to prosper

Unfortunately, the treaty was more or less ignored in case law during the early years. *Wi Parata v Bishop of Wellington*[160] is one of the first well-known cases regarding the treaty albeit for negative reasons. Chief Justice Prendergast declared that Māori had no civilized system of law and that they were uncivilized people who were incapable of holding sovereignty.[161] The Chief Justice went further and said that the treaty "must be regarded as a simple nullity".[162] The effect of this comment was huge; for decades the courts stopped looking at Māori related issues, and more importantly, Māori stopped going to court. Moreover, in *Hoani Te Heuheu Tūkino v*

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153 Waitangi Tribunal *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* above n 17, at 527.

154 At 72.

155 At 525.

156 Claudia Orange *The Treaty of Waitangi*, above n 145.

157 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, above n 4, at 7.

158 Waitangi Tribunal *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* above n 17.

159 Heemi Taumaunu *Mai te Po ki te Ao Mārama,* above n 124.

160 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72.

161 At 77.

162 At 78.

Aotea District Maori Land Board[163] the Privy Council held that the treaty did not give rise to rights enforceable by the courts and that it must be incorporated into statute in order for it to have legal standing.[164] The courts to this day have not yet overruled this decision. Although, comments that indicate a movement away from this line of thinking have been made[165] and the treatment of the treaty began to soften in the following years. *Huakina Development Trust v Waikato Valley Authority*[166] and other cases thereafter tend to demonstrate the courts' willingness to acknowledge the principles of the treaty even when there is no express statutory reference to it or its principles.[167]

The *New Zealand Māori Council v Attorney-General (SOE)*[168] case heard in 1987 was the first case to touch on the treaty in-depth and how it should be viewed and / or applied. This case concerned the New Zealand's government commencement of privatisation of state-owned assets.[169] Māori were concerned that this reorganisation would deny their rights under the treaty as it would decrease the assets available to return in response to grievances.[170] The State-Owned Enterprises Bill was enacted in 1986.[171] Section 9 stated that "[n]othing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi".[172] The New Zealand Māori Council argued that the Crown's proposal to transfer assets out of Crown ownership before claims could be heard was in breach of the principles of the treaty and outside the powers vested in the relevant legislation.[173] President Cooke stated that the treaty "should be interpreted… as a living instrument".[174] Justice Richardson also said that "… the Treaty must be capable of adaptation to new and changing circumstances".[175] Due

163 *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590.

164 *Hoani Te Heuheu Tūkino v Aotea District Māori Land Board,* above n 163.

165 For example, in *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 Cooke P stated that the case 'represented wholly orthodox thinking' and later in *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 at 305 said 'more fundamental questions of the place of the Treaty in the New Zealand constitutional system were left open'. Lastly, in *New Zealand Māori Council v Attorney-General (Broadcasting Assets)* [1994] 1 NZLR 513 at 516 he stated te Tiriti was 'of the greatest constitutional importance to New Zealand'.

166 *Huakina Development Trust v Waikato Valley Authority* (1987) 12 NZTPA 129.

167 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, above n 4, at 17.

168 *New Zealand Māori Council v Attorney-General,* above n 165.

169 *New Zealand Māori Council v Attorney-General*, above n 165.

170 *New Zealand Māori Council v Attorney-General*, above n 165.

171 State-Owned Enterprises Act 1986.

172 Section 9; and *New Zealand Maori Council v Attorney-General*, above n 165, at 559.

173 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, above n 4, at 17.

174 *New Zealand Maori Council v Attorney-General*, above n 165.

175 *New Zealand Maori Council v Attorney-General*, above n 165.

to the two different versions, this case established that "what matters is the spirit".[176] This led to what we now generally call the "treaty principles". It is the principles and not the bare words that have legal effect.[177] Ultimately, the Court of Appeal found that if the Crown transferred land to state-owned enterprises without ensuring that they would not breach the treaty principles it would be contrary to s 9.[178] It is worth acknowledging that the treaty texts themselves and the principles are distinct. However, for the purposes of my paper, when referring to the treaty I am primarily referring to the principles rather than the document itself as the principles are a more appropriate way in which to assess whether final-settlement clauses are consistent with this framework.

A Treaty Principles

It is important to note that the following principles were developed in the *SOE* case by a non-diverse bench.[179] However, the principles have also been addressed by the Waitangi Tribunal in their reports.[180] What follows is a brief outline of the treaty principles and how they have been described.

Partnership has been understood as an overarching principle from which the key principles have been drawn.[181] Partnership is the obligation to act reasonably and in good faith.[182] President Cooke in *SOE* said that partnership entails "responsibilities analogous to fiduciary duties".[183] His Honour went further and declared that "the parties owe each other co-operation", however "the principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy".[184] The courts, as well as the Waitangi Tribunal, have recognised the Crown's obligation to act in good faith and make informed decisions.[185] Although it has been stated that this does not extend to an absolute duty to consult.[186] Importantly, the treaty partnership is a continuous, evolving and ongoing

176 *New Zealand Maori Council v Attorney-General*, above n 165.

177 At 560.

178 Nicola Wheen and Janine Hayward, *Treaty of Waitangi Settlement*s, above n 22, at [18].

179 *New Zealand Maori Council v Attorney-General*, above n 165.

180 Waitangi Tribunal *He Tirohanga o Kawa ki te Tiriti o Waitangi: The principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (2001).

181 Waitangi Tribunal *He Tirohanga o Kawa ki te Tiriti o Waitangi: The principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal*, above n 180, at 77.

182 *New Zealand Maori Council v Attorney-General*, above n 165, at 664.

183 *New Zealand Maori Council v Attorney-General*, above n 165, at 664 and 683 respectively.

184 At 664.

185 *New Zealand Maori Council v Attorney-General*, above n 165, at 664; and Waitangi Tribunal *He Tirohanga o Kawa ki te Tiriti o Waitangi: The principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal*, above n 180, at 85.

186 Waitangi Tribunal *He Tirohanga o Kawa ki te Tiriti o Waitangi: The principles of the Treaty of Waitangi*

relationship.[187] The Crowns obligations towards Māori do not "end" or freeze in time. Likewise, "the Treaty itself does not end".[188] Rather, the Crown is obliged to ensure that they are continuing to perform adequately and execute their duties as reasonable treaty partners. The maintenance of the ongoing relationship is therefore key.

Active protection reflects that the "protection accorded to land rights is a positive 'guarantee'" and is "not merely passive" protection".[189] In other words, the protection in art 2 was a "positive guarantee" by the Crown to preserve Māori ability to use lands and waters to the fullest extent practicable.[190] The Privy Council stated that active protection requires more when there is taonga involved and if that taonga is vulnerable due to earlier breaches of the treaty.[191]

A duty to remedy past breaches was also accepted.[192] There is, therefore, a duty on behalf of the Crown to grant a remedy where a claim has merit (is well-founded) and there are no reasonable grounds to withhold.[193] The Waitangi Tribunal recognised the principle of reciprocity as deriving from art 1 and 2 of the treaty.[194]

B Post-Treaty Principles

These principles have been applied in both legislation and cases following the *SOE* case which provides insight into what these principles require.[195] In the *New Zealand Māori Council v Attorney-General (Radio Frequencies)*[196] the Crown wanted to allocate radio frequencies in a way that was going to harm the Māori language. To act consistently with the treaty, the Crown was instructed to wait for the release of a Waitangi Tribunal report to ensure they were fully informed before taking action.[197] *New Zealand Māori Council v*

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as expressed by the Courts and the Waitangi Tribunal, above n 180, at 85.

187 Legislation Design and Advisory Committee *Legislation Guidelines: 2018 Edition*, above n 6.

188 Matthew Palmer "The Treaty in New Zealand's Law and Constitution*"* National Library (9 March 2015) <https://natlib.govt.nz/>.

189 *New Zealand Maori Council v Attorney-General (Broadcasting Assets)*, above n 165, at 674 as per Richardson J.

190 At 642 as per Cooke P.

191 *New Zealand Māori Council v Attorney-General,* above n 165.

192 At 664-665.

193 At 665 as per Cooke P.

194 Waitangi Tribunal *He Tirohanga o Kawa ki te Tiriti o Waitangi: The principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal*, above n 180, at 80.

195 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, above n 4, at 18.

196 *New Zealand Māori Council v Attorney-General (Radio Frequencies)* [1991] 2 NZLR 129; and Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, above n 4, at 18

197 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, above n 4, at

Attorney-General (*Broadcasting Assets)*[198] broadly stands for the proposition that if the taonga at issue is vulnerable due to previous Crown action, more is required and expected of the Crown to actively protect it to be a good treaty partner and act in accordance with what was promised under art 2.[199] However, the Privy Council stated that the Crown's obligation to protect Māori is not absolute and unqualified.[200] Notably, in *Barton-Prescott v Director-General of Social Welfare,*[201] the court stated that:[202]

> ...since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance…and that for the purposes of interpretation of statutes, it will have direct bearing whether or not there is a reference to the treaty in the statute dealing with the status.

It seems clear that "even where Parliament has intervened, the Treaty of Waitangi retains its influence….does not so directly" and:[203]

> There needs to be a greater will to engage at an analytical level with the issues arising out of the Treaty, and there needs to be an appreciation that dealing with the Treaty is not a short term problem…the demands of the Treaty relationship enduring.

The words "the demands of the Treaty relationship enduring" reflect the ongoing treaty partnership. It could be argued that the Treaty settlement process is an example of the Crown working on their relationships with Māori by providing redress to compensate for injustices suffered. However, as will now be shown, the Treaty settlement process that is set up to make amends and uphold a treaty obligation is not exactly what meets the eye, raising doubt in the adequacy and appropriateness in regards to the context in which final-settlement clauses are made.

C Final Settlement Clause's Inconsistencies with Te Tiriti o Waitangi / The Treaty of Waitangi

Although there is some overlap with final-settlement clauses inconsistency with tikanga, final-settlement clauses inconsistency with the treaty is bolstered by the issues and flaws with the Treaty settlement process.

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198 *New Zealand Māori Council v Attorney-General* (*Broadcasting Assets)*, above n 165, at 517.

199 At 517.

200 At 513.

201 *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179.

202 At 184.

203 David Baragwanath, Hekia Parata and Jon Williams "Treaty of Waitangi – the last decade and the next century", above n 25, at 11 and 28.

Similarly to the tikanga value of whanaungatanga is the principle of partnership which is premised on an ongoing, continuous treaty relationship. Although it could be said that reaching a settlement is an example of cooperation by the Crown where the iwi or claimant group are given redress and the Crown receives the final-settlement clause in return, Māori did not sign up to a treaty that was intended to be breached. The treaty relationship is an ongoing obligation, not finite as final-settlement clauses suggest. Final-settlement clauses promote that all the consultation required in that space is done. They are not reflective of partnership. In fact, the wording and operation of these clauses illustrate the opposite. Related to this line of thinking is the principle of actively protecting Māori and upholding te tino rangatiratanga. Final-settlement clauses putting an end to the Crown's obligations is not an example of actively protecting Māori. Moreover, prohibiting tribunal and courts jurisdiction is an example of the Crown actively placing another wall and burden in front of Māori, quite the contrary to active protection. The Crown here has failed to provide the bare minimum of protection to Māori and claimant groups in this context, instead, expecting iwi and claimant groups to fight against them if a scenario such as the example arose.

The settlement process has a part to play in this analysis and strengthens these arguments. The process provides insight into how these clauses come about and whether their existence was made in a tikanga and treaty-compliant manner. "The aim [of the settlement process] is that both parties can "move on" from historical grievances".[204] Research has been conducted regarding the impact that the treaty claims settlement process has had on Māori.[205] It was found that the published 'motivations and objectives' of the settlement policy focused on restoring the honour of the Crown and removing the sense of grievance for Māori.[206] Notwithstanding this, Jones has found that many experience frustration with the settlement process, particularly the lack of genuine negotiation and the "lack of attention paid to actual grievances and matters of justice".[207] Jones argues that the settlement process undermines Māori legal traditions.[208] There is little evidence to support the idea that settlements have had a significant positive impact on the well-being of the general Māori population.[209] Jones argues that:[210]

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204 Benjamin Bielski "Final Settlement Clauses in Treaty Settlement Legislation", above n 11, at 24.

205 Margaret Mutu "The Treaty Claims Settlement Process in New Zealand and its Impact on Māori" (2019) 8 Lands 1 at 1.

206 At 10.

207 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori law* (UBC Press, Vancouver, 2016), above n 4,, at 22.

208 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori law* (UBC Press, Vancouver, 2016), above n 4, at 156.

209 Michael Belgrave "Negotiations and Settlements" in Nicola Wheen and Janine Hayward, *Treaty of Waitangi Settlements,* above n 22, at [175].

210 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori law* (UBC Press,

> If Māori legal traditions are recognised as the first law of Aotearoa, treaty settlements would proceed along very different lines...processes and structures that subordinate Māori legal traditions to those of the state would not be acceptable.

He goes further and states that settlements would not be seen as a process of the Crown acknowledging Māori claims, rather, a process where iwi acknowledge institutions of the state.[211] The five values that underpin tikanga would shape the settlement agreements and processes.[212] Perhaps most importantly, what is emphasised is that if the Treaty settlement process is to reflect its objectives of assisting and enhancing Māori and their rights, there must be a significant shift in the way that the entirety of the settlement process is executed.[213] Similarly, Professor Maria Bargh queries how settlements come about and believes that it is difficult to see how they can come to "an end" when the group who settle have to experience continuing breaches by the Crown.[214]

International standards that Aotearoa New Zealand has consented to such as the United Nations Declaration on the Rights of Indigenous Peoples are prohibited from negotiations and settlements.[215] The settlements are also said to be negotiated under circumstances where there is an extreme power imbalance.[216] The requirement that negotiations are confidential places pressure on the openness and honesty that tikanga values.[217] Negotiators have reported bullying by public servants and Crown agents.[218] Claimants are misled and facts are misrepresented in order to try and advance settlements.[219] This has caused iwi or claimant groups to settle under duress.[220] This is unsurprising considering there are unrealistic goals in place to finish settling

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Vancouver, 2016), above n 4, at 152.

211 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law,* above n 4, at 152.

212 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law,* above n 4,, at 152.

213 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, above n 4,, at 152.

214 Maria Bargh "The Post-settlement world (so far)" in Nicola Wheen and Janine Hayward, *Treaty of Waitangi Settlements,* above n 22, at [167].

215 Margaret Mutu "The Treaty Claims Settlement Process in New Zealand and its Impact on Māori", above n 205, at 13.

216 Ani Mikaere "Settlement of Treaty Claims: Full and Final, or Fatally Flawed?" (1997) *New Zealand Universities Law Review 17*(4) 425 at 451; and Margaret Mutu "The Treaty Claims Settlement Process in New Zealand and its Impact Māori", above n 205, at 11.

217 At 11.

218 Margaret Mutu "The Treaty Claims Settlement Process in New Zealand and its Impact on Māori", above n 220, at 11.

219 At 11.

220 Margaret Mutu "The Treaty Claims Settlement Process in New Zealand and its Impact on Māori", above n 220, at 11.

claims by particular dates.[221] For example, in 2008 the New Zealand Government announced that they aimed to settle all historical claims by 2014.[222] As Philip Joseph points out, this goal was nothing short of aspirational as opposed to achievable.[223] Later in 2014, the Labour Government declared that all historical treaty claims would be resolved by 2020.[224] Hon Andrew Little MP conceded that the Crown will miss the 2020 deadline and claimed that litigation was slowing things down.[225] However, Jones argues that the number of groups in litigation actually suggests that the process is failing to take the time to get things right, and that: [226]

> It might work in the short term in terms of forcing people into agreements... But it doesn't work in terms of achieving durable, long-lasting settlements, which the Crown says it is aiming to do.

It is therefore no surprise that people do not accept the Crown's apology as genuine, rather, as "meaningless".[227] Claimant negotiators have stated that in most cases it takes generations to repair the division and conflict arising out of the process.[228] Mere Mangu believes that the Crown's processes are the reason for the division between the iwi or claimant group and the Crown and that it had been a "terrible process to date". [229]

The Crown has a duty to act in the best interests of all New Zealanders.[230] Relatedly, settlements are not to affect Māori entitlements as New Zealand citizens nor do they affect their ongoing rights out of the treaty or under the law.[231] The whole purpose here is to assess whom final-settlement clauses serve and whether, in fact, they are contrary to Māori in relation to tikanga and the treaty.

I argue that the settlement process undermines Crown guidelines and principles applied in the resolution of historical claims set out in Section II. One of the guidelines that the Crown must follow is that Treaty settlements should not create further injustices. Based on the above

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221 At 11.

222 Leigh-Marama McLachlan "Crowns admits it will miss treaty settlements 2020 deadline" (26 November 2019) Radio New Zealand <https://www.rnz.co.nz/>.

223 Philip A Joseph *Constitutional and Administrative Law in New Zealand,* above n 54, at 87.

224 Leigh-Marama McLachlan "Crowns admits it will miss treaty settlements 2020 deadline", above n 222.

225 Leigh-Marama McLachlan "Crowns admits it will miss treaty settlements 2020 deadline", above n 222.

226 Leigh-Marama McLachlan "Crowns admits it will miss treaty settlements 2020 deadline", above n 222.

227 Margaret Mutu "The Treaty Claims Settlement Process in New Zealand and its Impact on Māori", above n 220, at 11.

228 At 11.

229 Leigh-Marama McLachlan "Crowns admits it will miss treaty settlements 2020 deadline", above n 221.

230 Office of Treaty Settlements *Healing the past, building a future. A Guide to Treaty of Waitangi Claims and Negotiations with the Crown. Summary Edition,* above n 9, at 11.

231 At 11.

information, the Treaty settlement process is itself an injustice. Moreover, if we apply the latter example of the application of the *take-utu-ea* framework, one can see how final-settlement clauses being included in settlement legislation may give rise to further treaty injustices. If there is a real grievance in relation to what has been settled, and the iwi or claimant group cannot gain access to the court or tribunal, how is justice served? Settlements must aim to be fair and remove the sense of grievance felt for Māori.[232] One would think that the redress removes some grievance. However, iwi and claimant groups are settling under duress and unfair conditions. Therefore it cannot be confidently said that settlements remove the sense of grievance felt for Māori, and final-settlement clauses are just another possible grievance in the way.

Principles that are also meant to be considered in reaching a settlement include "acting in good faith based on mutual trust and cooperation towards a common goal".[233] It is doubtful that iwi or claimant groups view final-settlement clauses as achieving a common goal as they work directly in favour of the Crown and operate by restricting, instead of enhancing, tangata whenua rights. The principle of restoration of relationships is also of relevance. "The strengthening of the relationship between the Crown and Māori is an integral part of the settlement process and will be reflected in any settlement".[234] On the one hand, it could be argued that final-settlement clauses reflect the Crown and Māori coming to a mutual agreement and are a testament to that agreement. Alternatively, when looking at the wording of final-settlement clauses alone it is hard to view this as positive, particularly from the perspective of an iwi or claimant group whom this clause is precluding from the courts and tribunal. To reiterate, this clause promotes the ending of the relationship rather than a restoration of the relationship. On a broad level, among other things, the settlement process appears to be a mere check box to the Crown and is in of itself causing further injustices, bleeding out through the existence of final-settlement clauses.

"The settlement process needs to tell a different story…settlements cannot be written only by the Crown."[235] The "settlement" process does not end – unless breaches in these relationships end.[236] Treaty settlements would look different if it were te ao Māori and tikanga leading the process and tikanga values shaping the legislation.[237] It is reasonable to suggest that if this were

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232 At 11.

233 At 11.

234 At 11.

235 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, above n 4, at 152.

236 Matthew Palmer "The Treaty in New Zealand's Law and Constitution*"* National Library*,* above n 188.

237 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, above n 4, at 152.

so, final-settlement clauses would not be included as they are of sole benefit to the Crown rather than vulnerable tangata whenua. Although the Crown continues to steer this story it is important to think about what story would be told if there was a different writer. Based off of my analysis, not only are final-settlement clauses inconsistent with tikanga, but they are also inconsistent with the treaty.

V Interpreting Final Settlement Clauses – A Proposed Direction of Travel

Kotahi te kohao o te ngira e kuhuna ai te miro ma, te miro pango, te miro whero

There is but one eye of the needle through which the white, the black and the red threads must pass

Final-settlement clauses are inconsistent with both tikanga and the treaty. Now, we turn the waka towards what this may mean or look like on a practical level by discussing what those with the interpretive power, including but not limited to courts and tribunals, should do if faced with final-settlement clauses.

The above whakataukī was used by Coates in *Ellis*[238] to encourage the Justices of the Supreme Court to think about the law in Aotearoa as a *whāriki* (woven mat / piece of fabric),[239] and that they are one of the weavers and entities that create and add to our whariki of law. Not only should the courts draw from the law of England, but they should also draw from tikanga Māori, the law of the tangata whenua and use it as is appropriate.[240] In accordance with this whakataukī, this section advocates that to uphold tikanga and the treaty, final-settlement clauses should be read down so that they are of no effect.

A Ngāti Apa Ki Te Waipounamu Trust v The Queen[241]

Ngāti Apa Ki Te Waipounamu Trust v The Queen (Ngāti Apa) provides insight into the interpretation of final-settlement clauses and to what extent they may oust access to the Waitangi Tribunal by a cross-claimant.[242] The Court of Appeal decided to interpret the final-settlement clause narrowly in that it did not prevent Ngāti Apa as a cross-claimant.[243] The case law supports that "where an interpretation is available that will be consistent with perceived intention, and that interpretation does not limit a party's access to justice, that will be

238 *Ellis v R,* above n 113.

239 John Moorfield "Te Aka: Māori English, English-Māori Dictionary and Index", above n 3.

240 *Ellis v R* SC 49/19 28 Febrary 2020 (Response Submissions of the Appellant) at 8.

241 *Ngāti Apa Ki Te Waipounamu Trust v R* [2000] 2 NZLR 659.

242 *Ngāti Apa Ki Te Waipounamu Trust v R,* above n 241.

243 *Ngāti Apa Ki Te Waipounamu Trust v R,* above n 241.

preferred".[244] However, the aftermath of the *Ngāti Apa* decision saw the passing of the Foreshore and Seabed Act 2004. This reminds New Zealanders that at the end of the day, Parliament is supreme and "a judicial decision in favour of Māori interests can still be overruled by legislation".[245]

There is a fundamental relationship between the interpretive role of the courts and the role to uphold tikanga and the treaty which has been sought by Māori for years. Cases have been raised that suggest that in some circumstances, tikanga governs and is to be the law that is applied.[246] Considering final-settlement clauses exist by virtue of attempting to make amends to a treaty breach with Kupe's descendants, this is one of those circumstances where tikanga should govern. If final-settlement clauses are indeed inconsistent with tikanga and the treaty, it would be unjust for those who have the power and discretion to interpret these clauses to give final-settlement clauses their literal and plain meaning. In *Barton-Prescott* it was stated that the general application of the treaty "must colour all matters to which it has relevance should colour".[247] Based on my above analysis, if tikanga and the treaty shaped the interpretation of final-settlement clauses, the outcome would be that they are not interpreted at face value and read down so that they are of no effect. However, if this were so, one cannot ignore the implications and tension that this may have on some of the constitutional principles that underlie our constitutional framework; parliamentary sovereignty and separation of powers.

Aotearoa New Zealand is premised on a New Zealand-European constitutional makeup, in which Māori rights and interests are undermined.[248] With the treaty the British bought with them the doctrine of parliamentary sovereignty.[249] Aotearoa New Zealand's Parliament includes the Queen, the Governor-General, and the House of Representatives which consists of 120 members who are elected every three years.[250] Parliamentary sovereignty reflects the principle that Parliament can make and unmake any law.[251] This very principle has enabled the passing of law that removes rights from Māori to act in accordance with the general public's wishes.[252] Parliament is therefore well placed to legislate as it pleases, and include final-

244 Benjamin Bielski "Final Settlement Clauses in Treaty Settlement Legislation", above n 11, at 33.

245 Benjamin Bielski "Final Settlement Clauses in Treaty Settlement Legislation", above n 11, at 35

246 *Ellis v R,* above above n 113; *Takamore v Clarke,* above n 108; *Mercury New Zealand Ltd v Waitangi Tribunal*, above n 121; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board,* above n 111.

247 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, above n 4, at 19.

248 At 562.

249 At 557.

250 Jacinta Ruru and Jacobi Morris "Maranga Ake Ai" the heroics of constitutionalising 'Te Tiriti o Waitangi/The Treaty of Waitangi' in Aotearoa" (2020) Federal Law Review 48(4) 556 at 561.

251 A.V Dicey *Introduction to the Study of the law of the Constitution* (10th ed, 1959) at 3.

252 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, above n 4, at 562.

settlement clauses in Treaty settlement legislation. If the courts were to read down final-settlement clauses, this may be viewed as an interference on Parliament's right to legislate as it has passed Treaty settlement legislation that explicitly includes final-settlement clauses. Relatedly, the constitutional principle of separation of powers stands for the principle that the three branches of government; the Legislature, the Executive and the Judiciary all serve different functions to ensure that one branch does not have excess power.[253] The Legislature makes and unmakes law, the Executive implements the laws and the Judiciary interprets the law and makes case law.[254] If final-settlement clauses are read down, there is also a possibility that the judiciary is stepping outside of its jurisdiction and into Parliament's territory.

Although parliamentary sovereignty is one of, if not the leading constitutional principle in Aotearoa New Zealand, it has been subject to challenge. Chief Justice Dame Sian Elias as she then was noted that while Parliament is supreme, it legislates under the law of the constitution, which is proposed to be a matter for the courts.[255] She stated that "what is required is an 'explicit analysis of constitutional principle' rather than identification of a 'sovereign' or a search for a single 'rule of recognition'".[256] She then went on to say; "does that mean Parliament is not sovereign? Yes. But it never was."[257] Academics from other jurisdictions have also been critical of parliamentary sovereignty on the basis that it is not realistic.[258] President Cooke held in obiter that "[s]ome common law rights presumably lie so deep that even Parliament could not override them".[259] This reflects the judicial responsibility that the common law protects the democratic society and an independent judiciary. Palmer has suggested that if a case came before the New Zealand courts and at issue was the influence of the treaty, the treaty would be found to be valid in regards to international law and therefore binding on the Crown.[260] Linked to this latter argument, in arguing that fiscal caps in Treaty settlements are illegal and inappropriate, notwithstanding parliamentary sovereignty, Williams claimed that the treaty imposes obligations on the Crown not to legislate inconsistently with the treaty principles.[261] At international law, the impact of a valid treaty of cession gives rise too and imposes the obligation of acting in good faith.[262] Justice Richardson in *New Zealand*

253 At 219.

254 Ministry of Justice "Learn About the Justice System: Who makes & applies the law (Last updated 27 August 2020) Justice.govt.nz < https://www.justice.govt.nz/>.

255 Dame Sian Elias, 'Sovereignty in the 21st century: Another Spin on the Merry-go-Round' (2003) 14(3) Public Law 148 at 162.

256 At 162.

257 At 162. .

258 See, for example Harold Laksi *A Grammar of Politics* (G Allen & unwin, 5th ed, 1967).

259 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA).

260 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, above n 4.

261 Martin Williams "Fiscal Cap on Full and Final Settlement of all Māori Claims is Illegal and Inappropriate" (1993) 2 WLR.

262 Martin Williams "Fiscal Cap on Full and Final Settlement of all Māori Claims is Illegal and

Māori Council v Attorney-General[263] recognised the applicability of the international law doctrine of good faith as imposing inherent obligations on the Crown and Māori as parties to the treaty. The treaty therefore imposes the treaty partners a fiduciary obligation not to place themselves in a position where a duty of theirs is in conflict with their personal interest.[264] Drawing on this line of argument, the Crown, upon which such an obligation is imposed by law, cannot legally put itself in a position where its duty to Māori conflicts with its interests.[265] Māori are vulnerable to Parliament. To legislate in conflict with them is an abuse of their discretion.[266] Williams claims that such a statute or part of a statute:[267]

> ...may be disregarded by a court, and can be regarded as illegal, this suggests that, even if enacted, a full and final settlement of all Māori claims would be illegal.

In *Ngāti Whātua*,[268] Ngāti Whatua sought declarations from the Crown for intending on transferring land they had mana whenua over.[269] The majority allowed the appeal holding that the Court had jurisdiction to deal with the declarations regarding rights.[270] However, they decided that they could not deal with the declarations that speak to the Crown's ability to enter into a deed with another iwi.[271] Conversely, Elias CJ in her minority judgment reasoned that just because at the conclusion of the Treaty settlement process the settlement is transformed into a bill, does not mean that it is out of Judge's reach particularly when it is a treaty breach at issue.[272] This suggests that in these circumstances where a breach of the treaty is at issue, the court may have jurisdiction to look at legislation. There is therefore scope to argue that parliamentary sovereignty may not be the determining factor in relation to how legislation ought to be interpreted.

Based on the above, the reading down of final-settlement clauses appears to be viable. Yes, it is likely previous Parliaments were not concerned with legislating consistently with tikanga and the treaty whilst constructing Treaty settlement legislation. However, as Aotearoa New

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263 *New Zealand Māori Council v Attorney-General,* above n 165.

264 Martin Williams "Fiscal Cap on Full and Final Settlement of all Māori Claims is Illegal and Inappropriate", above n **Error! Bookmark not defined.**.

265 Martin Williams "Fiscal Cap on Full and Final Settlement of all Māori Claims is Illegal and Inappropriate", above n **Error! Bookmark not defined.**.

266 Martin Williams "Fiscal Cap on Full and Final Settlement of all Māori Claims is Illegal and Inappropriate", above n **Error! Bookmark not defined.**.

267 Martin Williams "Fiscal Cap on Full and Final Settlement of all Māori Claims is Illegal and Inappropriate", above n **Error! Bookmark not defined.**.

268 *Ngāti Whātua Ōrakei Trust v Attorney-General* [2019] 1 NZLR 116 (SC).

269 At [51].

270 At [115]-[116].

271 At [115]-[116].

272 At [115]-[116].

Zealand is becoming a more inclusive and indigenised country, the argument that the Parliament of today intends to legislate inconsistently with tikanga and the treaty is an unattractive one. Parliamentary sovereignty is not immune from challenge particularly where the treaty is at issue. This opens the door for those with discretion to interpret final-settlement clauses in a tikanga and treaty compliant way. A related but alternative way of looking at the availability of interpretation of final-settlement clauses is by juxtaposing privative provisions.

B Privative Provisions

Final-settlement clauses oust courts and tribunals jurisdiction. They are therefore similar to privative provisions, also known as ouster clauses.[273] A privative provision aims to prevent courts and tribunals from looking into particular matters.[274] The general judicial orthodoxy on privative provisions suggests that the courts are reluctant to oust access to the court.[275] In *Bulk Gas Users Group v Attorney-General (Bulk Gas)*[276] the privative provision at issue was s 96 of the Commerce Act 1975 which stated:[277]

> Except on the ground of lack of jurisdiction, no order, approval, proceeding, or decision of the Secretary under this Part of this Act shall be liable to be challenged, reviewed, quashed, or called in question in any Court…

The similarities between the above provision and final-settlement clauses are obvious. Section 96 states "no order, approval, proceeding, or decision...shall be liable to be challenged, reviewed quashed or called in question in any Court", which is similar to final-settlement clauses which state generally "no court or tribunal has jurisdiction to inquire into or make any recommendation on...".[278]

Justice Cooke in *Bulk Gas* held that an ouster clause will not apply "if the decision results from an error on a question of law which the authority is not empowered to decide conclusively".[279] It was established that the courts will refrain from reading legislation in a manner that restricts access to the courts, the consequence being that privative clauses are read down meaning they are of no effect.[280] However, if there are alternative dispute mechanisms available, the court is

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273 Benjamin Bielski "Final Settlement Clauses in Treaty Settlement Legislation", above n 11, at 4.

274 Benjamin Bielski "Final Settlement Clauses in Treaty Settlement Legislation", above n 11, at 4; see generally Josh Pemberton "The Judicial Approach to Privative Provisions in New Zealand" [2015] NZ L Rev 617.

275 At 5; and at 634.

276 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA).

277 At 132.

278 Ngai Tahu Settlement, above n 20; and Ngāti Hinerangi Claims Settlement Act, above n 20.

279 *Bulk Gas Users Group v Attorney-General*, above n 276, at [133] and [138].

280 *Bulk Gas Users Group v Attorney-General*, above n 276; and *Tannadyce Investments Limited v*

more likely to give effect to the privative provision.[281] But, in the context of final-settlement clauses, the alternative dispute resolution mechanism is the Waitangi Tribunal whose jurisdiction is also ousted.

Bielski states that:[282]

> [Final-settlement clauses] are unique insofar as they are *agreed* to by iwi – via a deed – as a part of their Treaty settlement, rather than simply *imposed* by the passage of legislation. Thus, [final-settlement clauses] are *sui generis,* and this may affect their interpretation. It might mean that the courts are more willing to recognise an [final-settlement clauses] ousting effect, on basis that this effect has been agreed.

When reflecting on the issues and flaws with the settlement process that have been explored, it is arguable whether iwi and claimant groups can be said to have fully agreed to the settlements. This is because the lived experiences of the Treaty settlement process have seen iwi and claimant groups reporting settling under duress, feeling unsupported by the Crown and disappointed with the process. Ample evidence supports quite the opposite of iwi agreeing to settlements.

The interpretation of privative clauses is a creation of the common law by virtue of judicial review. *Bulk Gas* reflects the traditional judicial orthodoxy in regard to privative clauses. But, *Bulk Gas* is of its time. In *Bulk Gas,* there was no discussion on tikanga, as at the time tikanga was in essence irrelevant to Parliament and to the court.[283] However, if we draw from the cases previously discussed such as *Takamore*[284] which establishes that tikanga is part of the values of the common law[285] and Ellis[286] where the court based their next steps in an appeal on tikanga, these are better and stronger indications of where we are in contemporary Aotearoa New Zealand. Moreover, the notion that the Crown and the three branches of government must execute their duties as true treaty partners is too of growing importance. Tikanga and the treaty

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Commissioner of Inland Revenue [2011] NZSC 158 at [4].

281 *Tannadyce Investments Limited v Commissioner of Inland Revenue,* above n 280, at [15]; and *Bulk Gas Users Group v Attorney-General*, above n 276, at [136].

282 Benjamin Bielski "Final Settlement Clauses in Treaty Settlement Legislation", above n 11, at 31

283 *Bulk Gas Users Group v Attorney-General*, above n 276.

284 *Tqkamore v Clarke,* above n 108.

285 *Ellis v R,* above n 113; *Takamore v Clarke,* above n 108; *Mercury New Zealand Ltd v Waitangi Tribunal*, above n 121; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board,* above n 111; *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Limited*, above n 118; and *cury New Zealand Ltd v Waitangi Tribunal*, above n 121.

286 *Ellis v R,* above n 113; *Takamore v Clarke,* above n 108; *Mercury New Zealand Ltd v Waitangi Tribunal*, above n 121; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board,* above n 111; *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Limited*, above n 118; and *cury New Zealand Ltd v Waitangi Tribunal*, above n 121.

add another *hīrau* to this waka (paddle).[287] If we adopt a different model of constitutionality informed equally by tikanga and the treaty, how does this change the legalistic jurisdiction of privative clauses? *Bulk Gas* is the initial take on English gymnastics where Lord Cooke adopts a constitutional stance on privative clauses and invites us to think about that on constitutional power and values, but only the Western kind. The likes of *Ellis*[288] pushes the waka a little further. It gives us a less radical invitation to parliamentary scepticism and bolsters the argument that a different reinterpretation of these clauses may be required and appropriate. So, the reading down of final-settlement clauses so that they are of no effect is consistent with this direction of travel.[289]

Perhaps then as we see the fusion of tikanga and the common law and Treaty obligations continue to be valued and enforced, neither framework can be ignored and Parliament has a duty to legislate in accordance with them. To interpret final-settlement clauses consistently with tikanga and the treaty is to ensure that Parliament is legislating, and that the court is interpreting, appropriately. The Waitangi Tribunal has stated that:[290]

> Unless it is accepted that New Zealand has two founding cultures, not one; unless Māori culture and identity are valued in everything government says and does; and unless they are welcomed into the very centre of the way we do things in this country, nothing will change.

VI Conclusion

Ki te kahore he whakakitenga ka ngaro te iwi
Without foresight or vision the people will be lost

As the waka reaches the final destination, it is important to reflect on our journey. We have explored tikanga Māori, the values that underpin tikanga and how it has been treated in the law. Similarly, we looked at the history of the treaty, the development of the principles, and the Treaty settlement process which was established in order to settle historical claims. Final-settlement clauses reflect that in return for the redress, the Crown is discharged from their

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287 John Moorfield "Te Aka: Māori English, English-Māori Dictionary and Index", above n 5.

288 *Ellis v R,* above n 113; *Takamore v Clarke,* above n 108; *Mercury New Zealand Ltd v Waitangi Tribunal*, above n 121; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board,* above n 111; *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Limited*, above n 118; and *cury New Zealand Ltd v Waitangi Tribunal*, above n 121.

289 *Ellis v R,* above n 113; *Takamore v Clarke,* above n 108; *Mercury New Zealand Ltd v Waitangi Tribunal*, above n 121; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board,* above n 111; *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Limited*, above n 118; and *cury New Zealand Ltd v Waitangi Tribunal*, above n 121.

290 Waitangi Tribunal *Ko Aotearoa Tēnei A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at xviii.

duties and the court and tribunal's jurisdiction to inquire into what was settled is ousted. Final-settlement clauses function in favour of the Crown.

In light of Aotearoa New Zealand's movement towards a more indigenised Aotearoa, the descriptive material was drawn on and used to answer the fundamental question; are final-settlement clauses consistent with tikanga and the treaty? Ultimately, I argue that final-settlement clauses are inconsistent with both tikanga and the treaty. Final-settlement clauses do not enhance or promote whanaungatanga, mana, kaitiakitanga or manaakitanga. Relatedly, due to the clause explicitly discharging the Crown and bringing the Māori-Crown relationship to an end they fall short of reflecting the treaty principle of partnership premised on being a good treaty partner and acting in good faith. Similarly, the ousting of the court and tribunal's jurisdiction is not an example of actively protecting Māori, but rather, an example of actively restricting Māori.

Supplementing these arguments are flaws with the Treaty settlement process. As stated, final-settlement clauses lie within Treaty settlement legislation, the final product of the Treaty settlement process. Many have found that iwi and claimant groups have felt oppressed by the Crown through the settlement process, and relationships have deteriorated throughout. It is no question that the settlement process has several issues. These issues are the context and background to the making of final-settlement clauses, leaving me with the pressing question: why are final-settlement clauses a necessary ingredient of this legislation if the Crown were truly doing their job?

In light of my analysis, similarly to privative provisions, if final-settlement clauses must be interpreted by those who have the power to do so they should be read down so that they are of no effect. If final-settlement clauses were given their plain and literal meaning, not only is this inconsistent with tikanga, but this would also err on the side of a further treaty breach. Although parliamentary sovereignty is a relevant consideration in this inquiry, the Parliament of Aotearoa New Zealand today cannot intend to legislate inconsistently with tikanga and the treaty, and nevertheless, the court has a role to ensure that these frameworks are not being disadvantaged. How tikanga and the treaty interact with our current legislation is an important kaupapa. This is an example of placing tikanga, te ao Māori and te Tiriti at the forefront and challenging the existence of legislation (or whatever the case may be) as Aotearoa New Zealand continues on its journey of adaptation. Although tangata whenua have endured an unfortunate past, conversations such as this may help in turning this waka around. I conclude with the following whakataukī:

Ka mate te kāinga tahi, ka ora te kāinga rua
When one house dies, a second lives
When something good emerges from misfortune

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