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Direct Negotiation with the Crown in Treaty of Waitangi Claims

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I INTRODUCTION

Treaty of Waitangi claims and settlements have received much prominence in recent years, both from a political and legal point of view. There are number of formal options available to Maori who have grievances against Crown action. In recent years direct negotiations have become increasingly important methods for dealing with these grievances, and the government has been developing its negotiation policies.

This paper looks at the role direct negotiations play in the area of Treaty claims. Part II describes three formal options available to Maori claimants: the Waitangi Tribunal, the courts, and remedial legislation. It looks at how they have influenced each other, and, in particular, how they can affect direct negotiations. Part III examines Crown negotiation policy as contained in the Crown's Proposals published in 1994. Part IV looks at some issues of cross-cultural communication as well as constitutional implications flowing from the direct negotiation process. The final part draws conclusions regarding the negotiations themselves and their relations to other avenues for Treaty of Waitangi grievances.

This paper attempts to show that none of the institutions of the claims process can be looked at in isolation and that they have had considerable interaction. It is also suggested that direct negotiations will become increasingly important as methods of claims settlement. The paper argues that negotiations between Maori and the Crown are rich in

cross-cultural and institutional issues. They cannot be seen merely as bargaining about resources, or even rights breaches, but must also be recognised as discussions about identity, the status of the parties and ultimately New Zealand's constitution.

II METHODS OF RESOLVING MAORI GRIEVANCES

The government provides four main avenues for addressing Maori claims of wrongful Crown action. These are the Waitangi Tribunal, litigation in the Courts, remedial legislation, and direct negotiation with claimants. This part of the paper presents an overview of the first three, while the following parts discuss direct negotiations.

A The Waitangi Tribunal

1 Jurisdiction

This Tribunal was established under the Treaty of Waitangi Act 1975, and has experienced a growth in its powers and influence to become a highly significant institution. Initially its scope of inquiry was limited to reporting on whether legislation, or Crown policy, acts or omissions *after* 10 October 1975 breached Treaty principles.[1] Even at this stage though the Tribunal regarded itself as having the power to "consider" events before this date, even if it could not "investigate" them. In 1985, after the Tribunal began making a notable impact in the claims process, an amending Act extended the jurisdiction of the Tribunal to claims

[1] The date on which the Treaty of Waitangi Act 1975 came into force.

from 6 February 1840, enlarged its membership, and empowered it to commission research and appoint counsel to represent claimants.[2]

Apart from the Chair up to 16 additional members, both Maori and Pakeha, are appointed by the Crown.[3] The Tribunal can hear claims from Maori who feel prejudicially affected by legislation, policies, acts or omissions of the Crown inconsistent with the principles of the Treaty of Waitangi.[4] If the Tribunal finds any claim is well founded, it may recommend action that the Crown take to compensate for or remove the prejudice.[5] Such recommendations can involve broad policy measures as well as compensation through transfer of resources or money. In certain cases involving assets transferred to State Owned Enterprises in the 1980s, the Tribunal can make binding recommendations.[6] Later negotiated settlements made such a power applicable to timber-cutting rights on Crown-owned plantation forests, and to assets of the state-owned railways, vested by statute in into a company similar to a state-owned enterprise.[7] The power has not yet been exercised, and it is generally considered that political pressures would restrict its use. The Tribunal has,

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[2] Treaty of Waitangi Amendment Act 1985.

[3] Treaty of Waitangi Act 1975, s 4.

[4] Above n 3, s 6(1).

[5] Above n 3, s 6(3)-(4).

[6] See Treaty of Waitangi (State Enterprises Act) 1988

[7] Above n 3, ss 8HA-8HJ. The amending enactments are the Crown Forest Assets Act 1989, and the New Zealand Railways Corporation Restructuring Act 1990, ss 43-48.

however, recently contemplated its use in the Muriwhenua claim, and may well do so for some land in Turangi.[8]

The Tribunal deals with three types of claims:[9]

(a) historical (past Crown actions);

(b) contemporary (current Crown actions);

(c) conceptual ('ownership' of natural resources).

Historical claims may be major claims involving large tribal losses, or specific claims. Historical claims are grouped by districts for combined hearings with specific claims being ancillary to the main inquiries. One inquiry and report may involve as many as 30 individual claims. These claims involve a range of subject-matter involving events prior to 1985, including Crown and private purchases, effects of the Native Land Court, and confiscations.

Contemporary claims deal with a wide range of issues including resource management , Maori language, and economic development. These issues have often been the subject matter of court actions, and there has been some interplay between claims before the Waitangi Tribunal claims and court actions. Examples include the transfer of assets to State

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[8] See A Hubbard "Waitangi fatigue" *Sunday Star Times*, Auckland, 24 August 1997, C1-C2.

[9] See ET Durie "Background Paper" (1995) 25 VUWLR 97.

Owned Enterprises in the 1980s, and the 1992 fisheries settlement. Conceptual claims involve Maori interest in the use and development of rivers, lakes, foreshores, minerals and geothermal resources, or in the outputs from their development.

2 Bicultural Procedure

The Waitangi Tribunal's bicultural process is significant.[10] The turning point came in 1982 during the Motonui-Waitara Claim when the Tribunal held a hearing on the claimants' marae. While the Tribunal holds parts of hearings in non-Maori settings, the marae hearings have become a marked feature of proceedings. The Tribunal's rationale is that claimants feel more at ease, and can provide more effective evidence when they can give testimony in Maori, on their tribal lands. The Tribunal members come to the claimants' marae as distinguished manuhiri and take over the marae during proceedings. The Tribunal must upholds the kawa of the marae while attempting to respect both Maori and Pakeha laws. Moreover, women cannot be denied the right to speak. Lawyers, used to court protocol, must make some accommodation.[11]

Despite the efforts towards cultural sensitivity, Boast claims that the Tribunal should not be seen as an: "unparalleled example of a bicultural procedure to be offered as a model to the

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[10] WH Oliver *Claims to the Waitangi Tribunal* (Waitangi Tribunal Division, Department of Justice, Wellington, 1991) 13-17; ET Durie and GS Orr "The Role of the Waitangi Tribunal and the Development of a Bicultural Jurisprudence" (1990) 14 NZULR 62, 64-72.

rest of the world".[12] Given that the Tribunal is subject to judicial review there could be an obligation for it to fully document proceedings, provide opportunity for witnesses to be questioned and to preserve impartiality between the Crown and claimants. The Tribunal is deemed to be a Commission of Inquiry[13] and proceeds in a manner that is inquisitorial, formal and judicialised. Cross-examination does occur, and: "can be elaborate and lengthy, and can include challenges to the qualifications and expertise of the witnesses".[14] The Tribunal may commission research and authorise (and fund) the claimants to commission research.[15] It analyses historical, anthropological, sociological, economic and other evidence. Specialist evidence has been playing an increasingly important role in hearings.[16]

In considering the claims, the Tribunal has regard to both the English and Maori language versions of the Treaty and, for the purposes of the Act, has: "exclusive authority to determine the meaning and effect of the Treaty as embodied in the 2 texts and to decide issues raised by the differences between them."[17] The Tribunal's interpretation of the Treaty has involved considering it as an international treaty.[18] This leads to consideration of

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[11] Above n 10, 70.

[12] RP Boast "The Waitangi Tribunal: "Conscience of the Nation" or Just Another Court? (1993) 16 UNSWLJ 223, 235.

[13] Above n 3, clause 3 of the Second Schedule.

[14] Above n 12.

[15] Above n 3, clause 5A of the Second Schedule.

[16] Above n 12.

[17] Above n 3, s 5(2).

the jurisprudence resulting from treaties with indigenous peoples in other jurisdictions such as the United Sates and Canada, as well as instruments of international law, and scholarship on interpreting international treaties.[19]

3 How the Tribunal relates to other institutions

The Tribunal is a creature of statute, and its capabilities have been enhanced and restricted by statute. While the tribunal has a good deal of flexibility in defining its own procedures and in writing its reports, it must proceed within the limits of an ordinary Act of Parliament. As will be discussed the tribunal's powers have been expanded following negotiated agreements which were themselves entered into following court rulings.

Taking claims through the Waitangi Tribunal is a long and costly exercise. .[20] Under-funding is often a problem, and delays are long.[21] The Tribunal offers a great deal more flexibility than the courts, both in terms of procedure and solutions. Unlike court orders, however, Tribunal recommendations are, for the most part, not binding. Often certain matters have come before both the courts and the Waitangi Tribunal.[22] The Tribunal itself

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[18] W Renwick *The Treaty Now* (GP Publications, Wellington, 1990) 20-24.

[19] The Tribunal's *Orakei Report* drew on interpretative principles described in Lord McNair's *The Law of Treaties*.

[20] Ngai Tahu's claim, for example, cost $2.4 million, see H Melbourne *Maori Sovereignty - The Maori Perspective* (Hodder Moa Beckett, Auckland, 1995) 155.

[21] Above n 9, 103.

[22] See generally J Munro *Maori in the Courts - The Limits of Litigation 1987-1995*, M Litt Thesis (Law) Balliol College, Oxford, 1996.

can be a major focus of court cases. In 1991 the New Zealand Maori Council sought judicial review of the decision of the Minster of Communications to proceed with frequency tender process under the Radiocommunications Act 1989 before the release of a Waitangi Tribunal Report on the Maori language.[23] The Court of Appeal held that as a matter of administrative law, the Minster was required to wait and consider the Tribunal's recommendations.[24]

Tribunal reports are typically well-reasoned and based on solid evidence. These can give claimants a basis for entering into direct negotiations with the Crown. Initially the Tribunal makes a report on the facts of the claim. Only if negotiations fail or are not entered into will the parties be heard on remedies and the Tribunal will report its recommendations. This process thus encourages negotiations to follow factual findings. The tribunal can also provide for mediation. However, these provisions appear to have failed due to the Crown's agent, the Crown Law Office, refusing to become involved in the bargaining process.[25]

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[23] Waitangi Tribunal *Te Reo Report* (Government Printer, Wellington, 1986).

[24] *Attorney General* v *New Zealand Maori Council* [1991] 2 NZLR 129.

[25] I Macduff "Resources, Rights and Recognition - Negotiating History in Aotearoa/New Zealand" (1995) 19/3 Cultural Survival Quarterly 30, 31.

B Litigation

1 Direct results

While The Waitangi Tribunal exists as a body whose primary purpose is investigation of Maori grievances, Maori retain the option of taking cases to the courts. There are two main bases for claiming at law: common law aboriginal title and the Treaty of Waitangi.[26] Arguably the jurisprudence of the state's fiduciary duty towards aboriginal people can stand alone as a third basis. The notion of fiduciary duty is considered in aboriginal title and treaty jurisprudence, particularly in North America. For many years the courts in New Zealand refused to recognise the existence of aboriginal title rights and this even put themselves in conflict with the Privy Council over this issue.[27] Moreover this conflict was resolved in part by a provision in the Native Land Act 1909, later continued in another statute, which prevented Maori from bringing aboriginal title claims against the Crown, in the courts or otherwise, except as provided in any other Act.[28] While this legislative impediment was recently removed, there is hardly any land which can be regarded as subsisting under uninvestigated aboriginal title.[29] Non-territorial aboriginal title rights in

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[26] See P McHugh *The Maori Magna Carta* (Oxford University Press, Auckland, 1991); RP Boast "Treaty Rights or Aboriginal Rights? " [1990] NZLJ 32.

[27] See McHugh's discussion, above n 26, 117-122.

[28] Section 84 of the Native Land Act 1909, later included, with wording of an even more comprehensive scope, in s 155 of the Maori Affairs Act 1953. For commentary see Boast above n 26.

[29] The Maori Affairs Act 1953 was repealed by the Te Ture Whenua Maori Act 1993. Furthermore section 145 of the latter Act renders "Maori customary land" inalienable.

New Zealand have traditionally come within statutory regimes, and the New Zealand courts have usually needed at least an allusion to these rights before recognising them.[30] Enactments such as the Resource Management Act 1993 and the Fisheries Act 1983 require those administering them to take account of traditional Maori usage. In so doing they take these resources outside the framework of common law recognition of traditional ownership and use regimes

The second legal basis involves a jurisprudence that has come to the fore over the last decade. An early view taken by the New Zealand courts was that the Treaty was merely declaratory of rights at common law, that is aboriginal title rights.[31] An early judgment, which since gained considerable notoriety, claimed that the Treaty was a mere nullity so far as it purported to cede sovereignty since there was no body politic which was capable of such cession.[32] Throughout most of the colonial period the government and courts attached little value to the Treaty. The standard position was explained by the Privy Council in *Hoani*'s case - that Treaty rights were unenforceable in court without incorporation into statute.[33]

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[30] For instance *Te Weehi* v *Regional Fisheries Officer* [1986] 1 NZLR 680 (Maori fishing rights).

[31] *R* v *Symonds* (1847) [1840-1932] NZPCC 387(SC).

[32] *Wi Parata* v *Bishop of Wellington* (1877) 3 New Zealand Jur (NS) SC 72. For a discussion of this aspect of the case see K Keith "The Treaty of Waitangi in the Courts" (1990) 14 NZULR 37.
It should be emphasised that this judgment viewed the Treaty as a "simple nullity" as a Treaty of cession. Prendergast CJ was not claiming that the Treaty was in *all respects* a nullity.

[33] *Hoani Te Heu Heu Tukino* v *Aotea District Maori Land Board* [1941] NZLR 590 (PC).

In the late 1980s and early 1990s the Court of Appeal, under the presidency of Sir Robin Cooke, gave the Treaty of Waitangi a legal significance not previously recognised. A series of cases came before the courts involving the privatization of state assets by the government. Transfer of these assets was contested by Maori claimants as it would have lessened the resource base the Crown could use to settle claims. The first of these groundbreaking cases concerned the State-Owned Enterprise Act 1986 which contained a provision stating: " Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi".[34] Despite the Act containing specific provisions concerning protection mechanisms for claims before the Waitangi Tribunal, the court held that the Crown would have to come up with more effective measures. This forced the Crown to negotiate with the plaintiffs and to come up with an arrangement which was enacted as the Treaty of Waitangi (State Enterprises Act) 1988. As mentioned above this gave the Waitangi Tribunal the power to make binding recommendations regarding the assets concerned. This new Act was itself applied in a case brought by the Tainui Trust Board seeking protection of its claim to coal mining rights.[35] This litigation was to play a key role in the negotiations between Waikato Tainui and the Crown which lead to a major settlement.[36]

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[34] *New Zealand Maori Council* v *Attorney General* [1987] 1 NZLR 641. The relevant provision of the Act was section 9.

[35] *Tainui Maori Trust Board* v *Attorney General* [1989] 2 NZLR 513.

[36] See RTK Mahuta "Tainui: A Case Study of Direct Negotiations" (1995) 25 VUWLR 157.

Between 1987 and 1995, Maori groups took 11 major cases to the High Court and the Court of Appeal, and two of these went on to the Privy Council.[37] Litigation was brought for a variety of assets subject to claims by Maori groups and included: fisheries[38], petroleum[39], forestry[40], broadcasting frequencies[41], and hyroelectricity.[42] Often these related to claims supplementary to those for lost land. While no case went as far as ruling that the Treaty could be directly enforceable in a New Zealand court, it's effects have been held to be significant. In a High Court case it was found that even if there is no mention of the Treaty it must be considered in cases impacting upon Maori concerns as it forms part of the fabric of New Zealand law.[43]

Despite a number of "victories", the direct usefulness of courts for Maori claimants is limited. The courts cannot generally make rulings on historical grievances since the land title involved will either be with a private person or belong to the Crown. As mentioned above aboriginal title is almost redundant in New Zealand. The cases of the 1980s and 1990s mentioned above concerned process more than substance. No land has yet been returned under the Treaty of Waitangi (State Enterprises) Act 1988. Moreover, the Crown

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[37] Above n 22.

[38] *Te Runanga o Muriwhenua Inc* v *Attorney-General* [1990] 2 NZLR 641.

[39] *Love* v *Attorney-General* Unreported, 17 March 1988, High Court Wellington Registry CP 135/88 (HC).

[40] *New Zealand Maori Council* v *Attorney-General* [1989] 2 NZLR 142

[41] *New Zealand Maori Council* v *Attorney-General* [1992] 2 NZLR 576; *New Zealand Maori Council* v *Attorney-General* [1994] 1 NZLR 513.

[42] *Te Runanga O Te Ika Whenua Inc* v *Attorney-General* [1994] 2 NZLR 20.

has found ways to avoid the desired effect of the protection mechanisms established by transferring land through government departments rather than state owned enterprises, the former not being covered by the legislation.[44] Munro notes that despite claims of 'judicial activism' in the recent Treaty of Waitangi jurisprudence, the courts are constrained by the constitutional order and so cannot be revolutionary in their approach.[45] Claims brought by Maori groups must have a *legal* rights and can only receive *legal* remedies. This must be contrasted with the flexibility, in terms of processes and solutions, of negotiation, and even the Waitangi Tribunal.

A relatively new area for the courts has been challenge of "settlements" by disaffected groups. In the case where direct negotiations have led to an agreement and subsequent transfer of assets to claimants, some Maori within the interested group have not been satisfied with the result. The most notable example is the "Sealords Deal" whereby the Crown attempted a permanent, pan-tribal settlement of commercial fisheries claims. An unsuccessful suit was filed in attempt to prevent Parliament from enacting the settlement deed.[46] The Treaty of Waitangi Fisheries Commission, to which the fisheries quota was transferred, has been facing ongoing court cases opposing its distribution models.[47] While

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[43] *Huakina Development Trust* v *Waikato Valley Authority* [1987] 2 NZLR 188.

[44] Above n 22, 25.

[45] Above n 22, 100-110.

[46] *Te Runanga o Wahrekauri Rekohu Incorporated* v *Attorney General* [1993] 2 NZLR 301.

[47] Above n 38; R Berry "Court bid to alter fisheries allocations" *Sunday Star Times*, Auckland, 20 July 1997.

the Commission appears to be approaching an agreement, it faces strong challenges from urban Maori groups who would gain nothing under the distribution policy currently contemplated.[48]

2 Flow-on effects

Apart from the immediate results, the high profile court cases gave impetus to direct negotiations between Maori and the Crown. By giving some legal effect to the Treaty of Waitangi, the courts made the government realise that it had an obligation to take action on grievances. This mirrors developments in other comparable jurisdictions where court decisions have also been a prelude to action by the executive and legislature.[49] A court ruling can significantly alter the power imbalance.[50] Furthermore, litigation impedes the execution of policy as well as the standing of the government, which cannot do as it decides with its assets. Even the *threat* of litigation can disrupt executive action.

Munro notes that success in the courts may have a significant psychological impact on the public and the claimant group.[51] Public awareness of the group's grievance will probably be

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[48] See "Fisheries snags looking smaller" *The New Zealand Herald*, Auckland, 29 July 1997, A5; R Berry "Clash mars fisheries hui" *Sunday Star-Times*, Auckland, 27 July 1997, A4; "Iwi optimistic over fisheries hui" *The Press*, Christchurch, 28 July 1997.

[49] See C Wickliffe *Indigenous Claims and the Process of Negotiation and Settlement in Countries with Jurisdictions and Populations Comparable to New Zealand's* Background Report for Environmental Information and the Adequacy of Treaty Settlement Procedures, Parliamentary Commissioner for the Environment, September 1994.

[50] Above n 22, 64-65.

[51] Above n 22, 71-79.

enhanced, while the court's recognition of rights may legitimate the claim in the public eye. Litigation could also contribute to the claimant group's development in terms of politicisation. It may also make members more determined to pursue claims.[52] This cohesion and politicisation may put even more pressure on the Crown to respond to the grievance. Nevertheless, not everything is positive in this regard either. Litigation can stimulate a backlash from those who oppose the claim.[53] Munro also comments that court procedure, with its emphasis on lawyers, and prominent Maori personalities, can have a disempowering effect on the claimant group at the grass roots level.

3 Litigation culture at the negotiating table

As explained above, litigation and direct negotiation are strongly interwoven. A successful court case may be necessary to bring the Crown into negotiations in the first place. However, once the parties are engaged in negotiations, the effect of the court is still present. Procedure in a courtroom is adversarial, and if this adversarial culture is carried on to the negotiating table there are implications on how negotiations will develop. Litigation will typically involve a zero-sum gain situation, while in negotiation creative solutions which satisfy the needs of both parties are often required. Furthermore lawyers advising claimants during negotiations will carry the litigation paradigm through to negotiations. It is observed

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[52] See the Comments of Sir Tipene O'Regan in Melbourne, above n 20, 155-156.

[53] See for example SC Scott *The Travesty of Waitangi - Towards Anarchy* (The Campbell Press, Dunedin, 1995).

that both Crown and claimants typically engage in positional bargaining.[54] Locking oneself into a particular position undermines the possibility of achieving an appropriate settlement. It will be noted later that the Crown's policy acts to reinforce this suboptimal approach. As well as the issue of the approach of the parties, are considerations of substantive law. Direct negotiations involve "bargaining in the shadow of the law"[55] and parties know that they can always resort to the courts to enforce their legal rights. This will be a consideration for all negotiators and can place constraints on their actions and discussions.

C Legislation

Even more so than for the other methods for resolving Maori claims, legislation should not be looked at in isolation. As mentioned above the Waitangi Tribunal is itself a creature of statute and its powers can be expanded and limited by Parliament. The result in groundbreaking 1987 *New Zealand Maori Council* case may not have been possible had the relevant statute not stated that its provisions could not be applied inconsistently with the principles of the Treaty of Waitangi. [56] This case could thus be said to comply with the legislative incorporation rule in *Hoani's* case.[57]

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[54] Above n 22, 154.

[55] R Mnookin and L Kornhauser "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale LJ 951.

[56] Above n 34.

[57] Above n 33.

The importance of statute in the field of direct negotiations is in respect to codification of settlement deeds, and to government policy following a Waitangi Tribunal report or court judgment. The interrelation of the various institutions can be seen in respect to the aftermath of the first *New Zealand Maori Council* case, described above. In the context of the Crown's present policy of direct negotiation and claims settlement, enactment of the settlement deed is a major component. Such enactment is an important part of the well-developed negotiation and settlement policy in Canada.[58] Legislation can also can also be used before a settlement to assist a tribe in terms of organisation and legal personality, as evidenced by the Te Runanga o Ngai Tahu Act 1996.

[58] Above n 49.

III NEGOTIATION POLICY IN NEW ZEALAND

A Background

Prior to 1989 there was no global Crown policy in relation to direct negotiations of Treaty claims. Negotiations and settlements which did occur were ad hoc, the resulting "settlements" were often considered inconclusive, and these claims continue today. In 1946 Prime Minster Fraser concluded a settlement with Tainui elders for compensation - £6,000 annually for the next 50 years, and £5,000 thereafter in perpetuity.[59] In time, this came to be seen as inadequate and the major agreement of 1995 was the result.

In 1989, following, the first of the high profile court cases mentioned above, the Government announced that it would enter into direct negotiations with Maori claiming under the Treaty. In 1989 the Treaty of Waitangi Policy Unit of the Department of Justice published *Principles for Crown Action on the Treaty of Waitangi*.[60] These were the principles to guide Executive action as a whole. Five years later, the Office of Treaty Settlements, which took over functions of the Treaty of Waitangi Policy Unit, published a significant and controversial publication entitled *Crown Proposals for the Settlement of*

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[59] Above n 36.

[60] For background and discussion see A Frame "A State Servant Looks at the Treaty" (1990) 14 NZULR 82.

Treaty of Waitangi Claims. As the title implies, these were meant to be proposals to be put before Maori for consideration and comment.

The proposal package, often labeled the "fiscal envelope" was strongly rejected throughout Maoridom.[61] A series of hui throughout the country brought Crown Ministers and officials in contact with tribes throughout the country - an unequivocal message of rejection of the proposals was conveyed to the government. As well as having objections to the content of the Proposals, many Maori were dissatisfied with the manner in which they were presented.[62] A common criticism was that the Proposals were not developed in consultation with iwi. The government did involve Te Puni Kokiri (the Ministry of Maori Development) in the formulation of the policies. The Minister in Charge of Treaty of Waitangi Negotiations has also stated that it would have taken too long for all the claimants to have made their input; Maori opinion was to have been sought following the release of the proposals. Some commentators argue that given the cross-cultural context, there should have been a joint development of negotiation policy.[63] Another criticism was that too little time was given for Maori to prepare and present their submissions. Significantly, the "Proposals" have largely become the actual policy for Crown action,[64] although certain features, particularly, the fiscal cap, may be irrelevant with the formation of a new

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[61] See W Gardiner *Return to Sender* (Reed, Auckland, 1996); MH Durie "Proceedings of a Hui Held at Hurangi Marae, Turangi" (1995) 25 VUWLR 110.

[62] See *Report of Submissions - The Crown's Policy Proposals on Treaty Claims Involving Public Works Acquisitions*, June 1996.

[63] I Macduff "Resources, Rights and Recognition - Negotiating History in Aotearoa/New Zealand" (1995) 19 Cultural Survival Q 30.

government in 1996. Several key aspects of the negotiation policy and procedure will be discussed below.[65]

B Principles

The recent Treaty of Waitangi jurisprudence has tended to look past the Treaty itself and has focused on "the principles of the Treaty". This is the wording used in the Treaty of Waitangi Act 1975, and thus dates from the beginning of the modern grievance settlement process. Such an approach can be criticised both by those who see it as creating unwarranted legal rights from a political document which should be relegated to history texts, as well as those who see the new trend as avoiding the actual guarantees and obligations of the Treaty.[66] This debate aside, one clearly evident result is that each actor in the claims field: the claimants, the courts, the Crown, the Waitangi Tribunal etc has a different statement of what those principles are.[67] When other principles are included, there is great possibility for divergent expectations.

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[64] Above n 22, 58.

[65] *Coalition Agreement - New Zealand First and the New Zealand National Party*, Policy Area: Maori, 6 December 1996.

[66] See M Jackson "Colonisation as Myth-making - a Case Study in Aotearoa (New Zealand)", cf G Chapman "The Treaty of Waitangi - Fertile Ground for Judicial (and Academic) Myth-making" [1991] NZLJ 373.

[67] See for example the summary in M Chen and G *Palmer Public Law in New Zealand* (Oxford University Press, Auckland, 1993) 419.

The Crown has taken a principled approach in developing its negotiation policy, looking both to the Treaty and other considerations. The 1989 document outlined the following guiding principles:

(1) the principle of kawanatanga (government by the Crown);

(2) the principle of rangatiratanga;

(3) the principle of equality (of all New Zealanders before the law);

(4) the principle of cooperation;

(5) the principle of redress

The commentary in the document suggests that kawanatanga involves sovereignty whereas rangatiratanga is self-management inextricably linked to possession of resources and taonga. It is understandable that this would be the position of the Crown. However, given the current debate on what these terms of the Treaty meant, and what they mean today, such a position is far from contentious. The principle of equality also raises problems. This principle holds that all New Zealand citizens are equal before the law. As far as article III of the Treaty grants Maori the same rights as other citizens, there is no issue. It should however be recognised that Article II gave Maori tribes rights to resources which other citizens would not have, and so a significant element of difference in rights appears. Indeed, the negotiations and even the whole settlement process are largely concerned with the claim by Maori to this difference of rights and the Crown's obligations to uphold it.

The 1995 document, which focused on the area of direct negotiations, rather than the overall Crown approach towards the Treaty, put forward the following seven principles:[68]

(1) the Crown explicitly acknowledges historical injustices;

(2) in attempting to resolve outstanding claims the Crown should not create further injustices;

(3) the Crown has a duty to act in the interests of all New Zealanders;

(4) as settlements are to be durable, they must be fair, sustainable, and remove the sense of grievance;

(5) the resolution process is consistent and equitable between claimant groups;

(6) nothing in the settlements will remove, restrict or replace Maori rights under Article III of the Treaty, including Maori access to mainstream government programmes;

(7) settlements will take into account fiscal and economic constraints and the ability of the Crown to pay compensation

It will immediately be noted that four of the seven principles (2,3,5 and 7) appear to place some constraint on the way the Crown can proceed. Moreover the sixth principle does not seem to be directly connected to the claims contemplated which will typically involve rights under Article II.

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[68] Office of Treaty Settlements *Crown Proposals for the Settlement of Treaty of Waitangi Claims - Detailed Proposals* (1994).

Some of the objections to these guiding principles and the policies based on them will be outlined below.

C The Formal Process for Direct Negotiations[69]

The Proposals set out four main stages in the procedure to be followed in direct negotiations:

(1) acceptance onto a Negotiations Work Programme;

(2) negotiations leading to a draft Deed of Settlement;

(3) ratification by both parties leading to the signing of a Deed of Settlement;

(4) implementation of the settlement.

1 Acceptance of the claim

The first step for the claimants involves presenting historical evidence to substantiate their claim. Those claimants who already have had their case heard by the Waitangi Tribunal will have an advantage. However, even if the Waitangi Tribunal has issued its findings, the Crown will still form its own view on these findings. For claims to be accepted onto then Negotiations Work programme, the Crown must:

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[69] See generally above n 68.

(1) accept that the claims are historically verifiable;

(2) agree to a position on the nature and extent of the alleged breach;

(3) accept that the correct claimant group has been identified for the claim area;

(4) accept that the claimant negotiators have proper mandate;

(5) agree that the claim has sufficient priority to be accepted into the Programme, given overall settlement policy and financial constraints.

The claimants, on their part, need to agree to the following:

(1) to negotiate a final settlement covering the entire claim, unless the Crown agrees to make an explicit exception;

(2) to negotiate knowing that the Crown's offer of redress will only cover the nature and extent of the breach accepted by the Crown;

(3) during negotiations, to waive all other avenues of redress available;

(4) that a condition of settlement involves the lifting of memorials and other measures to ensure finality.[70]

The first part of the process focuses on positions. It even appears to be a formalisation of positional bargaining. Despite the fact that claimants have taken the time, and expense. Of going through the Waitangi Tribunal, the Crown can still decide to reject the Tribunal's findings and formulate its own view. While this is problematic for claimants it is some

extent understandable given that the Tribunal reports have been criticised for exaggeration.[71] Real concern must lie with the condition that the claimants must accept the Crown's position before redress is discussed. Furthermore discussions must focus on the entire claim unless the Crown accepts otherwise. While the claimants may be ready to enter into direct negotiations, they may be unwilling to do so for a settlement of their entire claim. The Tainui settlement for instance, concerned only the raupatu lands, and not other tribal claims such as the Waikato River. The reluctance to settle for the entire tribal claim can be seen in the recent rejection of the Crown's offer to Whakatohea.[72]

Overall this part of the process appears to give the Crown considerable power in deciding whether or not to proceed. It reads less like a formula for encouraging negotiation and more like one for guiding position forming.

2 Negotiating redress

In this second stage the Crown develops its negotiating brief, based on its positions on the nature and extent of the breach.. This may involve the Office of Treaty Settlements having preliminary discussions with the claimants, and consultations with interested third parties. Once the Crown's brief has been formulated, negotiations with the claimants as to redress

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[70] These memorials affect land coming within the Treaty of Waitangi (State Enterprises act) 1988 as mentioned above.

[71] See the comments of W Oliver in "Waitangi Fatigue", above n 8. Strong language by the Waitangi Tribunal may in some respect be advantageous to the Crown, see below.

[72] R Berry "Iwi reject $40m land settlement" *Sunday Star Times*, Auckland, 27 July 1997, A2;

are undertaken. The Crown can appoint its negotiators who will likely be lead by the Minster in Charge of Treaty of Waitangi Negotiations or a senior official.

It would appear that at this stage at least the exchange between Crown and claimants would be approaching a more dialogue-oriented style of negotiation. However, even here it has been suggested that the process is more akin to a series of ultimata flowing from Cabinet.[73] If this is the case then it may be questioned whether present policy is actually 'negotiation', or if the term is simply being used to project a more positive picture of the settlement procedure.

3 Draft Deed of Settlement

If the negotiations lead to agreement among negotiators, the next stage involves ratification, both by the Crown and by the claimants. The Government needs to ensure that there is sufficient political support for the settlement, and this may involve approval by Parliament. The claimants will engage their own ratification process. The Crown will need to be assured that there has been due process and that there is sufficient tribal support to ensure settlement durability. Issues of mandate will be discussed below

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Editorial "No mood to settle" *The New Zealand Herald*, Auckland, 29 July 1997, A12.

[73] Comments by K Ertel on "The Validation, Negotiation and Settlement of Claims" at "In Search of the Pathway Forward" Seminar Series, Government Buildings, Wellington 7 October 1996.

4 Implementation

This final stage involves putting the Deed into practice. This primarily involves transfer of assets. The Crown needs to be assured that there is a legal body set up which has the capability to receive and manage the assets. Having an adequate governance structure is important. Problems arise in finding the right structure for such organisations since iwi themselves do not have legal personality in New Zealand law. Apart from existing structures such as companies, incorporated societies and trust boards, an organisation can be created by statute to suit specific needs.[74]

D Limitations

The Crown's policy imposes certain significant limitations on negotiations and settlements. Some of the major ones which caused concern for Maori are outlined below.

1 Fiscal constraints

A major limitation, which initially accompanied the Crown proposals, was the "fiscal cap" of $1 billion for settlement of all Treaty claims. This maximum sum was actually lower from the date of policy's announcement since the fisheries settlement of 1992 was to be counted against the total as well as the around $170 million Tainui settlement were to be

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[74] Such as the Te Runanga o Ngai Tahu Act 1996.

subtracted from the total. The sum of $1 billion was declared by the Government to be what the country could afford, although no reasoning as to how the sum was arrived at was presented. This limitation drew much protest from claimants, particularly those who felt that their tribal losses alone amounted to billions of dollars.

The Coalition Agreement between the New Zealand National Party and the New Zealand First Party, which followed the 1996, indicated that the fiscal cap as previously stated would no longer form part of official Crown policy. Nevertheless the principles of fiscal responsibility and affordability of settlements, as well as consistency among settlements, will continue.

2 Natural resources[75]

The "Conservation Estate", lands administered by the Department of Conservation, are not readily available for settlements of Treaty claims. The land in question includes, among others, national parks, marginal strips and marine reserves. Particular sites of significant historical, cultural or spiritual importance could be considered for settlements. It is unlikely that full ownership would be transferred except in exceptional circumstances involving small discrete parcels of land of very special significance to Maori, although the Crown acknowledges the possibility of two other mechanisms - the transfer of title with statutory conditions and transferring a significant management role. With the Conservation Estate

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[75] Above n 68, 13-24.

being viewed as land managed by the Crown on behalf of all New Zealanders, a major concern is that levels of management and protection be continued and that public access and third party rights be maintained.

The Crown acknowledges four main types of interest in natural resources:

(1) ownership interest - which allows all uses and potential uses subject to legal obligations;

(2) use interest - allowing defined uses of the resource but not all potential ones;

(3) value interest - spiritual or cultural interest, even if the resource is controlled by others;

(4) regulatory interest - this refers to the management and control of a resource for the common good

The Crown's position is that under Article II of the Treaty, interests in natural resources are use and value interest. Therefore ownership interests based on Article II are not for negotiation. Ownership can be claimed if it can be shown that the Crown did not exercise its rights to fairly acquire property under Article I, otherwise a fair acquisition of land by the Crown is deemed to have extinguished use interests connected to the land.

The stance of the New Zealand government would appear to differ from that taken in other jurisdictions. Wickliffe notes that in Australia, Canada and the United States there is acknowledgment of ownership interests in natural resources.[76] Moreover courts in these

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[76] Above n 49.

countries have accepted that indigenous people have priority of rights as against other users where treaty arrangements guarantee rights to use, take or have access to natural resources. She also notes that overseas trends illustrate the value of joint management models.

A claim made by indigenous peoples throughout the world is that under customary laws often based on notions of stewardship of the land and other natural resources, the environment was protected. It is further claimed that the arrival of Europeans saw unsustainable exploitation of natural resources and resultant ecological problems. Now, many Europeans are saying that he environment must be protected and are using the conservationist stance to deny land and resource right of aboriginal peoples.[77] It is understandable that many indigenous people feel frustrated that the colonists responsible for most of the destruction can now take the moral high ground of conservation to prevent recognition of rights to resources which have economic, historical, and cultural significance to the claimants, and which can be used for tribal development, which is often desperately needed.

A prominent New Zealand conservationist has however claimed that while notions of kaitiakitanga are important for many Maori, often those who make the decisions concerning development of natural resources will be driven more by commercial motives, rather than environmental needs.[78] He further claims that the lands retained in the Conservation Estate

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[77] F Wilmer *The Indigenous Voice in World Politics* (Sage Publications, Newbury Park, 1993).

are the least suitable for commercial exploitation and that their development cannot be undertaken without considerable harm.

Matters of the Conservation Estate in Treaty claims involve some of the most complicated issues given that the resources are owned by the Crown, not privately, while at the same time there are powerful third party interests demanding that the Crown retain ownership. The government needs to take care to distinguish fact from posturing, both by those using the language of conservation for political ends, and by those claiming that no wrong can be done under Maori ownership. Given overseas experience, there appears to be value in the New Zealand government shifting its stance to one which would allow greater possibility for (at least) joint-management arrangements.

3 Third party interests

As mentioned above, three underlying principles of the government's position are the obligation to govern for the benefit of all New Zealanders, avoiding the creation of new injustices, and the protection if third party rights. These conditions strongly limit the scope for redress available for settlements, and act to bring parties other than the Crown and claimants into the equation. At the most basic level, private property rights will be protected. In the case of freehold estates, it is clear that present titles will not be disturbed.

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[78] Comments of Kevin Smith in C Archie *Maori Sovereignty - The Pakeha Perspective* (Hodder Moa Beckett, Auckland, 1995) 53.

It is more complicated in the area of pastoral leases where the government seems obliged to pay compensation to leaseholders for transfer of title to iwi.[79] In regard to natural resources, access and recreational rights of the public are important considerations in any settlement arrangements.

The requirement for settlement consistency among claims means that one iwi cannot concentrate solely on the merits of its own case, but must have a strong interest in the settlements for other iwi. This measure may lead to fairness across claims, and avoid the situation of one iwi feeling aggrieved if they perceived that their settlement was proportionately lower than for another. It does however, impose further restrictions before negotiations have even begun. It also leaves open the question as to how comparisons are to be made. It may not be easy balancing divergent factors such as lands lost, manner of disposition, non-territorial rights lost, social and economic development problems. Further complications can arise if a new fiscal cap is designated. Certain settlements would have been agreed within the framework of a previous fiscal cap, and so depending on whether this sum is greater or smaller, one set of claimants may feel that they have been inequitably treated.

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[79] See C Robertson "How the Taranaki land row began" *The Independent*, Auckland, 6 September 1996, 10; Editorial "Maori lands: The wrong way to put wrongs to right" *The Independent*, Auckland, 9 August 1996, 10; R Berry "Reserved land owners heard by government" *Sunday Star Times*, Auckland, 20 July 1997.

4 Completeness and finality of settlement

As in Canada, the New Zealand government desires to make present settlements complete and durable. This is important given that previous attempts at final resolution, mainly through monetary awards have not stood the test of time and the claims are again before the government. In order to achieve finality it would seem that sufficient compensation would have to be paid. This would be unlikely to equal the amount the claimants feel they have lost. It would though, need to be sufficient to achieve the government's aim of removing the sense of grievance. Given that there are strong limitations already imposed by the government before dialogue even begins, the achievement of this will undoubtedly be complicated.

In accepting the Crown's offer for settlement, claimants inevitably face a dilemma. On the one hand they are keen to obtain resources to enable economic development and self-reliance of the tribe. On the other had, the channels of claim are officially closed forever once they sign the Deed of Settlement.[80] Given the history of settlements deemed "final", and the concern that present offers may still be inadequate, it is not surprising that there is a feeling among some Maori that these settlements are merely interim measures. Many non-Maori, however, are concerned at the continuation of claims, particularly where

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[80] Above n 73.

compensation arrangements have been made in the past. Public demand for finality appears to have been a primary consideration behind the government's policy in the first place.[81]

E Mandate and Representation

1 Maori mandate

Issues of mandate are among the most significant in respect to negotiations. To ensure effectiveness and durability of settlements the government needs to be sure that it is negotiating and settling with the right people. To proceed with negotiations, the claimant group must present a Deed of Mandate to the Crown. This Deed needs to define the claimant group and describe the claims, including any boundaries for land. The Deed needs to state who are the mandated representatives having authority to negotiate and settle with the Crown. The Deed needs to describe how authority for the representatives was obtained from the people who stand to benefit. In cases where there is dispute or uncertainty as to mandate, several options are available:

(a) voluntary settlement among competing groups;

(b) ruling by the Maori Land Court;

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[81] See DAM Graham "Address by the Minister in Charge of Treaty of Waitangi Negotiations" (1995) 25 VUWLR 232.

(c) ruling by the Maori Appellate Court in proceedings before the Waitangi Tribunal;

(d) legislated settlement.

There is much dispute among Maori on the question of the level at which negotiations and settlements should proceed. Some argue that these should be at a pan-Maori level. This view holds that in modern society the tribe has become largely irrelevant. Many Maori live outside their rohe, mostly in cities, often unsure of their tribal affiliation. If settlements proceed on a tribal basis, many of these people stand to gain nothing. A leading proponent of this view, Hon Peter Tapsell, has stated: [82]

> There was a time when tribal organisations were useful....For today's major problems you need an organisation which provides for all the people in a region....I envisage eight or 10 regional organisations, each looking after everyone in the area whatever their canoe.

Many Pakeha also voice objections to tribalism, seeing them as divisive,[83] a relic of the past, and something that throughout the world has disappear with the passage of time.[84]

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[82] Quoted in D McLoughlin "The Maori Burden - Shame of New Zealand" (November 1993) North and South 60, 68-69. See also the Comments of Hon Peter Tapsell in Melbourne, above n 20, 63-70.

[83] See the comments of Glyn Clayton in C Archie, above n 78, 33; B Skelton "Tribalism no aid to social justice" *The New Zealand Herald*, Auckland, 25 June 1997.

[84] See comments of Prof Peter Munz in Archie, above n 78, 93.

Global settlement ignores the interests of iwi and hapu - the units which originally held the land or other resources being claimed. It also ignores tribal governance structures which have a long history, unlike more recent attempts pan-Maori organisations. That success with global settlements is not assured is well illustrated by 1992 fisheries settlement. Despite eventually putting over half of the national fishing quota under Maori control, this settlement continues to cause many legal problems for The Treaty of Waitangi Fisheries Commission, the body responsible for the management and distribution of the fisheries assets. Sir Tipene O'Regan is one of the leading proponents of the view that the iwi is the proper level at which to conduct negotiations.[85] He claims: [86]

> Tribe is essentially about kin groups and commonly owned assets whereas race is essentially the handmaiden of welfare and a useful device used by the state to distinguish us from Pakeha. It is only Pakeha and the Crown identifying us all as Maori which makes us Maori.

For O'Regan the single biggest Treaty breach, which continues to this day, was the systematic and intentional destruction of the legal personality of the tribe.[87] He claims that the emphasis should be on rights, in this context the rights to resources by the body that

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[85] T O'Regan "A Ngai Tahu Perspective on Some Treaty Questions" (1995) 25 VUWLR 179.

[86] Quoted in Melbourne, above n 20, 154-155.

[87] Above n 85, 185.

held them - the tribe. Discussion concerning urban Maori often focuses on notions such as fairness and equity, which O'Regan opposes as bases for treaty settlements.[88]

From the Crown's perspective it would certainly be easier to deal with one or several large bodies, rather than a large number of small ones. The Minster in Charge of Treaty of Waitangi Negotiations has expressed the desire for the establishment of a kaumatua council.[89] As mentioned above, one stream of Maori thought rejects this type of "unite and rule" approach. There is then some irony in the criticism of other commentators that, through mechanisms such as the fiscal cap and binding settlements for the entire claim, the Crown is creating an environment which encourages strong division among Maori groups.[90] However the government has expressed the preference for Maori to be responsible for heir own affairs rather than to have decisions imposed by the Crown,[91] and clearly desires claimant groups to sort out out any conflicts before negotiations.

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[88] Above n 85, 185.

[89] Above n 81, 236.

[90] An example, albeit somewhat difficult to follow, can be found in L Watson "The Negotiation of Treaty of Waitangi Claims: An Issue Ignored" (1996) 8 Otago LR 613.

[91] Above n 81.

2 The Crown's mandate

Mandate is not only of concern to claimant negotiators. The government faces strong political and fiscal constraints in respect to settlements. Many taxpayers object to having to pay for the Crown's errors and injustices of the past.[92] The government therefore needs to feel that the level of opposition to its policy is not so high as to discredit it. These pressures will act to restrict the dollar value and the types of resources available for settlements . This is clearly reflected in the Crown's proposals. It also appears that the government feels that settlements must final if non-Maori are going to support them.[93]

As mentioned above, the courts play an important role in both declaring the Crown's legal obligations and shaping public perceptions. It was observed that court rulings in favour of claimants can both legitimise the claims in the public eye, and cause some form of back-lash. Although it is difficult to draw definite conclusions as to public perceptions, a court order can certainly be regarded as giving the Crown mandate to proceed with negotiations. The Waitangi Tribunal also plays a role in influencing public perceptions. A good example is the extremely exaggerated wording in parts of the report on the Taranaki claim. This may have given the Minister in charge of Treaty of Waitangi negotiations the backing he needed to proceed with compensation negotiations.

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[92] Above n 53.

[93] Above n 81, 234-5.

IV CROSS-CULTURAL AND INSTITUTIONAL ISSUES

A Cross-Cultural Negotiations

Critical to the settlements process is the fact that Treaty of Waitangi negotiations take place in a cross-cultural context. This situation creates considerable potential for misunderstanding and thus negotiating difficulties. There are claims that for years Maori and Pakeha have been 'talking past each other'[94] and that this is continuing in Maori - Crown negotiations. Often this relates directly to resources. As mentioned above, the Crown recognises the second article of the Treaty as conferring use and value interests to Maori for natural resources, while Maori would view this as imparting ownership interests. This can be taken even further in looking at concepts of property. The European view of property rights is quite different from the concepts of relationship to ancestral lands of Maori customary law.

Communication problems can appear not only due to differences between Maori and Pakeha, but also due to the fact that claimants must deal with the government which could be described as having its own "culture" complete with peculiar terminology, accountability

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[94] J Metge and P Kinloch *Talking Past Each Other - Problems of Cross-Cultural Communication* (Victoria University Press, Wellington, 1984).

structures etc. Lack of familiarity with the processes and language of government create further potential for misunderstanding and can disempower claimants.[95]

While a substantial examination of the role of culture in negotiations is beyond the scope of this paper, it is necessary to mention some of the possible implications from cultural difference. Janosik outlines four basic approaches toward culture taken in the negotiation literature:[96]

(1) culture as learned behaviour;

(2) culture as shared value;

(3) culture as dialectic;

(4) culture in context.

The first approach is pragmatic and accuracy of results has much to do with the reliability and sensitivity of the observer. The primary focus is on "etiquette" . The second approach involves searching for central cultural values or norms which distinguish a group, and subsequently predicting how a person will behave due to these values. While the second approach assumes a homogeneity in a culture's dominant value or value set, analysts are faced with the complications of individual variation and change over time. The third approach can accommodate this. It can also handle conflicting value ideals in society. The fourth approach is multi-causal, holding that while culture is important, it is not the only

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[95] Above n 73.

[96] RJ Janosik "Rethinking the Culture-Negotiation Link" 3 Negotiation Jnl 385.

factor. Aspects such as age, gender, the negotiating environment need to be considered, and often these will be more influential on a person's behaviour than culture itself.

While simpler views of culture may be more readily applicable by negotiators they run the risk of oversimplification. It is certainly dangerous to view a person's cultural background as being deterministic of his or her behaviour. A more appropriate description of culture is that of a framework of symbols and values within which particular individuals and groups navigate in staking out their own positions and defining their own interests. Trying to define a Maori approach may not be as useful as looking at approaches within each iwi or hapu. Similarly, there is considerable variation in organisational culture from one government department to the next. Appreciation of an interlocutor's culture is ultimately a poor substitute for understanding his beliefs and behavioural patterns.[97]

In negotiations between indigenous peoples and states it should be noted that the parties have often dealt with each other over an extended period of time. In New Zealand this is particularly important since the majority of the Maori population live in urban areas and are very familiar with "Pakeha culture". Indeed many will be more familiar with cultural elements of non-Maori origin. The Crown likewise is not dealing with people from another country and has a history of dealing with Maori claims. Maori civil servants and politicians play a key role in formulating Crown policy, just as Pakeha advisors will be critical for the claimants. The approach of culture as a dialectic may be extended in this situation as over

the course of New Zealand history both Maori and Pakeha have influenced each other's cultures.

Given the above analytical limitations, culture does have the potential to pervade the entire communication process. Even the very elements of negotiation, including notions of 'conflict', 'time', and 'agreement' may be viewed through entirely different metaphors.[98] While it is readily acknowledged that a negotiation model which is evidently culture-specific should not be applied in its entirety to cross-cultural dialogue, it may also be impossible to have one single "culturally sensitive" model which can apply across all contexts. If this is correct, then the first stage in cross-cultural conflict resolution should involve creating a mutually acceptable approach to negotiations. Current thinking in the field of dispute resolution suggests that process should be a key consideration and that if a negotiation is perceived to be a series of agreements, then agreement on process is a important step.

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[97] P Salem "Conflict, Culture and Negotiation in Natural Resource Bargaining" (1995) 19 Cultural Survival Q, 77.

[98] See GO Faure "Conflict Formulation and Going Beyond Culture-Bound Views of Conflict" in BB Bunker and JZ Rubin (eds) *Conflict, Cooperation and Justice: Essays inspired by the Work of Morton Deutsch* (Jossey-Bass, 1995) 41.

B Finality and Time

As mentioned above government policy demands that negotiations lead to full and final settlement. Statements form the government had also indicated the intention to settle all outstanding claims by 2000, [99] although more recently the expected completion date seems to have shifted to 2010.[100] It could be possible to conclude that the government views the settlements process as something finite which it would like to complete and put behind it. The Crown perspective may, however, be more complex than this. In 1995 the Minster in Charge of Treaty of Waitangi Negotiations stated at a conference entitled "Treaty Claims: the Unfinished Business":[101]

> I am not sure that we'll ever finish in that sense. I am not certain I want it to. It is not a matter of reaching some conclusion, as the prime Minister said, closing the book and putting it to one side - forgetting about the rest.

More recent comments of the Minister of Maori Affairs seem to complement such a stance:[102]

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[99] C Davis *The Crown's Development of its Proposals for the Settlement of Treaty of Waitangi Claims and Negotiating with Iwi* LLM Research Paper, Advanced Negotiation, Law Faculty, Victoria University of Wellington, 1996, 30.

[100] Comments of Hon D Graham in "Waitangi fatigue", above n 8.

[101] Above n 81, 232.

[102] T Garner "Henare urges Maori to shape their future" *The New Zealand Herald*, Auckland, 8 August 1997.

> Maori should not rush into settlements with the Crown. It takes as long as it takes. People have to be confident in the knowledge that what they are doing is for the right reasons, not because there might not be any money next year.

A commonly expressed Maori view is that desire for finality is inconsistent with Crown's Treaty obligation, acknowledged by the courts and the Waitangi tribunal, to participate in an ongoing partnership.[103] Firstly it should be noted that the government is not proposing to extinguish Treaty rights. As noted by Ertel the settlement process is concerned with compensating wrongs, not buying rights - something which would have a completely different price structure.[104] Furthermore, various opinions form Maori leaders express the desire to obtain the assets from settlements and to move down the path of tribal development rather than dwelling on grievances.[105] There is a strong sense that the government cannot help iwi to succeed and that Maori, having obtained the resources, will achieve on their own.

One commentator, however, has suggested that there is a completely different view among some Maori holding that: "the grievance is more valuable than any practical settlement."[106]

Time taken for settlements is also a point of contention. Crown policy is open to criticism that it is being unreasonable in wanting all claims settled in such a short space of time. Aspects

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[103] C Wickliffe "Issues for Indigenous Claims Settlement Policies Arising in Other Jurisdictions" (1995) 25 VUWLR 204, 214.

[104] Above n 73.

[105] Comments of T O'Regan on "The Nature of the Settlement Interchange" at "In Search of the Pathway Forward" Seminar Series, Government Buildings, Wellington 21 October 1996; comments of R Mahuta in "Treaty fatigue", above n 8.

such as greater consultation in developing policy, developing a mutually acceptable negotiating process, spreading compensation payments over many years, all require the Crown to stop considering a completion date and possibly to look at the settlements process as open-ended. While such suggestions would probably improve the settlements process, it should be remembered that the Crown was under pressure form Maori frustrated that the claims process, primarily through the Waitangi Tribunal, was too slow.[107]

It would appear that the Crown's desire for swiftness and finality is not as simple as sometimes claimed. Maori likewise are not all desirous of a slow, meticulous process. Whatever shape the claims process takes, Treaty rights will continue, and so it is necessary to distinguish between finality in settlement of historical grievances from the Crown's ongoing Treaty obligations.

C Imbalance of Power

Power imbalance between the parties is often an issue in negotiations since such an imbalance can have considerable impact on the process and outcome. This can be contrasted to the courtroom or other tribunals where strict procedural rules and a neutral arbiter can mitigate the effects of power differences between the parties. In the Crown-claimant bargaining situation a strong imbalance of power becomes apparent. Munro notes:[108]

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[106] See "No mood to settle" , above n 72.

[107] Above n 61, 12.

> The Crown wields control over the negotiation process; it has skilled and experienced advisors and negotiators; and it can, for the most part, pick when and on what terms it wants to negotiate, and whether or not to settle. Maori are in a comparatively weak position. They have few human and financial resources; they cannot enter into negotiations without a measure of political largesse or as a result of judicial favour; and are often unable to walk away from a settlement, either because their needs are pressing, or for fear that, without settlement, the Crown will act or omit to act so as to prejudice Maori interests.

Davis claims that the act of publishing the Proposals exemplified the Crown's power over Iwi.[109] It could thus set the agenda and influence public opinion towards its views. It could even be said that the Crown was presenting the "Proposals" as a fait accompli to Maori. The fact that the thinking contained in the Proposals continues to guide the government's approach may lend credibility to this argument.

It is possible that the Crown is transplanting its 'culture of ruling' to negotiations with Maori. Davis states:[110]

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[108] J Munro *The Treaty of Waitangi and the Sealord Deal* LLM Research Paper, Faculty of Law, Victoria University of Wellington, 1993, 21

[109] Above n 99, 17.

[110] Above n 99, 13.

> Rather than enter into meaningful consultation with Maori about possible options for a process of settling Treaty claims the Government took a course of action altogether consistent with its culture of ruling. Firstly , it geared the development of its Proposals in such a way that they were agreeable to the majority of the population and in that sense less of a political risk. Secondly, the Government developed these Proposals in isolation from the wider Maori community which enabled it to release them to the voting public with the clear message that they in fact represented the Crown's preferred view on the boundaries of settling Treaty claims.

Macduff observes that the Crown now finds itself in an unfamiliar position in that it is not exercising its directive authority, but is negotiating about rights. The Crown's experience in this area is quite limited.[111]

While most of the academic literature on the Treaty of Waitangi appears to accuse the Crown of abuse of its power in some manner, the fact remains that the government is pursuing a comprehensive claims settlement programme. This may beg the question as to why it is involved in this process at all. That the courts have obliged the Crown to recognise certain obligation does not provide a sufficient answer since the Crown is undertaking more than can be required by necessarily specific court orders. Maori, like other nations of the "fourth world", have none of the usual power bases which could influence governments, such as wealth, military strength or overwhelming numbers. Wilmer poses the question:

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[111] I Macduff "The Role of Negotiation: Negotiated Justice" (1995) 25 VUWLR 144, 147.

"Could the emergence of indigenous activism suggest that moral suasion is an element of influence in the process of the twentieth century global political discourse?".[112] I would suggest that this could be answered in the affirmative for national as well as international politics. In the present age, moral suasion presents a real factor influencing governments and public opinion. It could be argued that the claim of powerlessness by Maori could give them a very real source of power - sufficient power to make the state do that which it would not do in the past in terms of acknowledging rights.

D What Are We Negotiating About?

The primary focus of the Crown's policy documents appears to be physical resources - whether land or other assets. It is likely, however, that the bargaining also concerns less tangible matters. Macduff comments that the bargaining also deals with identity.[113] The growing status being accorded to the Treaty is reshaping the role of Maori in New Zealand society and in the political and constitutional spheres. Direct negotiations with the Crown are an integral part of this process. While much public opinion argues for universality of rights, the dialogue between the Crown and Maori emphasises the differences in rights based on identity. In Treaty of Waitangi terms, the negotiations focus on the second article guarantees to rangatira, rather than third article rights granted to all British Subjects (now New Zealand citizens).

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[112] Above n 77, 14.

[113] Above n 111, 144.

That there is more at stake than merely assets is clearly illustrated by the Deed of Settlement between the Crown and Tainui.[114] Of great symbolic importance in the Tainui settlement was the apology from the Crown. In respect to issues if identity, such an apology may be even more significant than monetary compensation. In the most formal way the Crown has acknowledged wrongful action on its part. In so doing it reinforces the link with the "Crown" which committed those acts, with the ancestors of the Tainui people today, as well as the relationship over the years between the two parties.

The Tainui Deed of Settlement also links te tino rangatiratanga to the issues of assets. While government policy in New Zealand is more hostile towards recognising a notion of Maori sovereignty than in comparable jurisdictions, the issue is gradually coming to the fore. If tribal organisation is strong, and the tribe is successful in claiming resources, particularly tribal lands, from the Crown which recognises its second article rights, then the intellectual step to consideration of sovereignty is not as great as may initially be thought.

The very fact that the Crown is entering into negotiations with another body is itself indicative of a status of that interlocutor. While it is inevitable to have power and other imbalances in a real-world bargaining situation, negotiation presupposes a *formal* equality between the parties. As mentioned above, however, the extent to which the Crown is actually involved in 'negotiation' rather than a process which merely uses the term for

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[114] See the Waikato Raupatu Claims Settlement Act 1995.

public relations value is open to discussion. Nevertheless, the fact the Crown is willing to label these activities "negotiations" is itself significant. There is possible indication that through this process the Crown is acknowledging that its sovereignty is not as unitary as commonly thought. The dialogue primarily about assets, could thus been seen as a dialogue which touches on the country's constitution.

Despite the above considerations of sovereignty, the usefulness of "sovereignty in the modern context may be limited. Geoffrey Palmer states the following:[115]

> [T]he idea that sovereignty should be given to Maori at a time when the notions of sovereignty are collapsing all over the world seems to me to be ludicrous. Once upon a time, we thought the New Zealand Government was sovereign. We hardly think that now. Far from being the indivisible omnipotent concept that Hobbes made it in Leviathan, sovereignty is more like a piece of chewing gum. It can be stretched and pulled in many directions to do almost anything. Sovereignty is not a word that is useful and it ought to be banished from political debate. The notion that sovereignty for Maori comes from the Treaty of Waitangi is highly controversial and requires reading one provision of the Treaty up and another one down.

Considerable academic debate continues as to what "te tino rangatiratanga" meant to the rangatira who signed the Treaty. Such discussion, however, is likely to remain in the realm

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[115] G Palmer "Where to From Here?" (1995) VUWLR 243.

of theory. It is the outcome of the negotiations between Maori and the Crown that will show what this means in this age. The full effects may not be felt for some years after settlements have been implemented and iwi have regained the path of development interrupted by years of colonial neglect of their rights. The Maori voices of are heard in negotiations with the Crown, the more their voices will be heard in defining and building the state.

V CONCLUSIONS

Due to the strong interconnections among the institutions involved in Treaty of Waitangi settlements it is necessary to see how the outcomes in one can impact upon proceedings in another. A Maori group may need to take their claim through a number of these institutions before the claim can be resolved to their satisfaction.

The Waitangi Tribunal is a specialised institution which produces thoroughly researched reports, and which has reasonable scope in its recommendations. It is limited by the fact that for the most part it has recommendation power only, and in those fields where its recommendations are binding there are strong political pressures restricting their exercise. A Waitangi Tribunal report will often serve as the basis for the groups claim in direct negotiations. In recent times the Tribunal has indicated that it is willing to produce reports that in terms of wording may compromise accepted academic objectivity in order to strongly affect public opinion and thus give the Crown mandate for settlements.

The courts have played a highly significant role during the last decade in giving legitimacy to claims. Judgments in favor of Maori plaintiffs have recognised the Crown's legal obligations in respect to the Treaty and have forced he Crown to negotiate where previously it felt it had no need to do so. Nevertheless, the courts can offer little in the way of direct substantive results. The process and outcomes reached are also limited since only legal rights and remedies are applicable. It would appear that some negative effects of litigation,

notably the adversarial mindset, carry through to negotiations where they may actually impede mutually beneficial results being reached.

While the potential scope for remedial legislation is unlimited, it's importance in the claims process is limited to a few key areas. Its main function is to make into law negotiated agreements reached between the Crown and Maori.

The Crown's aim is to reach settlements which are durable and which remove the sense of grievance, while being fair to the whole country. This paper has shown that there are a number of criticisms which can be leveled at the Crown's policy and the way it has been presented to Maori. The policy appears to formalise positional bargaining, and, from the very start, restrict negotiations in a number of areas. This would appear to work against the very advantages that make negotiation suitable for resolving grievances, including flexibility in processes and outcomes.

As discussed in this paper, the cross-cultural context has a significant effect on the negotiations, not only because it involves Pakeha talking to Maori, but also because claimants are talking to government. Cultural differences may impact upon people's interpretation of key issues involved and so raise considerable possibility for misunderstanding. Also the government's "culture of ruling" may mean that it has some difficulty in engaging in true negotiation which rejects imposition of solutions in favour of formally equal parties working towards agreement. There may even be some question as to whether the Crown is engaging in "negotiations" at all.

It is important to note that the negotiations between Maori and the Crown take on a greater significance than merely discussions about resources and assets. There is an underlying dialogue which concerns issues of identity. In negotiating with the Crown the claimants assert their identity as tangata whenua and as Treaty partners. The Crown is more than the government of the day, but rather the same Crown which signed the Treaty of Waitangi and which failed to fulfill its Treaty obligations in many instances. Further to issues of identity are issues of constitutional significance. By entering into negotiations with iwi, the Crown is acknowledging that iwi have a dialogue status in respect to Treaty rights which is higher than that of other citizens dealing with the state.

Despite numerous criticisms aimed at the government's Treaty policies, considerable progress has been made over recent years, and more will likely be made in the near future. Negotiated settlements have given some iwi a considerable resources base which they can use for future development. The period of the greatest influence of litigation and the Waitangi Tribunal are probably over. It is likely that direct negotiations will be the most important Treaty settlement mechanism in the coming years. It is submitted that the Crown will need to alter its approach in order to achieve "negotiated justice". Moreover, while there is likely to be a measure of finality in the settlement of historical claims, it is doubtful whether the Crown's obligations will cease completely once the settlements have been implemented. Ultimately only time will tell how successful the government and Maori have been in resolving Treaty of Waitangi grievances.

GLOSSARY OF MAORI WORDS

hapu	kin group, sub-tribe
hui	meeting, gathering
iwi	people, tribe
kaitiakitanga	guardianship, stewardship
kaumatua	elder
kawa	custom, protocol
kawanatanga	governance, government
marae	traditional village
manuhiri	visitors, guests
rangatira	chief
raupatu	confiscation
rohe	tribal district, boundary
taonga	treasures, possessions, assets
tangata whenua	original inhabitants of an area, iwi/hapu with customary rights over an area
tino rangatiratanga	highest chieftainship, self-determination, independence, sovereignty

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