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HEALING THE PAST OR HARMING THE FUTURE? "LARGE NATURAL GROUPINGS" AND THE TREATY SETTLEMENT PROCESS

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ABSTRACT

This paper examines a critical aspect of the current Treaty of Waitangi settlement process - the Crown's decision to adopt a policy of negotiating and settling solely with "large natural groupings" of Maori.

This paper argues that the large natural grouping policy is conceptually flawed and has the effect of shutting out the smaller groups which traditionally dominated Maori society, unless they amalgamate into larger groups. The result of this is that such groups often find their access to redress abrogated by settlements negotiated without their consent or involvement.

This raises two significant problems for the settlement process. The first is that the flaws with the current process are alienating many groups, creating a very real risk that some supposedly "full and final" settlements will prove not to be, and instead require re-opening and re-negotiation.

The second is the possibility that the process itself is adversely affecting the redevelopment of traditional Maori social structures, and is therefore creating new Treaty grievances.

Given the problems with the policy, this paper argues that the Office of Treaty Settlements ought to commence negotiations with claimants free from the constraints of a non-negotiable bottom line on the level at which negotiations will occur.

The text of this paper (excluding abstract, contents page, footnotes and bibliography) comprises about 14 300 words.

I INTRODUCTION

In his final speech as a Member of Parliament, the Rt Hon Sir Douglas Graham, the person responsible for driving Treaty of Waitangi (**Treaty**) settlement policy throughout the 1990s was involved in a short, bitter exchange with then opposition MP Tariana Turia, which proceeded as follows:[1]

> Rt Hon. Sir DOUGLAS GRAHAM: If that member thinks we are going to deal with hapu settlements, she can forget it. There are thousands of them, and if she thinks the Crown is dividing people now, which we are certainly not trying to do---
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> Tariana Turia: It's a treaty right.
>
> Rt Hon. Sir DOUGLAS GRAHAM: The member keeps talking about treaty rights. If the member does not want any settlements, and I know she does not, then, say we want to deal hapu by hapu, in a thousand years' time she will still be working it out and will still be arguing about the hapu rohe boundary. It is bad enough dealing at the iwi level, but that is another issue.

This deceptively simple exchange, during the final speech of such a pivotal figure, reveals much about the way in which Treaty settlements have proceeded in New Zealand over the past few decades. It illustrates the problems involved in formulating a settlement policy, the sense of urgency that underpins it, and in the final sentence, the frustration that much of the public has with the existence of any process at all. Further, it questions the degree to which any process is, or should be, consistent with the Treaty itself.

Since the 1980s, there has been an increased recognition and acceptance of the need to provide redress for historical Treaty of Waitangi grievances. The question of how to achieve this has vexed successive Governments, with the solution now seen as being in a process of direct settlement.

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[1] Rt Hon Douglas Graham (5 October 1999) 580 NZPD 19590.

Direct settlement is the process whereby historical Treaty grievances are settled between the Crown and Maori claimants in the political arena, rather than through the Courts, or the Waitangi Tribunal.[2] Over the past decade, this process has developed to such a point where it is essentially the only way of obtaining a settlement for such grievances,[3] and is certainly the method most favoured by the Government.[4] During this period it has evolved from what was an ad-hoc, ill-planned (albeit well intentioned) scheme[5] into a considerably more formal process.

This paper will argue that this process has been constructed in such a way that the most fundamental element – that of whom the Crown will negotiate with – has been unsuitably defined. By engaging in a unilateral definitional exercise, the Crown has decided to negotiate solely with "large natural groupings". Maori society has traditionally been organised along smaller, hapu lines rather than in the larger groupings the Crown seeks to negotiate with. This paper will argue that in so doing, the Crown has created a situation which potentially shuts many of these smaller groups out of the settlement process altogether.

The exclusion of smaller groups creates two significant and distinct problems. The first is that by electing to negotiate and settle claims with large natural groupings, the Crown may have excluded key interests, particularly those of smaller hapu. The implication of this is that these settlements may not stand up in the long term - a problem that will be accentuated as the pace

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[2] Mason Durie *Te Mana, Te Kawanatanga: The Politics of Maori Self-determination* (Oxford University Press, Auckland, 1998), 188; although frequently Waitangi Tribunal hearings are sought first, which then form the evidential basis for such negotiations.

[3] Except for the possibility which has existed since 1988 for the Waitangi Tribunal to make binding recommendations in some circumstances under the Treaty of Waitangi Act 1975, ss 8A to 8HJ - to date only one binding recommendation has been made, in the Waitangi Tribunal *Turangi Township Remedies Report* (GP Publications, Wellington, 1998). However the Government, prompted by the legislation, acted before this came into force - see Janine Hayward "Three's a Crowd? The Treaty of Waitangi, the Waitangi Tribunal and Third Parties" (2002) 20 NZULR 240.

[4] Evidenced by the increasing budget of the body responsible for these direct settlements, Office of Treaty Settlements, which now dwarfs that of the Waitangi Tribunal - See Alan Ward *An Unsettled History – Treaty Claims in New Zealand Today* (Bridget Williams Books, Wellington, 1999), 41.

[5] See Ward, above, 25-40; "National Overview" (May 1997) Maori LR, 4; Douglas Graham *Trick Or Treaty* (Institute of Policy Studies, Wellington, 1995).

of settlements increases. The second problem is that the process itself may be a breach of the Treaty.

However, as Douglas Graham alluded to in his exchange with Tariana Turia, this policy exists in order to create the possibility of final Treaty settlements within a finite time period. The political importance of such an outcome is huge, especially given the pressure from the public for the process to be conducted speedily. As such, it is necessary to consider whether the problems it causes can be justified in pursuit of this important goal.

II GENESIS OF THE DIRECT SETTLEMENT PROCESS

The formalisation of the Treaty settlement process started in 1992, when Cabinet decided to establish a new, comprehensive policy for Treaty claims relating to historical land grievances.[6] While a "Treaty of Waitangi Policy Unit" had been established by the Fourth Labour Government in the late 1980s, it served mainly to co-ordinate policy development.[7] It was not until National gained power in the early 1990s that the Crown actively encouraged Maori claimants to enter into direct settlement negotiations, with or without a Waitangi Tribunal hearing.[8]

The impetus behind the development of such a process[9] was a desire amongst "virtually all" of the incoming MPs to have historical Treaty

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[6] David Williams "Honouring the Treaty of Waitangi – Are the Parties Measuring Up?" (2002) 9 Murdoch University Electronic Journal of Law 3, para 13; Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua : Healing the Past, Building a Future* (Wellington: 2002) 21.

[7] Alan Ward *An Unsettled History – Treaty Claims in New Zealand Today* (Bridget Williams Books, Wellington, 1999), 41; Office of Treaty Settlements, above, 21; Note, however, that this body did draw up a series of very basic policies for the likely conduct of direct negotiations – see Treaty of Waitangi Policy Unit "The Direct Negotiation of Maori Claims" (Department of Justice, Wellington, 1990).

[8] Ward, above, 41. The Waitangi Tribunal is a body established by the Treaty of Waitangi Act 1975 empowered to investigate a claim by "any Maori" that they (either individually or as a member of a group) are, or are likely to be, prejudicially affected by legislation, regulations, policies or Crown acts and omissions which are inconsistent with the principles of the Treaty. If it finds that a claim is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future– Treaty of Waitangi Act 1975, s6.

[9] And concurrent weakening of the capacity of the Waitangi Tribunal, see Ward, above, 38-40.

settlements completed quickly.[10] As Hon John Luxton, the Minister of Maori Affairs at the time said, there was a need to "get them [historical claims] out of the way and have a clean slate as we move into the next century".[11] The policy for effecting such settlements, however, was largely unknown until late 1994, with the public release of a set of proposals for the conduct of what was to be the "full and final settlement for all historical grievances".[12]

The Minister of Justice at the time (and Minister in Charge of Treaty of Waitangi Negotiations), the Rt Hon Douglas Graham noted that there were a number of issues which were worked through in this period, including:[13]

- Parameters in which settlements could be negotiated;
- How to differentiate between "historical" and "contemporary" claims;
- How the "proper claimant" could be identified, and how they would authorise their negotiators;
- The procedure to be followed in negotiations;[14]
- Who would hold any assets transferred to Maori and on what terms; and
- What assets could be included in a redress package.

Graham notes that the resolution of these issues was not uncontroversial, even within Government, with "[d]iffering views held by officials [having to]

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[10] Ward, above, 41; This can be seen in the contents of Cabinet documents during the period – particularly the paper dated 16 September 1992 by Simon Murdoch, the chair of the Officials Committee (Strategy) to the Chair of the Cabinet Strategy Committee which observed "Officials have noted, from previous discussion by Ministers, that to "do nothing" is not an option" and that "Rather a decisive policy step which ends uncertainty and creates a new and different momentum in public policy is required" – see Officials Committee (Strategy) "Treaty of Waitangi: Principles for Settlement of Maori Claims" (16 September 1992), discussed in Cabinet Minute "Principles for Settlement of Maori Claims" (21 September 1992) CAB (92)M38/11.

[11] Hon John Luxton in (5 July 1994) *The New Zealand Herald*, Auckland, quoted in Cherryl Waerea-I-te-Rangi Smith "The Treaty under Attack" in Auckland University Research Unit for Maori Education *The Treaty Under Siege* Monograph No 22, 7.

[12] David Williams "Honouring the Treaty of Waitangi – Are the Parties Measuring Up?" (2002) 9 Murdoch University Electronic Journal of Law 3, para 13.

[13] See Douglas Graham *Trick Or Treaty* (Institute of Policy Studies, Wellington, 1995), 55.

[14] Although, interestingly Graham states that this "was more an internal matter for the Government", suggesting that consultation was not considered as necessary for this aspect of the settlement process.

be resolved at the Cabinet table".[15] After the internal dialogue within Cabinet, and between officials, the Government produced a booklet detailing their proposals.[16] It is notable that this entire process was conducted with "negligible Maori input".[17]

Post-release discussion around the mechanics of the proposed scheme appears to have been eclipsed by what Graham later described as the "most controversial decision that was made by the government at the time".[18] This decision was to set a "fair yet affordable"[19] sum, $1 billion over a ten year period, as the limit of total Government expenditure, including both cash and the value of land and other natural resources for Treaty settlements.[20]

The rationale for a fiscal cap was first to reassure people (including many in Cabinet) that the process was affordable, and secondly to reinforce the finality of settlements.[21] The fiscal cap was to be made permanent by placing 'relativity clauses' in settlements, whereby, when settling, claimants were assured that their settlement would amount to a certain percentage of the total amount spent on settlements (based on the $1 billion cap).[22] If future governments were to reopen settlements with one claimant, they would be obliged by these clauses to reopen all settlements, at considerable expense.

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[15] Graham, above, 55.
[16] See Office of Treaty Settlements *Crown Proposals for the Settlement of Treaty of Waitangi Claims (Detailed Proposals)* (Wellington, 1995).
[17] Mason Durie *Te Mana, Te Kawanatanga: the politics of Maori self-determination* (Oxford University Press, Auckland, 1998), 190-191.
[18] Graham, above, 58, 64.
[19] Graham, above, 60.
[20] David Williams "Honouring the Treaty of Waitangi – Are the Parties Measuring Up?" (2002) 9 Murdoch University Electronic Journal of Law 3, para 13.
[21] Graham, above, 58-59; see also Cabinet Minute "Treaty of Waitangi: Settlement Policies: Ensuring Finality" (10 October 1994) CAB(94)M38/7.
[22] Graham, above, 58-59; although it appears that the concept of placing such clauses in settlement deeds arose during the negotiation of particular settlements, rather than as a policy developed in the abstract, as the concept is conspicuously absent from the Cabinet papers which preceded the settlement proposals, particularly from the cabinet minute detailing measures taken to ensure finality – Cabinet Minute "Treaty of Waitangi: Settlement Policies: Ensuring Finality" (10 October 1994) CAB(94)M38/7.

It was the $1 billion cap which raised the ire of those who attended the thirteen hui following the release of the Crown's proposals,[23] while issues such as mandating of negotiators, governance structures and the negotiation process itself "seemed to raise little passion".[24] The minutiae of the proposals appears to have been overshadowed by what was rejected by even moderate and conservative Maori as an outrageous decision to limit the budget for settlements in such a way.[25]

That is not to say that the issues of process were entirely ignored. Of 2077 submissions received on the Crown's proposals, at least 869 rejected the proposals outright as a result of their unilateral development.[26] Furthermore, some submitters made specific suggestions about representation, although the report of submissions notes (perhaps unsurprisingly) "[t]hese suggestions often conflicted with one another".[27] At a hui called by Sir Hepi Te Heuheu in January 1995, the policies were criticised as being designed to protect the Government and provide assurances for the general populace rather than having as their primary focus the provision of a just remedy for past injustices.[28] Professor Mason Durie suggests that there was also concern about the impact of the policies on smaller, ill-resourced groups.[29]

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[23] For a detailed (albeit biased) account of the proceedings of these hui, see Wira Gardiner *Return to Sender: What really happened at the fiscal envelope hui* (Reed, Auckland, 1996).
[24] Hon Douglas Graham *Trick Or Treaty* (Institute of Policy Studies, Wellington, 1995), 64.
[25] See Alan Ward *An Unsettled History – Treaty Claims in New Zealand Today* (Bridget Williams Books, Wellington, 1999), 52.
[26] See Te Puni Kokiri *Report of Submissions: Crown Proposals for Treaty of Waitangi Claims* (Wellington, 1995) 5.
[27] Te Puni Kokiri, above, 92-93. These submissions variously suggested that whanau, hapu or iwi were the desirable vehicle for negotiations.
[28] JH Roberts *Alternative vision – He moemoea ano: from fiscal envelope to constitutional change: the significance of the Hirangi Hui* in Craig Coxhead "Where are the Negotiations in the Direct Negotiations of Treaty Settlements?" (2002) 10 Waikato LR 13, 24; see also M H Durie "Proceedings of a Hui held at Hirangi Marae, Turangi" in Geoff McLay (ed) *Treaty Settlements: The Unfinished Business* (Institute of Policy Studies, Wellington, 1995).
[29] Mason Durie *Te mana, te kawanatanga: The Politics of Maori Self-determination* (Oxford University Press, Auckland, 1998) 188.

While the concept of a fiscal cap appears to have disappeared (for now) from the settlement process,[30] the remainder of the 1994 proposals remain, largely unaltered, in the current settlement policy. Any major changes made to the policies have also been made without consultation with Maori.[31]

III THE CURRENT SETTLEMENT PROCESS

The current iteration of the Government's Treaty settlement protocols can be found in *Ka tika a muri, ka tika a mua: Healing the past, building a future*, produced by the Office of Treaty Settlements[32] in 2002.[33] In the foreword, Hon Margaret Wilson, the current Minister in Charge of Treaty of Waitangi Negotiations, outlines the goal of the process as ensuring that settlements are "fair, affordable and lasting".[34]

It is pertinent to note at this stage that there is no legislation underpinning these protocols, and that they are simply Government policies.

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[30] See Office of Treaty Settlements "Ka Tika a Muri, Ka Tika a Mua : Healing the Past, Building a Future" (Wellington: 2002) 30; and Hon Margaret Wilson's statement that the Labour led Government has "now moved entirely away from the fiscal envelope concept in planning" Hon Margaret Wilson "Principles to guide settlement of Treaty claims" (3 August 2000) Press Release. However, note that while the rhetoric of a 'fiscal cap' has disappeared, one of the Crown's negotiating principles remains 'fairness between claims', meaning that similar claims should receive a similar level of redress. Given that key early settlements were negotiated within the framework of a fiscal cap, it is difficult to see how this policy can mean anything other than the fiscal cap model is still adhered to – see also Craig Coxhead "Where are the Negotiations in the Direct Negotiations of Treaty Settlements?" (2002) 10 Waikato LR 13, 26-27; and Tom Bennion "New principles to guide the settlement of historical Treaty claims" (July 2000) Maori LR which notes that "the harsh relativity clauses of the Tainui and Ngäi Tahu settlements make it difficult for any government to stray too far from the $1 billion figure for all major settlements".

[31] Such as the adoption of a "principles" framework in July 2000, and moves to "streamline" Treaty claims in February 2002 – Coxhead, above, 25.

[32] The Office of Treaty Settlements is a separate unit within the Ministry of Justice reporting directly to the Minister in Charge of Treaty of Waitangi Negotiations. It was established in January 1995 to manage historical Treaty settlements – Office of Treaty Settlements, above, 23.

[33] Office of Treaty Settlements, above.

[34] Office of Treaty Settlements, above, 4.

A "Large Natural Groupings"

To guide the settlement process, the document outlines certain "key settlement policies" which provide, inter alia, that the Crown seeks a "comprehensive settlement of all claims of a claimant group" in order to ensure that all historical grievances have been addressed.[35] While this appears to be a noble aim, it is potentially compromised by the next policy, which baldly states that "[t]he Crown strongly prefers to negotiate claims with large natural groupings rather than individual whanau and hapu".[36]

The Crown has thus decided to define the Maori Treaty partner for the purposes of historical settlements in terms of 'large natural groupings'. This is an important decision, with considerable influence on how the settlement process is conducted.

By its very nature this is also a difficult decision. The question of the identity of the Maori Treaty partner, and particularly the level of Maori society at which to pursue Treaty negotiations, is a vexed one. The area is so complicated and the number of considerations and possibilities so vast that any decisions which are made will be controversial.[37]

Maori society is organised in many ways, but iwi, hapu and whanau are the main traditional categories.[38] Iwi are the largest grouping, followed by hapu, whereas whanau groups consist mainly of the extended family. Both iwi and hapu are primarily organised along the lines of whakapapa, or direct descent from a common ancestor.[39]

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[35] Office of Treaty Settlements, above, 32.
[36] Office of Treaty Settlements, above, 32.
[37] See Kirsty Gover and Natalie Baird "Identifying the Maori Treaty Partner" (2002) 32 Univ of Toronto L J 39, 40; Tom Bennion "Who Represents Maori Groups?" (Nov 1994) Maori LR, 1; Paul Meredith "Seeing the "Maori Subject": Some Discussion Points" (Draft, Te Matahauariki Institute, University of Waikato).
[38] Angela Ballara *Iwi: The Dynamics of Maori Tribal Organisation from c1769 to c1945* (Victoria University Press, Wellington, 1998), 17.
[39] Ballara, above, 17.

B Development

It was known from a very early stage in the development of the direct settlement process that problems could arise with the definition of whom to negotiate and settle with. A Cabinet paper dated 28 June 1993 notes "[w]ith every claim there is an inherent risk for the Crown that it may not be dealing with the appropriate representatives of the claimants".[40] While this appears to be more directly concerned with the issue of mandating rather than with the appropriate level with which to deal, the footnoted text reveals that the problem can arise in three ways, one of which is that "the wider group (e.g., iwi) does not represent the interests of a sub-group (e.g., hapu) within the claimant group with respect to some particular land etc".[41] The paper goes on to say (emphasis added):[42]

> [o]ne approach could be for the Crown to state its position that it will only settle claims with iwi, rather than hapu or individual Maori. This would not remove the problem of overlapping claims, but would reduce it. To be effective this position may need to be incorporated in legislation. *This issue is likely to be particularly controversial for Maori and would require discussion and consultation.* The Treaty in its Maori version protects both iwi and hapu.

The issue was again raised in a report ordered by Cabinet from an ad hoc committee of officials in July 1994.[43] This paper also noted the importance of getting representation issues right – "[e]xcluding the right people or including the wrong people can both result in new grievances",[44] and that "[a] particular

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[40] Officials Strategy Committee "Treaty of Waitangi Settlement Fund: Size, Shape, Timescale and the Reciprocation from Maori" (28 June 1993) CSC (93) 90, para 64.
[41] Officials Strategy Committee "Treaty of Waitangi Settlement Fund: Size, Shape, Timescale and the Reciprocation from Maori" (28 June 1993) CSC (93) 90, 17 fn 1.
[42] Officials Strategy Committee "Treaty of Waitangi Settlement Fund: Size, Shape, Timescale and the Reciprocation from Maori" (28 June 1993) CSC (93) 90, para 67.
[43] Ad Hoc Officials Committee "Treaty of Waitangi Settlement Policies: Outstanding Matters" (10 October 1994) CSC (94) 140.
[44] Ad Hoc Officials Committee "Treaty of Waitangi Settlement Policies: Outstanding Matters" (10 October 1994) CSC (94) 140, 2.

concern is that minority interests are protected against an oppressive majority".[45]

When the specific point of which group to deal with was considered, the report noted that "[a]ggregating grievances into a wider group, e.g. hapu grievances being subsumed at the iwi level emphasises the overall nature of grievance felt by Maori but could lead to settlements that are not seen to extinguish highly specific grievances".[46] The report did not express any ultimate view as to the level at which claims should be pursued, but did note that the issue should be addressed.[47] Cabinet also noted the issue at the October 1994 meeting that considered the report.[48]

The October 1994 meeting was the last time that Cabinet considered the issue before the settlement proposals were released for public consultation (in the "fiscal envelope" hui). The Crown did not put forward a firm view as to what its preference was, and a perusal of the proposals reveals that they appear to have left the question of what level of Maori society to deal with open.[49] In the course of consultation, as was noted above, there were various suggestions as to what the appropriate level was.[50] While the Crown's report of submissions noted that they often "conflicted with each other", there were

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[45] Ad Hoc Officials Committee "Treaty of Waitangi Settlement Policies: Outstanding Matters" (10 October 1994) CSC (94) 140, 2 – the sentence continues "[and] the majority against an unreasonable minority"; this has resonance with the terms of the Te Ture Whenua Maori Act 1993, s17(2)(d) which strikes a similar balance in terms of interests in land.

[46] Ad Hoc Officials Committee "Treaty of Waitangi Settlement Policies: Outstanding Matters" (10 October 1994) CSC (94) 140, 3.

[47] Ad Hoc Officials Committee "Treaty of Waitangi Settlement Policies: Outstanding Matters" (10 October 1994) CSC (94) 140, 10.

[48] Cabinet Minute "Treaty of Waitangi Settlement Policies: Outstanding Matters" (17 October 1994) CAB (94) M 39/11, (b)(iii).

[49] See Office of Treaty Settlements *Crown Proposals for the Settlement of Treaty of Waitangi Claims (Detailed Proposals)* (Wellington, 1995), 42-43 where the same questions raised in the Cabinet papers re-appear.

[50] Te Puni Kokiri *Report of Submissions: Crown Proposals for Treaty of Waitangi Claims* (Wellington, 1995), 92-93. These submissions variously suggesting that whanau, hapu or iwi were the desirable vehicle for negotiations.

clear statements in the submissions that the Crown would at the very least need to leave open the possibility of dealing with smaller groups.[51]

The fiscal envelope hui was the last time the policy was put up for public consultation. An inter-departmental working group then examined proposals for negotiations processes and recommended, inter alia, that "the Government explicitly place a priority on negotiating and settling claims brought by iwi or confederations of iwi".[52] This was subsequently approved by the Cabinet Strategy Committee,[53] and reflected in the Crown's settlement guide.[54]

The preference for dealing solely with iwi has subsequently changed to a preference for dealing solely with 'large natural groupings'. The change occurred, according to current Office of Treaty Settlements director Andrew Hampton, in recognition of "the diversity of Maori political organisation".[55] Despite this change in policy, smaller groups are still unable to negotiate directly as they do not fit the Crown's criteria for what constitutes a "large natural grouping".[56] This is, in Hampton's words, in order "to accommodate the reality that a settlement with each registered claimant is unsustainable".[57]

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[51] See Te Puni Kokiri, above, 93 – these included "Whanau should sometimes be considered appropriate mandating groups"; "Hapu are the mandated negotiating body for iwi"; "The Treaty of Waitangi guaranteed hapu ownership so one person should not negotiate on behalf of iwi". It should be noted, that there were also contrary submissions which suggested that iwi should generally be the negotiating body, with hapu negotiations occurring rarely.

[52] Ministry of Justice "Treaty Settlement Policies: Reports from working groups" (5 July 1996) CSC (96) 127, paras 14, 45.

[53] Cabinet Strategy Committee "Treaty Settlement Policies: Reports from Working Groups" (10 July 1996) CSC (96) M22/8.

[54] See Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua : Healing the Past, Building a Future* (Wellington: 1999), 24.

[55] Response from Andrew Hampton, Director, Office of Treaty Settlements to a request from the author under the Official Information Act 1982 (17 June 2003).

[56] These factors include relevant Waitangi Tribunal findings; whether the group has a distinctive area of interest; whakapapa, tipuna, iwi, hapu, marae; and (crucially) the relative size of the group in terms of its population and rohe - response from Andrew Hampton, Director, Office of Treaty Settlements to a request from the author under the Official Information Act 1982 (17 June 2003).

[57] Response from Andrew Hampton, Director, Office of Treaty Settlements to a request from the author under the Official Information Act 1982 (17 June 2003).

C Justification for Policy

The Crown's justification for the policy (as set out in *Healing the Past*) is that it "makes the process of settlement easier to manage and work through, and helps deal with overlapping interests" as well as reducing costs for both the Crown and claimants.[58]

The Office of Treaty Settlements explored these reasons in more detail in a recent report to the Maori Affairs Select Committee, which stated:[59]

> [s]ettling all the claims of large natural groups (as opposed to the claims of small groups such as individual hapu) is the key to completing the settlement process expeditiously. Paradoxically, the settlement process will be prolonged if the Government attempts to increase the pace of settlement by negotiating with small groups.

This line of reasoning has also been endorsed by the current Minister in Charge of Treaty of Waitangi Negotiations, the Hon Margaret Wilson.[60]

The rationale for the policy can clearly be seen to be expedience, that is, making the goal of final settlements easier to achieve from the Crown's perspective. There is no evidence that the policy even considered which group Maori identified as most suitable, or was most representative of past or present notions of Maori social organisation.

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[58] Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua : Healing the Past, Building a Future* (Wellington: 2002), 44.

[59] Office of Treaty Settlements "Paper to Maori Affairs Committee Re: Speeding up of Historical Treaty Settlements" (8 October 2002); see also Office of Treaty Settlements *Briefing to the Incoming Minister in Charge of Treaty of Waitangi Negotiations* (Wellington, 2002).

[60] See Written Question from Rt Hon Winston Peters to Hon Margaret Wilson (24 October 2002) 54 NZPD Q Supp 2655, question No 11982, where Ms Wilson stated "[n]egotiations with smaller groups, or negotiations covering only some of the claims of the group (non-comprehensive settlements) will mean more negotiations are required than otherwise, and this will tend to delay completion of the settlement process."

Indeed, as identified above, the entire policy, including the decision to negotiate solely with Large Natural Groupings was reached with minimal consultation with Maori.[61] The risk is that the Crown may not be negotiating with the right people, and consequently that settlements could both overlook the grievances of the some groups and potentially create new ones.

IV CAUSE FOR CONCERN?

The current settlement process, and its outcome, can be seen as problematic. As outlined above, the goal of the process is, from the Crown's perspective, to obtain full and final settlements of historical Treaty grievances by way of negotiation. Crucial to achieving this goal is ensuring that the Crown is negotiating with the correct representatives of the other Treaty partner, that is, Maori; and also that it is not creating new grievances in the process.

The issue of correctly identifying the Treaty partner is important. For the process to be successful it must, according to Kirsty Gover and Natalie Baird in a recent University of Toronto Law Journal article, promote "buy-in" from a wide spectrum of Maori.[62] However, as Baird and Gover point out, the contemporary Treaty relationship has been "conceptualized in government rhetoric and popular discourse as a binary, quasi-diplomatic partnership between two centralized and homogenous polities".[63] This attitude can be seen in the development of the large natural grouping policy. The Crown opted to define the Treaty partner as the group which best suited their desire for speedy and cost-effective settlements.

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[61] Except for the opportunity to comment generally on the issue of claimant representation in the context of the "fiscal envelope hui" described above, which as noted returned a variety of responses detailed in Te Puni Kokiri *Report of Submissions: Crown Proposals for Treaty of Waitangi Claims* (Wellington, 1995), 92-93.

[62] Kirsty Gover and Natalie Baird "Identifying the Maori Treaty Partner" (2002) 32 Univ of Toronto L J 39, 40.

[63] Gover and Baird, above, 39-40.

A A Unprincipled Approach?

Gover and Baird argue that the effect of approaching definition issues in this way is to fail to recognise a Treaty status for "non-traditional Maori collectives".[64] However, when one unpacks the current framework for the negotiation and settlement of historical Treaty grievances, it becomes apparent that it is not only non-traditional collectives that are shut out of the process. While the term "large natural group" is not strictly defined, the factors which the Crown takes into account before entering into negotiations with a group are such that it is virtually impossible for any groups other than iwi, large hapu, or sizable confederations of hapu to satisfy the criteria.[65] The reason why "large hapu or confederations of hapu" may qualify is, according to the Office of Treaty Settlements and Te Puni Kokiri, because they function "in similar ways to iwi".[66]

The effect of the policy is that the Crown will seek to negotiate the direct settlement of historical grievances with iwi, and certain large hapu that function like iwi.

However, such an approach is inconsistent with modern historical and anthropological thought, which is firm on the point that it was hapu and not iwi which were (and arguably still are) the primary vehicles of Maori political

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[64] Gover and Baird, above, 39-40.

[65] These factors include relevant Waitangi Tribunal findings; whether the group has a distinctive area of interest; whakapapa, tipuna, iwi, hapu, marae; and (crucially) the relative size of the group in terms of its population and rohe - Response from Andrew Hampton, Director, Office of Treaty Settlements to a request from the author under the Official Information Act 1982 (17 June 2003).

[66] Response from Andrew Hampton, Director, Office of Treaty Settlements to a request from the author under the Official Information Act 1982 (17 June 2003); Response from Leith Comer, Chief Executive, Te Puni Kokiri to a request from the author under the Official Information Act 1982 (12 August 2003).

organisation.[67] The Waitangi Tribunal has also repeatedly acknowledged this.[68]

As academics from Victoria University's Treaty of Waitangi Research Unit summarised "[i]n 1840 hapu, which may be fewer than one hundred or up to a thousand people was the effective social and political unit of Maori society, although in times of war or other crises hapu may combine into larger iwi groups."[69]

The trend towards viewing iwi as the primary actors has emerged largely in the colonial context due to the desire by officials to find a "comprehensible and comprehensive hierarchical body politic with which to negotiate land purchases".[70] This effect was compounded by the need to respond to the challenges posed by colonisation - challenges best met in a larger collective unit.[71] The primacy of iwi within the Maori political order can thus, be seen as largely a Pakeha construct, as well as a response to the effects of colonisation.[72] It is interesting to note that this phenomenon of misunderstanding or deliberate manipulation forming the basis of 'traditional' identification is not unique to New Zealand, and has occurred in the colonial context in other countries as well.[73]

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[67] See Angela Ballara *Iwi: The Dynamics of Maori Tribal Organisation from c1769 to c1945* (Victoria University Press, Wellington, 1998); Steven C Bourossa and Ann Louise Strong "Restitution of Land to New Zealand Maori: The Role of Social Structure" (2002) 75 Pacific Affairs 162; Steven Webster "Maori Retribalisation and Treaty Rights to New Zealand Fisheries" (2002) 14 The Contemporary Pacific 341; see also the texts of the Treaty of Waitangi itself, where the word 'tribes' in the English text was translated as 'hapu' in the Maori version.

[68] Waitangi Tribunal *Ngati Awa Raupatu Report: Wai 46*, (GP Publications, Wellington, 1999), 132; Waitangi Tribunal *The Fisheries Settlement Report: Wai 307*, (Brooker & Friend Ltd, Wellington, 1992), 12; Waitangi Tribunal *Ngati Awa Settlement Cross-Claims Report: Wai 958,* (Legislation Direct, Wellington, 2002), 72.

[69] Richard Hill and Vincent O'Malley *The Maori Quest for Rangatiratanga / Autonomy 1840-2000* (Treaty of Waitangi Research Unit, Wellington, 2000), 1-2.

[70] Ballara, above, 59, 70, 81; see also Lindsay Cox *Kotahitanga: the search for Maori political unity* (Oxford University Press, Auckland, 1993) 141.

[71] Hill and O'Malley, above, 2.

[72] See Wayne Rumbles "Treaty of Waitangi Settlement Process: New Relationship or New Mask" (Paper Presented at Compr(om)ising Post Colonisation Conference, Woolongong, 10-13 February 1999), 10; this has subsequently been published in Dr Greg Ratcliffe (ed) *Compr(om)ising Postcolonialism(s): Challenging Narratives and Practices* (Dangaroo Press, Sydney, 2002).

[73] See Eric Hobsbawn and Terrence Ranger (eds) *The Invention of Tradition* (Cambridge, Cambridge University Press, 1983); particularly note Terence Ranger "The Invention of Tradition in Colonial Africa"

While the policies for the conduct of direct settlement emerged during the 1990s, there has been an extensive body of peer critiqued anthropological research into this area since the mid 1970s. As anthropologist Stephen Webster put it[74]:

> [t]he current expansion and urgency of historical research in Maori land and fisheries grievances has found itself in need of a far better understanding of Maori kinship. At first glance, it appeared that social anthropology had been remiss in contributing to a better understanding of either kinship or land. An examination of the history of social anthropology and Maori Studies shows, however, that important fundamental research had been undertaken and critiqued by 1975.

As such, there is, and has been for some time, a substantial body of evidence as to the actual nature of Maori society. However, much policy and academic work, including the "Large Natural Grouping" policy, does not reflect this. Rather, these policies are reminiscent of the traditional, flawed assumption that iwi are the paramount bodies, commanding obedience from hapu, who in turn command obedience from whanau. As respected historian Alan Ward put it:[75]

> the supposedly neat hierarchy of whanau, hapu, and iwi, with its rangatira and its ariki (a tidy pyramidal model which still gets trotted out in anthropology and sociology that feeds upon previous publication rather than undertaking original research or checking the most recent writings) was not actually like that.

Thus, by choosing to negotiate almost solely with iwi, the Government is choosing a model inconsistent with tikanga. As such the Crown may well be

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at 247-252 where it is noted that "Modern Central Africa tribes are not so much survivals from a pre-colonial past but rather largely colonial creations by colonial officers and African intellectuals".

[74] Stephen Webster "Maori hapuu and their history" (1997) 8 Australian Journal of Anthropology 307.

[75] Alan Ward "Historical claims under the Treaty of Waitangi" (1993) 28 Journal of Pacific History 181 quoted in Webster, above.

negotiating with the wrong groups and may therefore also be prejudicing its goal of obtaining 'full and final settlements'.

This is the result of what Gover and Baird describe as the "primary impulse of governments to date" to engage in "largely unilateral definitional exercises, effectively removing the debate about Maori identity from Maoridom".[76] Dr David Williams of the University of Auckland has called this approach to mandating issues the "one major flaw" of the modern Treaty settlement process.[77]

B Relevance Today

The decision to ignore hapu is not one of solely academic concern, and has been criticised by many Maori. At a hui held at Taupo in July 2003 by the Ministry of Justice as part of a review of the court system, the policy was repeatedly criticised by those present. Comments included (direct quotes unless otherwise noted):[78]

- [The] Government only wants to deal with "large natural groups" and therefore not hapu;
- [T]he Crown is making Mäori/whanau hapu join into "Large Natural Groups" to settle claims leaving the benefit to the whanau/hapu going to the "Large Natural Groups" ie whanau/hapu miss out;
- Mäori are hapu based yet the Crown [only negotiates] with ... "Large Natural Groups";
- Large Natural Groups policy dictates how Mäori must organise themselves
- The Crown needs to recognise hapu;

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[76] Kirsty Gover and Natalie Baird "Identifying the Maori Treaty Partner" (2002) 32 Univ of Toronto L J 39, 40.

[77] David Williams "Honouring the Treaty of Waitangi – Are the Parties Measuring Up?" (2002) 9 Murdoch University Electronic Journal of Law 3, para 2; see also Dr Joan Metge "Submission to the Maori Affairs Select Committee on the Runanga Iwi Bill" (MA/90/85, 14 February 1990) which criticises the Governments attempts to rigidly define "the essential characteristics of iwi" by law; and see generally the Interim Report of the Maori Affairs Committee on the Runanga Iwi Bill [1990] AJHR I.10A.

[78] Ministry of Justice *Hui Report: Seeking Solutions* (Wellington, 2003) 39-42, 47.

- Recognise that if 'hapu' want to be 'hapu' let them be. This is our legal entity. Hapu are recognised in the Treaty;
- Have hapu as the legal entity;
- Governance of hapu is not corporate;
- Current models mean the hapu are not really heard;
- Can't just rubber stamp models, and then call them Mäori;
- [Current] [s]ettlement structures are government structures – not iwi / hapu / whanau;
- How Mäori organise themselves is for them to work out;
- Settle hapu by hapu.

Thus the prominence of the hapu has not disappeared. These comments suggest that the current policy is not satisfactory to smaller groups in Maoridom (i.e. whanau / hapu). Forcing hapu to amalgamate together for the purpose of settlements can surely not then be seen as a principled approach.

V PRACTICAL EFFECTS

The lack of a principled basis could perhaps be seen as acceptable if the policy was actually working in practice. However, as the number of settlements increases the adverse effects of this policy are being increasingly felt.

The large natural grouping policy means that rather than smaller groups such as hapu being able to enter into direct negotiations with the Crown, they are forced to amalgamate together under the banner of an iwi or a sui generis body constructed for the purpose of settlements. The potential for smaller groups to have their interests prejudiced in this process is large, as their concerns and aspirations could be eclipsed by the interests of the larger group. Furthermore, as the Waitangi Tribunal noted in 1999 "often bitter" struggles

between hapu which were "thought once to have died" resurface when claims are heard and settlements negotiated.[79]

The scope for injustice is aggravated by two further elements of settlement policy - the policy of seeking comprehensive settlements, and the steps taken to ensure finality of settlements. In a nutshell, what the Crown is seeking is "settlements... with large natural groupings of claimants, for all of their historical claims, in a way which ensures the settlements will be lasting".[80]

A Comprehensive Settlements

In *Healing the Past*, the Office of Treaty Settlements states that the Crown "strongly prefers to negotiate settlements of all the historical claims... of a claimant group at the same time".[81] What this means is that once a mandate is accepted, the Crown will proceed to negotiate a settlement which covers all of the hapu and whanau present in the area. Such settlements will include "all claims of the group whether the claims have arisen or been considered, researched, registered, notified or made on or before the settlement is reached".[82]

In the context of the large natural grouping policy this means that the Crown will look for a large natural group with which it can conduct negotiations for the comprehensive settlement of all claims of the groups it purports to represent. The prospect is that these larger groups may claim to represent smaller groups who do not accept the mandate of the larger group to do so. If this is the case, the policy of seeking comprehensive settlements may

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[79] Comments reproduced in Tom Bennion "Whanganui River claims of Atihaunui and Tamahaki" (March 1999) Maori LR 4.
[80] Office of Treaty Settlements *Briefing to the Incoming Minister in Charge of Treaty of Waitangi Negotiations* (Wellington, 2002), 2.5.2.
[81] Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua : Healing the Past, Building a Future* (Wellington: 2002), 44.
[82] Letter from Tony Sole, Manager, Claims Development, Office of Treaty Settlements to Rawinia Konui (18 August 2003), which describes the policy in relation to the Ngati Tuwharetoa negotiation process.

mean that these smaller groups find their claims subsumed, even though they have not themselves consented to this.

B "Finality"

The desire to achieve comprehensive settlements is augmented by the main aim of the Treaty settlement process – that is to obtain full and final settlements of historical Treaty grievances. To this end, the redress provided by the Crown in settlements is offered "in total satisfaction of the grievance for all time".[83] Such a policy is consistent with the Crown's intention to put the issues of past grievances behind them.[84] This paper will not traverse the subject of whether such settlements are necessarily desirable.[85] However, the means by which the Government is seeking to ensure this finality are concerning.

Finality is ensured by the inclusion of a provision in the settlement legislation that the settlement is final, backed up by provisions stopping any possibility of the settlement being re-opened by either the courts or the Waitangi Tribunal.[86] Obviously, such provisions provide "powerful structural barriers to prevent Maori from pursuing their Treaty claims in the future".[87] These barriers can be seen in the wording of such provisions in settlement legislation passed to date.[88]

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[83] Office of Treaty Settlements, above 32; the quote is from Barney Riley "Mocked before the ink is dry on the statute? Final Settlements of Treaty of Waitangi Claims" (LLB(Hons) Research Paper, Otago University, 1994) 16.

[84] Hon Douglas Graham *Insight '94*, National Radio, 25 July 1994, quoted in Riley, above, 16.

[85] Note, however, that the Waitangi Tribunal has opined that the concept of finality was "clearly inconsistent with the Treaty" - Waitangi Tribunal *The Fisheries Settlement Report: Wai 307*, (Wellington, 1992) 10, and that if tribal leaders were to sign such final settlements it would serve "only to destabilise their authority" – Waitangi Tribunal *Taranaki Report : Kaupapa Tuatahi: Wai 143* (Wellington, 1996) 314.

[86] Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua : Healing the Past, Building a Future* (Wellington: 2002), 77.

[87] Annie Mikaere "Settlement of Treaty Claims: Full and Final, or Fatally Flawed?" (1997) 17 NZULR 425, 454.

[88] See, for example, the Ngai Tahu Claims Settlement Act 1998, s461(3), which states:

> 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

The combination of the comprehensive settlement and finality policies is that once a claimant group has negotiated a settlement, the legislation that gives effect to it will remove any possibility for smaller groups not involved in the settlement process to pursue their claims.

C The Crown's Answer

The Office of Treaty Settlements argues that it has processes in place to ensure that the settlement policy does not compromise hapu or whanau interests. These processes are effective, according to the Office, as they require "a transparent and inclusive mandating process, offering specific redress to [smaller] groups and providing an opportunity for all claimants to participate in the acceptance of a settlement offer through a ratification process".[89]

Furthermore, in *Healing the Past*, it was noted that in some cases specific smaller claims from whanau and hapu "can be addressed within the comprehensive settlement".[90] Andrew Hampton points to the return of Turuturu Mokai Reserve to Ngati Tupaia Hapu in the Ngati Ruanui settlement as an example of this.[91]

However, none of this removes the fact that hapu are forced to work within an imposed structure, which does not necessarily suit them. The return of the Turuturu Mokai Reserve was negotiated within the "Large Natural Grouping" framework, and title to the reserve vested not in the Hapu, but in

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(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.

[89] Response from Andrew Hampton, Director, Office of Treaty Settlements to a request from the author under the Official Information Act 1982 (17 June 2003).

[90] Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua : Healing the Past, Building a Future* (Wellington: 2002), 66.

[91] Response from Andrew Hampton, Director, Office of Treaty Settlements to a request from the author under the Official Information Act 1982 (17 June 2003).

Te Runanga o Ngaati Ruanui Trust, the entity representing the Iwi as a whole.[92] This process did not stop a number of whanau and hapu from rejecting the settlement, and even going so far as to travel to Wellington to object at the first reading of the settlement legislation.[93]

D The Policy in Practice

The effectiveness of both the policy and the Crown's attempts to mitigate any problems with it can be gauged by examining the extent to which it is causing problems in practice.

The most obvious manifestation of these problems can be seen in a number of cases where smaller groups have taken steps to challenge settlements negotiated by larger entities out of a concern that their interests will be subsumed within a wider settlement without their consent or involvement.

1 Te Atiawa

Such a challenge occurred during the Te Atiawa settlement. In its Taranaki report, the Waitangi Tribunal listed the hapu groupings with which the Government should enter into settlement negotiations with.[94] One of these was Te Atiawa, a group of six hapu, one of which was the Puketapu hapu. These six hapu formed the Te Atiawa Iwi Authority Incorporated (**TAIA**) as a vehicle through which to pursue negotiations with the Crown.[95]

What followed was described by Doogue J in the following terms: "[i]t appears that some time during 1995 before the incorporation of TAIA there was a change in the relationship between the Puketapu hapu and other hapus [sic] within the Te Atiawa iwi".[96]

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[92] See Ngati Ruanui Claims Settlement Act 2003, s 34.
[93] This was noted at the time by Metiria Turei (3 October 2002) 603 NZPD 885-887.
[94] Waitangi Tribunal *Taranaki Report : Kaupapa Tuatahi: Wai 143* (GP Publications, Wellington, 1996).
[95] *Kai Tohu Tohu O Puketapu Hapu Inc v Attorney-General & Te Atiawa Iwi Authority* (5 February 1999) High Court, Wellington, CP344/97 Doogue J, 2-4.
[96] *Kai Tohu Tohu O Puketapu Hapu Inc v Attorney-General & Te Atiawa Iwi Authority*, above, 3.

When, in 1996, TAIA lodged a claim by way of deed of mandate on behalf of the other five hapu, the Puketapu hapu sought to progress their own claim separately. There were attempts at mediation, but eventually the then Minister in Charge of Treaty of Waitangi Negotiations, Doug Graham decided to accept the mandate of TAIA to negotiate on behalf of the Te Atiawa aggregation. To this effect, he wrote a letter to the TAIA stating the conditions on which the mandate was accepted:[97]

> In accepting the mandate the Crown notes that there are unresolved issues between the Iwi Authority, Puketapu hapu and potentially Otaraua hapu. The Crown's acceptance would be provided on the basis that the Iwi Authority continues to ensure that:
>
> - provisions for Puketapu hapu representation and other hapu groups remain in place
> - Te Atiawa Iwi Authority remains committed to keeping Puketapu hapu and other hapu groups informed of the progress of negotiations, and
> - the five hapu continue to support Te Atiawa Iwi Authority (particularly Otaraua hapu).

The Puketapu Hapu was unhappy with this outcome and in late 1997 submitted its own deed of mandate, which was rejected by the Minister.[98] The position, then, was that the TAIA was negotiating a comprehensive settlement for all claims in the Te Atiawa rohe, including those of Puketapu, despite Puketapu not accepting the mandate of TAIA to do so. Puketapu unsuccessfully challenged this in Court, seeking a prohibitory injunction on the grounds that "it was for the Puketapu hapu to decide whether or not to negotiate with the Crown and, if so, how, and that it had its own deed of mandate for its representation and did not recognise TAIA's ability to

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[97] Hon Doug Graham, letter to the interim chairperson of Te Atiawa Iwi Authority Incorporated, reproduced in *Kai Tohu Tohu O Puketapu Hapu Inc v Attorney-General & Te Atiawa Iwi Authority*, above, 8-9.
[98] *Kai Tohu Tohu O Puketapu Hapu Inc v Attorney-General & Te Atiawa Iwi Authority*, above, 9.

represent it".[99] Despite this challenge, negotiations continued, and the settlement is currently at the heads of agreement stage.[100]

2 Ngai Tahu

In the South Island, a similar situation occurred when the Waitaha grouping challenged the ability of Ngai Tahu to enter into a settlement of its Treaty claims.[101] Interestingly, Ngai Tahu was supported by the Attorney-General on behalf of the Minister in Charge of Treaty of Waitangi Negotiations in defending this challenge.

Te Runanga o Ngai Tahu was established by Te Runanga o Ngai Tahu Act 1996 to provide a body corporate with which the Crown could conduct settlement negotiations. Section 15(1) of this Act provided that "the body shall be recognised for all purposes as the representative of Ngai Tahu Whanui".

The Waitaha group, not included in the definition of the Ngai Tahu Whanui in section 2 of the Act,[102] filed a claim with the Waitangi Tribunal for consideration of their historical grievances.[103] While this was pending, a deed

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[99] *Kai Tohu Tohu O Puketapu Hapu Inc v Attorney-General & Te Atiawa Iwi Authority*, above, 9.

[100] The heads of agreement can be viewed at http://www.executive.govt.nz/96-99/minister/graham/te_atiawa/index.html (Last Accessed 10 August 2003).

[101] *Waitaha Taiwhenua o Waitaki Trust & Ors v Te Runanga o Ngai Tahu & Attorney-General* (17 June 1998) High Court Christchurch CP41/98 Panckhurst J. An interesting description of the background to this dispute can be found in Andrew Sharp "Recent Juridical and Constitutional Histories of Maori" in Andrew Sharp and Paul McHugh (eds) *Histories: Power and Loss* (Bridget Williams Books, Wellington, 2001) 48-56.

[102] A supplementary order paper to the Bill sought to add Waitaha to the definition of Ngai Tahu whanui in clause 2 of the Bill, although this was withdrawn by the Hon Doug Kidd, who proposed it, after significant debate in the House – (20 March 1996) 553 NZPD 11580. Of significant interest from this debate is the statement made on the behalf of Waitaha during select committee proceedings referred to by the Hon Mrs T W M Tirikatene-Sullivan that "we of the iwi, hapu, and whanau of Waitaha have not, do not, and will not recognise any other iwi as having the reo, the mana, the tapu, the ihi, the wehi for Waitaha in all matters to do with our whakapapa, our waiata, our purakau, our patere, our karakia, our whanau, our hapu, and our iwi." - (20 March 1996) 553 NZPD 11579.

[103] These were claims Wai 618 and Wai 622.

of settlement was signed between Ngai Tahu and the Crown. The relevant provisions of the deed were summarised by Panckhurst J as follows:[104]

> [c]lause 17.3.11 contemplates amendment of the definition of "Ngai Tahu Whanui" in s2 of the 1996 Act to include a reference to "Waitaha". Clause 1.2.1 contains an extensive definition of "Ngai Tahu claims" and, relevantly for present purposes, includes [Waitaha's Tribunal claims] therein. The intent was for the Waitaha people to be recognised as included in Ngai Tahu Whanui and their unresolved claims to be subsumed as part of the greater Ngai Tahu settlement. By clause 17.3 the Crown agreed within six months to introduce legislation to give effect to the settlement.

Thus, the interests of Waitaha were included in the Ngai Tahu settlement, despite Waitaha's refusal to accept Ngai Tahu's mandate to negotiate on their behalf. Despite a challenge in the High Court, the provisions in the deed of settlement were passed into legislation, and Waitaha are now unable to pursue their claims through either the Courts or the Waitangi Tribunal.[105]

3 Ngati Ruanui

More recently, in the course of the Ngati Ruanui settlement, issues arose over the Crown's decision to accept the mandate of the Ngati Ruanui Muru me te Raupatu Working Party to settle all the historical claims of Ngati Ruanui. Two hapu which would have had their claims subsumed by any such settlement, Pakakohi and Tangahoe, argued that the working party did not possess such a mandate, and that they should have the opportunity to negotiate for the settlement of their claims independently.[106]

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[104] *Waitaha Taiwhenua o Waitaki Trust & Ors v Te Runanga o Ngai Tahu & Attorney-General* (17 June 1998) High Court Christchurch CP41/98 Panckhurst J, 3-4.

[105] See Ngai Tahu Claims Settlement Act 1998, s9; Sandra Lee, the then deputy leader of the opposition Alliance party noted in Parliament during the third reading of the Act that other groups – including Ngati Apa, Ngati Rangitane, Ngati Rarua and Ngati Mamoe also had their rights prejudiced by the passage of the Act – (29 September 1998) 572 NZPD 12376.

[106] See the covering letter to the Waitangi Tribunal's *Pakakohi and Tangahoe Settlement Claims Report: Wai 758* (Legislation Direct, Wellington, 2000).

Pakakohi and Tangahoe obtained an urgent hearing in the Waitangi Tribunal, which considered the matter and concluded that the claims of Tangahoe were not distinct from those of Ngati Ruanui as a whole, but that Pakakohi's claims were. However, the Tribunal found that there was not sufficient evidence of support for a separate settlement so as to warrant the Tribunal taking a hard look at the Crown's handling of the process.[107] The settlement process went ahead despite a subsequent High Court challenge.[108]

4 Other Settlements

These three settlements are the most visible examples of where smaller groupings have seen their claims subsumed within a larger grouping against their will. However, this is almost certainly a more widespread occurrence.

In every claims district there exists an actual or potential risk of many hapu simply acquiescing to the policy out of fear they will be excluded from the settlement process if they do not. When some hapu expressed concern about their role in the Ngati Tuwharetoa settlement process, the Office of Treaty Settlements responded with a letter outlining their policy and stating that:[109]

> if a minority of hapu choose to stand outside of... negotiations that would not be sufficient cause for the Crown not to begin negotiations... I should emphasise that – consistent with the policy of comprehensive settlement with large natural groups - the Crown would not contemplate having separate negotiations with individual hapu.

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[107] Waitangi Tribunal *The Pakakohi and Tangahoe Settlement Claims Report: Wai 758* (Wellington, 2000), 66; proceedings were brought following the production of this report alleging bias on the behalf of Chief Judge Joe Williams, who presided at the hearing, however these proceedings failed as the Court concluded there was no such bias – see *Hayes & Ors v Waitangi Tribunal & Ors* (10 May 2001) High Court Wellington CP111/01 Goddard J.

[108] *Watene & Ors v Minister in Charge of Treaty of Waitangi Settlements* (11 May 2001) High Court Wellington CP120/01 Goddard J.

[109] Letter from Tony Sole, Manager Claim Development, Office of Treaty Settlements to Rawinia Konui (18 August 2003).

Thus the prospect of exclusion, and having a settlement proceed without them, is brought home to wavering hapu by the Office of Treaty Settlements. Given this, it is unsurprising that some claimants feel that they have been forced, against their will, to amalgamate into "Large Natural Groupings" for fear they will miss out on a piece of the settlement if they do not. This can be seen in a submission to the Waitangi Tribunal from the Mokai Patea Waitangi Claims Committee, a body established by a number of hapu in the Whanganui area, where the claimants lament that they have had "no choice but to… enter this foreign process to protect our interests".[110]

E Fast-Tracking Claims

The potential for further problems with this policy can be seen in the current process for the settlement of Central North Island claims, which cover a third of Maoridom. Here, in an effort to secure a speedy settlement, the Government is proposing that a 'fast-track' system be used. A similar process is also proposed for the Volcanic Interior Plateau and Whanganui claim areas.[111]

In a letter from the Office of Treaty Settlements, claimants are informed that the Hon Margaret Wilson, the Minister in Charge of Treaty of Waitangi Negotiations has indicated "the importance of maintaining momentum".[112] This desire to expedite the process is also demonstrated by the Crown's actions, including bringing in former Finance Minister David Caygill in an effort to facilitate communication between the parties.[113]

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[110] See "Submission from the Mokai Patea Waitangi Claims Committee Concerning the Inquiry Boundary" (2 November 2002) Wai 903 Doc #2.57.

[111] "Memorandum and directions of Judge CM Wainwright re: Judicial Conference for Whanganui District Inquiry" Wai 903 Doc #2.88, 2.

[112] Letter from Ross Phillipson, Central North Island Project Leader, Office of Treaty Settlements to Interim Representatives of Claimant Groups (16 June 2003) Wai 950 Doc #2.1133(b), Wai 951 Doc #2.1039(a), Wai 952 Doc #2.1022(a).

[113] Eugene Bingham, Phil Taylor And Catherine Masters "Government Gambles on High Risk Treaty Plan" (19 July 2003) *The New Zealand Herald* Auckland 1.

The process sets down a two year timeframe for settlement which would bring fruits for the Government directly before the 2005 election. However, in the hurry to settle claims quickly, whatever the motive is, there is a risk that those smaller groups which are unable to negotiate with the Crown directly will be left behind.

1 Further compromise on hapu interests?

The Office of Treaty Settlements, in a letter to the interim representatives of claimant groups in the Central North Island, stated that "it is important that the interests of individual hapu and whanau are represented around the table".[114] The letter went on to say that the Office expects that claimant groups have "good processes and structures to enable this to occur". However, crucially, the letter stated "at the same time, we are conscious that whanau and hapu issues should not distract from progressing settlements at the wider level."[115]

This appears to be a clear indication that the Crown are willing to accept whanau and hapu interests being compromised in the quest for a comprehensive settlement.

2 Research

Smaller groups are further kneecapped by a lack of access to research funding. As Alan Ward, who has worked as a contract historian for the Waitangi Tribunal points out, claims tend to be "hydra-headed", as research at

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[114] Letter from Ross Phillipson, Central North Island Project Leader, Office of Treaty Settlements to Interim Representatives of claimant groups (16 June 2003) Wai 950 Doc #2.1133(b), Wai 951 Doc #2.1039(a), Wai 952 Doc #2.1022(a).

[115] Letter from Ross Phillipson, Central North Island Project Leader, Office of Treaty Settlements to Interim Representatives of claimant groups (16 June 2003) Wai 950 Doc #2.1133(b), Wai 951 Doc #2.1039(a), Wai 952 Doc #2.1022(a).

iwi level prompts further claims at the hapu, and occasionally whanau level as the smaller groups begin to "discern, and to assert" their interests.[116]

Despite the importance of such research, in furtherance of the plan to expedite the Central North Island claim, research is to be conducted initially along general lines, with "overview research covering all the generic issues".[117] The aim is to provide "a sufficient evidential base either for hearings and a Tribunal report on the claim issues affecting *all or most* of the claimants in a district, or for the negotiation of a settlement of these issues".[118]

The same process has been proposed for the Rotorua inquiry district.[119] In the proposal for this district, it is explicitly noted that the research would necessarily be based on "big picture" issues and devoid of specific claims, "such as a detailed hapu/whanau grievance about a [particular resource]".[120]

The problem then, is that if generic research is carried out into the big picture issues it will not explicitly examine the particular claims of hapu and whanau. This is particularly problematic as it is carried out with the goal of fast tracking a comprehensive settlement which will result in legislation extinguishing the rights of these smaller groups to pursue a claim at a later date.

These problems were noted by Jolene Patuawa, counsel for Ngati Tamakari, one of the hapu in the Central North Island claim district, in a

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[116] Alan Ward *An Unsettled History – Treaty Claims in New Zealand Today* (Bridget Williams Books, Wellington, 1999) 176.
[117] See Waitangi Tribunal Research Co-Ordinating Committee "Central North Island Inquiry: Stage One Casebook – proposal for an integrated research programme" (June 2003) Wai 950 Doc #2.1130, Wai 951 Doc #2.1035, Wai 952 Doc #2.1019, 1.
[118] Waitangi Tribunal Research Co-Ordinating Committee "Central North Island Inquiry: Stage One Csaebook Proposal" above, 1 (emphasis added).
[119] See Dr Barry Rigby, Eileen Barrett-Whitehead, Bruce Stirling, Dr Grant Phillipson "Rotorua Inquiry District: Stage One Casebook Discussion Paper" (May 2003) Wai 950 Doc #2.1129, 2.
[120] Rigby, Barrett-Whitehead, Stirling and Phillipson "Rotorua Inquiry District: Stage One Casebook Discussion Paper", above, 2.

memorandum to the Waitangi Tribunal. In her memorandum, it was stated that:[121]

> [i]t is a concern that the first stage overview research would be of little benefit to hapu claims like Ngati Tamakari... It is a concern of Ngati Tamakari that if generic research is commissioned and claims are settled on that research, the interests of Ngati Tamakari may be compromised from the lack of research into their specific claims.

A joint memorandum from counsel for Ngai te Rangi and Ngai Tukairangi argued that independently commissioned research was necessary as "in the absence of such... evidence, the fear that [the claimants] have is that their evidence will be submerged, glossed over or given little emphasis when considered alongside that of other competing claimants."[122]

Funding for such independently commissioned research is scarce. One of the main potential sources of such funding, the Crown Forestry Rental Trust, recently stated that it would make funding available for claimant research subject to criteria which would rule out virtually all hapu and whanau groups. These criteria require that those seeking funding possess "the organisational characteristics necessary to negotiate a settlement by 31 March 2006" and a "detailed business case, which satisfactorily addresses [Crown Forestry Rental] Trust requirements for claimant evidential base, claimant definition, mandate and a settlement model".[123]

Thus, funding for research is put out of the reach of smaller claimants who would almost without exception be unable to fulfil the Trust's requirements. As generic research will, by the researchers own admission, be unable to focus

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[121] "Memorandum of Counsel for Ngati Tamakari Regarding Memoranda dated 25 March 2003" (16 April 2003).
[122] "Joint Memorandum of Counsel for Ngai te Rangi and Ngai Tukairangi following Judicial Conference at Rotorua on 26 March 2003" Wai 950 Doc #2.1101(a).
[123] Gary Judd QC "Counsel for Crown Forestry Rental Trust memorandum to Tribunal for 27 March 2003 conference" Wai 950 (Wai 791), 2.

on specific claims, the smaller groups will simply not be able to prove the extent of their grievance, or due to the factors Alan Ward notes, even know that such a grievance exists.[124]

Michel Foucault's equation between *savoir* (knowledge) and *pouvoir* (power) is highly relevant here.[125] Larger Groups are able to obtain extensive research, and therefore gain detailed knowledge about their claims, giving them the power to negotiate and settle their claims with the Crown, whereas smaller groups are often unable to conduct sufficient research to even prove a grievance may possibly exist.[126]

If the process is sped up in the way proposed, these smaller groups will be still further disadvantaged, excluding their grievances from the settlement process, and potentially resulting in more injustice.[127]

VI ROLE OF THE COURTS

Given that these settlements purport to abrogate for all time the rights of groups to bring a claim for historical Treaty grievances, this would appear to be an area which the Courts should be jealously watching. However, what has occurred in practice reveals quite the opposite result.

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[124] Alan Ward *An Unsettled History – Treaty Claims in New Zealand Today* (Bridget Williams Books, Wellington, 1999) 176; see also Peter Shand "Fixing Settlement: An analysis of government policy for settling Tiriti grievances" (1998) 8 AULR 739, 760.

[125] Peter Shand points this out in relation to the disparity between the Crown and Claimants generally - see Shand, above, 760; Michel Foucault *L'Archelogie du Savior* (Panthenon, New York, 1972) and Michel Foucault *L'Ordre du Discours* (Panthenon, New York, 1971).

[126] Wayne Rumbles of Waikato University takes this further in "Treaty of Waitangi Settlement Process: New Relationship or New Mask" (Paper Presented at "Compr(om)ising Post Colonisation Conference, Woolongong, 10-13 February 1999), arguing "[t]hat the New Zealand state is able to construct the past and therefore is able to control the present is evident in the case of Treaty settlements; by having the power to accept the existence and the extent of Treaty breaches, the Crown can determine to large degree the outcome of the settlements."

[127] Note the conclusions of the Waitangi Tribunal in the *Pakakohi and Tangahoe Settlement Claims Report: Wai 758* (Legislation Direct, Wellington, 2000) 66. Here it is noted that there was a need for any deed of settlement in the Ngati Ruanui claim to reflect the traditions and identity of the smaller grouping lest they be "written out of Taranaki history." And "[t]hat, were it to happen, would create a fresh grievance out of the settlement of an old one."

A General approach of the Courts

As more settlements are conducted, more cases challenging them are making it to Court.[128] In several instances, constituent hapu have refused to recognise the authority of iwi claiming to speak on their behalf in settlement negotiations.

For the most part, these cases have struck a jurisdictional brick wall. In the High Court, judges have held that the direct settlement process is "not by its nature amenable to supervision by the Courts".[129] The reason given by the Court for its lack of jurisdiction is that negotiations are "entertained by the Crown as part of a political and not part of a legal process"[130] and that Court intervention "would be an outright interference in what is nothing more or less than an ongoing political process as opposed to a distinct matter of law"[131].

Furthermore, it has been held that if these negotiations lead to a settlement, that settlement would also be non-justiciable until it passes into legislation.[132] At this stage, as a matter of elementary constitutional principle, the decisions will be "inviolate and totally beyond the reach of the Court's supervision".[133]

The Court of Appeal recently examined the subject and upheld this line of reasoning. Gault P concluded:[134]

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[128] See *Kai Tohu Tohu o Puketapu Hapu Inc v Attorney-General and Te Atiawa Iwi Authority* (5 February 1999) High Court Wellington CP344/97 Doogue J; *Pouwhare and Or v Attorney-General and Te Runanga O Ngati Awa* (30 August 2002) High Court Wellington CP78/02 Goddard J; *Rukutai Watene and Ors v Minister in Charge of Treaty of Waitangi Negotiations* (11 May 2001) High Court Wellington CP120/01 Goddard J.

[129] *Pouwhare and Or v Attorney-General and Te Runanga o Ngati Awa* above, para 42; note that this approach has a concerning resonance with the comments of Prendergast CJ in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72 (SC) that the extinguishment of native title was an "act of state" and therefore beyond the reach of the courts.

[130] *Kai Tohu Tohu O Puketapu Hapu Inc v Attorney-General and Te Atiawa Iwi Authority* above, 15.

[131] *Greensill & Ors v Tainui Maori Trust Board* (17 May 1995) High Court Hamilton M117/95, 12-13 Hammond J.

[132] *Pouwhare and Or v Attorney-General and Te Runanga o Ngati Awa* above, para 45.

[133] *Pouwhare and Or v Attorney-General and Te Runanga o Ngati Awa* above, para 45.

[134] *Milroy and Ors v Attorney-General and Te Runanga o Ngati Awa* (11 June 2003) CA 197/02, Gault P, para 18.

> [t]he importance of the process for addressing claims in respect of breaches of the Treaty is fully recognised. Where that involves the exercise by the Executive of statutory or prerogative powers, lawfulness can be challenged on established grounds for judicial review. But where the action challenged does not itself affect the rights of any persons and is undertaken in the course of policy formulation preparatory to the introduction to Parliament of legislation, the courts will not intervene.

As the direct settlement process has no statutory basis, the result is that (generally speaking) the Courts will not look at the Treaty settlement process at all, instead holding it to be non-justiciable.

B Statutory Trusts

However, one case where the door was not entirely shut was *Waitaha Taiwhenua o Waitaki Trust & Anor v Te Runanga o Ngai Tahu and Attorney-General.*[135]

The claimants filed an application for review, arguing that Te Runanga o Ngai Tahu did not have the authority to negotiate on behalf of Waitaha, nor did they "have authority to purport to even conditionally settle Waitaha claims".[136] The defendants argued that the cause of action should be struck out, as these issues were not justiciable.[137]

This case is interesting, as the Court refused to strike out the claims immediately. Counsel for the plaintiffs sought to distinguish the earlier cases which had foundered. They argued that as the negotiating body was a statutory trust with defined powers, it was qualitatively different from the

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[135] *Waitaha Taiwhenua o Waitaki Trust & Or v Te Runanga o Ngai Tahu and Attorney-General* (17 June 1998) High Court Christchurch CP 41/98 Panckhurst J.

[136] *Waitaha Taiwhenua o Waitaki Trust & Or v Te Runanga o Ngai Tahu and Attorney-General* , above, 5.

[137] *Waitaha Taiwhenua o Waitaki Trust & Or v Te Runanga o Ngai Tahu and Attorney-General*, above, 6.

negotiating bodies in the earlier cases.[138] Panckhurst J noted that he broadly accepted the thrust of the plaintiff's arguments, and consequently refused to strike out the proceedings.

The Court noted, in what Cheryl Simes called "perhaps an excess of legal positivism"[139] that if the settlement legislation was passed further review of the ability of Ngai Tahu to settle on behalf of Waitaha would be impossible:[140]

> if the Bill was passed relevantly unamended for present purposes I consider that Parliament would have spoken and the Court's intervention would be wrong in principle. In that regard I accept the submission of Mr Andrew, for the second defendant, that for the Court to intervene to restrain approval of the statute "would be to sit in judgment on Parliament and to conclude that it had acted in error.

The Bill did proceed "relevantly unamended", and the Waitaha hapu were included in the settlement legislation.[141] The case, therefore, never made it to a substantive hearing.

As such, the Courts' position is that they will generally not intervene, save perhaps in the situation where the body conducting negotiations is a statutory body with limited and defined powers. In any event, if legislation is passed (as it invariably is) to give effect to a settlement, the Courts will hold that to be sacrosanct.

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[138] *Waitaha Taiwhenua o Waitaki Trust & Or v Te Runanga o Ngai Tahu and Attorney-General*, above, 9-10.
[139] Cheryl Y Simes "Deciding who should represent Maori" [2002] NZLJ 100, 101.
[140] *Waitaha Taiwhenua o Waitaki Trust & Or v Te Runanga o Ngai Tahu and Attorney-General*, above 11.
[141] See Ngai Tahu Claims Settlement Act 1998, s 9.

C Waitangi Tribunal

The approach of the Waitangi Tribunal has been essentially the same as the Courts. While it has stated that that it does have jurisdiction to consider whether any particular decision on settlements is a breach of the Treaty, it has also stated that it considers that there is an "air of artificiality" about such claims, due to the focus of the Tribunal on Crown actions.[142] This is because, the Tribunal argues, while the claims "are technically aimed at the Crown, they mask what is essentially an internal dispute between closely related kin groups as to which organisation at which level speaks for them".[143]

Furthermore, the Tribunal has adopted the reasoning of the Courts, holding that:[144]

> there are a number of important considerations which militate against the Tribunal interfering... except in clear cases of error in process, misapplication of tikanga Maori, or apparent irrationality. These considerations include the political nature of the decision making under challenge, the artificiality of treating internal disputes as if they were disputes against the Crown, and the inherent difficulty of the subject matter.

The conclusion to be drawn from the approach of both the Courts' and the Waitangi Tribunal is that, as Waitangi Tribunal member and Maori Land Court Judge Carrie Wainwright noted, "[i]t is very hard indeed to persuade any forum to call a halt to the process of effecting a settlement in order that the misgivings of the few can be addressed in the face of the apparent desire to proceed of the many, and of the Crown".[145]

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[142] Waitangi Tribunal *Pakakohi and Tangahoe Settlement Claims Report: Wai 758* (Legislation Direct, Wellington, 2000), 55-56.

[143] Waitangi Tribunal *Pakakohi and Tangahoe Settlement Claims Report*, above, 55; the inappropriateness of the Waitangi Tribunal as a forum for such grievances was noted over ten years ago by Chief Judge Edward Durie (as he then was) at the New Zealand Law Conference – see Edward Durie "Politics and Treaty Law" (Lecture to New Zealand Law Conference, Wellington, 2-5 March 1993).

[144] Waitangi Tribunal *The Pakakohi and Tangahoe Settlement Claims Report* above, 57.

[145] Carrie Wainwright "Maori representation issues and the Courts" in David Carter and Matthew Palmer (eds) *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (Victoria University Press, Wellington, 2002), 191.

D Should, or Could, the Courts Be More Involved?

1 The Arguments

Judge Wainwright notes that these challenges to previous settlements raised "matters of substance… that needed unraveling" but which were not addressed, as the courts "possibly lacked the will, but certainly lacked the means, to help".[146] Her honour goes on to argue that litigation is not the best means by which to resolve these issues as any attempt to fit these kinds of disputes into "legal boxes" (if this is indeed possible) will obscure the real issues, and sour relationships.[147]

While this may be the case, there is an argument to be made that the Courts should be more concerned with ensuring the fairness of the process. Chief Judge Durie (as he then was) at the 1993 New Zealand Law Conference made an observation that is still of significance today:[148]

> the just resolution of Maori claims that are fair and reasonable, not only between the partners but amongst Maori themselves, presents the greatest challenge to the claims process. Despite some opinion that the settlement of claims is a political matter, the courts may need to have a continuing role in the search for a proper solution… for the protection of the Crown as much as anyone else.

Similarly, Sir Robin Cooke (as he then was), writing at around the same time, observed that what progress had occurred in the Treaty area was the result of:[149]

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[146] Wainwright, above, 191.
[147] Wainwright, above, 191.
[148] Edward Durie "Politics and Treaty Law" (Lecture to New Zealand Law Conference, Wellington, 2-5 March 1993).
[149] Rt Hon Sir Robin Cooke "The Challenge of Treaty of Waitangi Jurisprudence" (1994) 2 Waikato LR 1.

> an interaction of three forces: first, some enlightened leadership on both the Crown and Maori sides; secondly, the inquiries and reports of the Waitangi Tribunal... thirdly, the traditional courts and in some of their judgments an increased willingness to take into account the Treaty and the fiduciary concept. The responsibility of judicial decision is quite different from that of Tribunal recommendation. The functions are complementary. All three forces are probably essential to further progress.

These arguments are forceful. As Sir Robin noted, the Treaty process is not solely political, and is one in which the Courts play an integral part. In addition to this, as Chief Judge Durie notes, for the process to achieve its aims it is necessary to ensure it is conducted fairly. If the political process is failing to provide this fairness, then the Courts must step in.

Furthermore, as Treaty barrister and editor of the Maori Law Review Tom Bennion points out, large natural groupings which achieve settlements will form legal structures to manage them – each with rules about membership, decision-making and distribution of benefits.[150] Bennion predicts that in some areas, unresolved issues around hapu and other small groups will come bubbling back up after settlement in the form of applications for judicial review of their actions, and litigation concerning the interpretation of any rules.[151] It would make sense, then, for the Courts to resolve disputes before this occurs, rather than functioning as an ambulance at the bottom of the cliff.

However, Judge Wainwright notes that even if Courts have the will to intervene, they lack the jurisdiction to do so.[152] Largely this is deliberate on the behalf of the Government. As Professor Mason Durie points out, one of

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[150] Interview with Tom Bennion (the author, Wellington, 12 September 2003).
[151] Interview with Tom Bennion (the author, Wellington, 12 September 2003).
[152] Carrie Wainwright "Maori representation issues and the Courts" in David Carter and Matthew Palmer (eds) *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (Victoria University Press, Wellington, 2002) 191.

the key motives behind the direct settlement process was a desire that the Government and not the courts would have the final say on Treaty issues.[153]

How, then, can the Courts fulfil the role that Chief Judge Durie and Sir Robin Cooke saw as fundamental to the durability of any settlements?

2 Mediation Provisions

One prospect is to utilise the Maori Land Court. This is not a novel concept, and current Chief Maori Land Court Judge Joe Williams has seen a role for the Court in resolving disputes over such representation issues.[154] The Court currently has jurisdiction contained in the mediation provision found in section 30 of the Te Ture Whenua Maori Act 1993, which provides:

> **30. Maori Land Court's jurisdiction to advise on or determine representation of Maori group**
>
> (1) The Maori Land Court may do either of the following things:
>
> (a) advise other courts, commissions, or tribunals as to who are the most appropriate representatives of a class or group of Maori:
>
> (b) determine, by order, who are the most appropriate representatives of a class or group of Maori.
>
> (2) The jurisdiction of the Maori Land Court in subsection (1) applies to representation of a class or group of Maori in or for the purpose of (current or intended) proceedings, negotiations, consultations, allocations of property, or other matters.
>
> (3) A request for advice or an application for an order under subsection (1) is an application within the ordinary jurisdiction of the Maori Land Court, and the Maori Land Court has the power and authority to give advice and make determinations as the Court thinks proper.

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[153] Mason Durie *Te mana, te kawanatanga: The Politics of Maori Self-determination* (Oxford University Press, Auckland, 1998) 188.

[154] Chief Judge Joe Williams "The Maori Land Court – A Separate Legal System?" *Victoria University Centre for Public Law Occasional Paper No 4*, (Wellington, 2001), 10-11.

The prospect of this provision being used in the settlement context was raised as long ago as 1994.[155] More recently, it has been noted that this provision, as amended in 2002,[156] would have allowed the Maori Land Court to have determined by order who were the most appropriate representatives of each of the objecting groups in the above cases, and as such, "whether the group should, for the purposes of negotiation, be involuntarily subsumed into the larger class".[157]

Such groups could now apply to the Chief Judge of the Maori Land Court in writing under section 30C of the Te Ture Whenua Maori Act for a determination. However, whether the Chief Judge chooses to act upon this request is largely at his or her discretion.[158] There is no requirement that every application under section 30 receives consideration, let alone a hearing, and the application may be dismissed if it is vexatious, frivolous or an abuse of the Maori Land Court, fails to satisfy rules of court, does not present serious issues for determination or, crucially "if the Judge considers it appropriate to dismiss or defer consideration of the application for any other reason".[159]

This provides what Symes calls an "extraordinarily subjective discretion"[160] which could pose problems to claimants, especially in light of

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[155] See Tom Bennion "Who Represents Maori Groups?" (November 1994) Maori LR 1; note that the possibility of using the mediation provisions in the Te Ture Whenua Maori Act to deal with mandate issues was considered by Cabinet during the initial development of the settlement proposals, but appears to have gone no further – see Hon John Luxton, Minister of Maori Affairs "Treaty of Waitangi Settlement Fund: Claimant Representation" (9 March 1994) CSC (94) 15, Officials Strategy Committee "Treaty of Waitangi Settlement Fund: Size, Shape, Timescale and the Reciprocation from Maori" (28 June 1993) CSC (93) 90.

[156] Te Ture Whenua Maori Amendment Act 2002 / Maori Land Amendment Act 2002.

[157] Cheryl Y Simes "Deciding who should represent Maori" [2002] NZLJ 100, 101; see also the comments of the Waitangi Tribunal in the *Pakakohi and Tangahoe Settlement Claims Report: Wai 758* (Legislation Direct, Wellington, 2000) at 56-57; however, note the concerns as to the efficacy of such determinations – see Carrie Wainwright "Maori representation issues and the Courts" in David Carter and Matthew Palmer (eds) *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (Victoria University Press, Wellington, 2002), 192-194; And the concerns of the Maori Land Court in *Re Ngati Paoa Whanau Trust* (1995) 96A Hauraki MB 155 which were raised in New Zealand Law Commission *Determining Representation Rights Under Te Ture Whenua Maori Act 1993* (NZLC SP8, Wellington, 2001) 12.

[158] See Symes, above, 101.

[159] Te Ture Whenua Maori Act, s 30C(6); Symes, above, 101.

[160] Symes, above 101.

the fact that judges in other Courts have been extremely reticent to enquire into what they view as policy decisions.

As well as these legal difficulties, even if the Court holds that the larger grouping is not the appropriate representative for the smaller group, there is nothing to stop the Government from deciding as a matter of policy that it will ignore the decision and proceed to settle with the larger group.[161] This point was noted by the Maori Land Court when it was asked to intervene in the dispute as to distribution of fisheries assets.[162] Deputy Chief Judge McHugh stated:[163]

> [t]he determination made by the Mäori Land Court following an inquiry under section 30(1)(b) may be... accepted as conclusive by the Chief Judge but there the matter rests. The determination is not binding on any other party. It is certainly not a determination that has any binding effect beyond the Chief Executive or Chief Judge although those respective persons may convey the determination by way of advice to third parties.

Overall, Section 30 provides one mechanism by which a Court could examine the issue of who the appropriate representative of a hapu is for the purpose of settlement negotiations, and therefore, whether the policy itself is appropriate for any given claimant group. However, given the limitations of the provision, it is not a particularly potent weapon in the armoury of smaller groups. It should also be noted that smaller groups will be ineligible for legal aid, and will be required to fund any such Maori Land Court action themselves.[164]

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[161] Symes, above, 101.
[162] *Cracknell v Treaty of Waitangi Fisheries Commission* (1993) Tairawhiti MB 152; noted in New Zealand Law Commission *Determining Representation Rights Under Te Ture Whenua Maori Act 1993* (NZLC SP8, Wellington, 2001) 12.
[163] *Cracknell v Treaty of Waitangi Fisheries Commission*, above.
[164] See *Rapai Amber Te Hau v Gisborne District Legal Aid Committee* (19 October 2000) Legal Aid Review Authority LRA 136/2000, Legal Aid Review Authority, Judge Middleton.

E Conclusions

The cumulative effect of the Large Natural Grouping policy, the measures taken to ensure finality of settlements and the Courts inability (and reticence) to become involved is grave. Smaller groups are shut out of the process altogether, unless they acquiesce to the will of a larger grouping. Such an approach is severely prejudicial to the smaller group's rights, as settlement legislation invariably ensures the finality of the settlements by removing the ability of the courts and Waitangi Tribunal to re-open the historical claims.[165]

VII WILL SETTLEMENTS STAND UP?

The flaws in the current policy raise two concerns. First: are the deficiencies likely to mean that any settlements reached will not stand up? And secondly: is this process in and of itself a breach of the Treaty? To find a discomforting answer to the first question, one only has to look to past attempts at settlements.

A Lessons from the Past

Attempts at settling historical grievances have occurred periodically throughout New Zealand history, most notably during the 1930s and 40s.[166] At this time, the Sim Commission[167] made a number of recommendations to the Government relating to the settlement or grievances emerging from the raupatu (land confiscations) during what Belich called the "New Zealand wars" of the 1860s.[168] This led to an increased awareness of past wrongs which, combined with the influence of the Ratana movement in the Labour

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[165] Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua : Healing the Past, Building a Future* (Wellington: 2002), 77.

[166] However, see also the South Island Landless Natives Act 1906 which intended to finally settle any sense of grievance in the South Island – and the comments of the Hon James Carrol about this at (1906) 137 NZPD 318-320 - Barney Riley "Mocked before the ink is dry on the statute? Final Settlements of Treaty of Waitangi Claims" (LLB(Hons) Research Paper, Otago University, 1994) 29.

[167] A Royal Commission of Inquiry established by the Government in 1928.

[168] See Richard Hill *Enthroning "Justice above Might"? The Sim Commission, Tainui and the Crown* (Treaty of Waitangi Policy Unit, Wellington, 1989); James Belich *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (2nd Ed, Penguin, Auckland, 1998).

government of the 1930s and the end of the great depression, led to a climate conducive to settlement negotiations.[169]

While the Second World War delayed these settlements, they occurred and were enshrined in legislation. As with the current process, finality was key. The Ngai Tahu Claim Settlement Act 1994 stated that it was an "Act to effect a Final Settlement of the Ngaitahu claim",[170] and even more explicitly that it was "in settlement of all claims and demands which have heretofore been made" and "which might hereafter be made".[171]

The failure of the 1944 Ngai Tahu "settlement" is most clearly obvious from the fact that just over fifty years later it was necessary to adopt legislation enshrining the terms of a new settlement negotiated to more properly address Ngai Tahu grievances.[172]

Interestingly in the Waitangi Tribunal hearing which preceded the 1998 settlement, the Crown argued that Ngai Tahu were estopped by the 1944 settlement from suggesting they were entitled to further compensation.[173] The Tribunal responded that "equity and justice required the Crown in good conscience to review the 1944 Act, who can say that the Crown might not be persuaded to do so again".[174]

Ngai Tahu is not the only example of where "final" settlements have been discarded and re-negotiated. The Ngai Tahu experience is almost identical to that of Taranaki, where the claimants "agreed to accept the provisions [of the Taranaki Maori Claims Settlement Act 1944] ... in full settlement and

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[169] See Riley, above, 29.
[170] See Long Title, Ngaitahu Claim Settlement Act 1944.
[171] Ngaitahu Claim Settlement Act 1944, s2.
[172] See Ngai Tahu Claims Settlement Act 1998.
[173] See Waitangi Tribunal *Ngai Tahu Report Wai 27*, (Brooker & Friend, Wellington, 1991), 1027.
[174] Waitangi Tribunal *Ngai Tahu Report*, above 1027; the Report refers to the Maori Purposes Amendment Act 1973 which revisited the terms of the 1944 settlement.

discharge of the aforesaid claim".[175] Similar wording can be found in the Waikato-Maniapoto Maori Claims Settlement Act 1946, which purported to settle claims relating to land confiscations in the Waikato.[176] The inadequacies of these settlements, too, can be seen in the fact that the claims have had to be renegotiated as they were found to be unfair, and incapable of being full, final settlements.

A more recent example can be seen in the settlement of the historical grievances of Ngati Whatua at Orakei. While an initial settlement was made in 1978, this had to be revisited in 1991 for much the same reasons at the settlements of the 1940s.[177]

B Will History Repeat Itself?

The lesson from this experience is clear. If settlements are not handled properly, the result, no matter what those actually negotiating the settlement commit to, will not ultimately stand up.

This was noted by Donna Awatere-Huata with respect to the Fisheries Settlement:[178]

> [f]rom the outset, the four Maori Crown negotiators were appointed by the Crown. Now, when is it a partnership when one partner decides who will negotiate on behalf of the other partner? If you steal my car, and then you appoint, against my wishes, my neighbour as my negotiating agent, if you two decide that you will buy me a

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[175] Taranaki Maori Claims Settlement Act 1944, preamble – quoted in Barney Riley "Mocked before the ink is dry on the statute? Final Settlements of Treaty of Waitangi Claims" (LLB(Hons) Research Paper, Otago University, 1994) 30.

[176] An interesting narrative of the process leading up to this settlement, including the negotiations with then Prime Minister Peter Fraser, can be found in Michael King *Te Puea* (Sceptre, Auckland, 1987).

[177] See Orakei Block (Vesting and Use) Act 1978; Orakei Act 1991; Justine Munro "The Treaty of Waitangi and the Sealord Deal" (1994) 24 VUWLR 389, 421-422.

[178] Donna Awatere-Huata, speech to the 1993 New Zealand Law Conference, quoted in Council for Aboriginal Reconciliation "Reconciliation and Social Justice Library" http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/car/kip7/16.html (Last accessed 21 July 2003), this comment is similar to one made by Josie Anderson, now a member of the Waitangi Tribunal, in Wira Gardiner *Return to Sender – What really happened at the fiscal envelope hui* (Reed, Auckland, 1996), 125.

> pushbike, you can hardly cry foul when I object to your procedures and to your full and final settlement.

The perception within the Government at present is clearly that these problems will not re-emerge. This is because, as Craig Coxhead of Waikato University notes, the Government believes that as Maori are participating and settling within the process as it currently stands, they have accepted the process.[179] This is a view which was shared by Dr Peter Shand, writing in the Auckland University Law Review in 1998.[180] Coxhead, however, goes on to argue that this is a false assumption, pointing to clear statements from claimant representatives that their entry into the negotiation process should not be taken to denote their acceptance of it.[181] He points out that Maori have "no alternative but to enter into negotiations if they are wanting to settle their Treaty claims".[182]

The comparison between the present process and that of the 1940s is thus inevitable. In both cases, the Crown have presented Maori with a process which is the "only deal in town"[183] with the expectation that the end result would be a definitive end to historical Treaty grievances. If the Government seriously intends achieving such an end result, however, it is necessary to learn from the lessons of the past, and ensure it is embarking on a well thought out program which is accepted by its Treaty partner. Lest it forget the words of

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[179] Craig Coxhead "Where are the Negotiations in the Direct Negotiations of Treaty Settlements?" (2002) 10 Waikato LR 13, 30.

[180] Peter Shand "Fixing Settlement: An analysis of government policy for settling Tiriti grievances" (1998) 8 AULR 739, 751, who states that "[t]hree years on... categorical rejection has turned into general acceptance as many iwi and hapu have settled or are about to settle on terms dictated on terms dictated to them by the Government".

[181] Coxhead, above, 30.

[182] Coxhead, above, 30; see also "Submission from the Mokai Patea Waitangi Claims Committee Concerning the Inquiry Boundary" Wai 903 Doc #2.57, para 11 – "we also have no choice but to… enter into this foreign process to protect our interests".

[183] This expression is borrowed from Professor Ranginui Walker who used it in the context of the "Sealords Deal" in his inaugural lecture at Auckland University – Ranginui Walker "Tradition and Change in Maori Leadership" (Auckland University Research Unit for Maori Education, Monograph No 18, August 1993), 19.

George Santayana: "[t]hose who cannot remember the past are condemned to repeat it".[184]

The Crown can hardly feign shock at the possibility that the current settlements may not be either full or final. It was known as early as 1993, when the direct settlement proposals were still in development, that declaring a policy of negotiating solely with iwi would "be controversial for Maori" and that the issue of claimant representation "[would] need to be resolved if the objectives of finality and durability are to be achieved".[185] And more specifically that if grievances were aggregated into a wider group there was a risk that "settlements… [would not be seen] to extinguish highly specific grievances".[186] Furthermore, the topic has been broached in Parliament on numerous occasions.[187] The current Minister in Charge of Treaty of Waitangi Negotiations herself said, shortly after taking office:[188]

> [t]he Government will pay special attention to mandate and cross-claim issues and will work closely with individual claimants to ensure a robust process… [u]nlike the previous Government, this Government recognises that it needs to be flexible regarding these issues and that different approaches will be needed for different claimant groups. We will be working with claimants to this end.

No matter how pressing the need for settlement with Maori, or for appeasement of the Pakeha public, any settlements reached under the current process may have been negotiated with the wrong parties, or omitted parties

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[184] George Santayana *The life of reason; or, The phases of human progress* (Scribner, New York, 1954).
[185] Officials Strategy Committee "Treaty of Waitangi Settlement Fund: Size, Shape, Timescale and the Reciprocation from Maori" (28 June 1993) CSC (93) 90, paras 74-76
[186] Officials ad hoc Committee "Treaty of Waitangi Settlement Policies: Outstanding Issues" (10 October 1994) CSC (94) 140, 3.
[187] See Sandra Lee (5 October 1999) 580 NZPD 19594; and Tariana Turia (17 September 1997) 563 NZPD 4401-4402 where the Ngai Tahu (Pounamu Vesting) Bill was said to be "the creation by this Government of further grievances that successive Governments will be expected to resolve."
[188] Hon Margaret Wilson "Principles to guide settlement of Treaty claims" (3 August 2000) Press Release.

which should have been included. Consequently, they may be subject to re-opening and re-negotiation in the future.[189]

VIII BREACH OF THE TREATY?

Turning to the second question identified above, the potential for the settlement process in its current form to create new, further Treaty grievances is becoming apparent. This is a point which has been recognised by the Maori Affairs spokespeople from the current Labour Government's two major parliamentary allies, the Green[190] and United Future[191] parties.

As the Waitangi Tribunal has expressly stated that it is "out of keeping with the spirit of the Treaty… that the resolution of one injustice should be seen to create another",[192] such an outcome is concerning. This paper examines two possible breaches – one stemming from the Crown's unilateral decision to negotiate solely with "Large Natural Groupings" and a second, stemming from the Crown's actions in vesting control of assets in the hands of corporate iwi bodies rather than directly with hapu

A Ignoring Hapu

As the analysis above shows, academic opinion is clear on the point that hapu played the central role in Maori social organisation at the time of the signing of the Treaty. This is reflected in the text of the Treaty itself, which is unambiguous on who the Maori partner is – 'ki nga hapu – ki nga tangata katoa'.[193] As is frequently noted "the chiefs who signed the Treaty did so on a mandate from hapu and whanau, not iwi".[194]

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[189] Whether settlements are unsound will, of course, require a closer examination of whether constituent hapu in each situation gave their willing, informed consent to larger-scale negotiations.
[190] Metiria Turei (3 October 2002) 603 NZPD 885-887
[191] Murray Smith (6 November 2002) 603 NZPD 1664-1665.
[192] Waitangi Tribunal *Waiheke Report : Wai 10* (Brooker & Friend Ltd, Wellington, 1987) 99; see also Waitangi Tribunal *Report on Muriwhenua Fishing Claim: Wai 22*, (Waitangi Tribunal, Wellington 1988), xxi.
[193] Janine Hayward "'The Crown' and 'Maori': Problems of Group Identity and the Treaty of Waitangi" (Paper presented at NZPSA Conference 1996: The Democratic State: Individual and Communities), 17.
[194] See Hayward , above, 12.

The Waitangi Tribunal has stated on a number of occasions that the traditional structure of social organisation is to be preserved under the Treaty.[195] As such, the traditional structures of social organisation should be protected by the Crown during the settlement process, otherwise the Crown cannot be said to be acting in accordance with the Treaty. Furthermore, the Tribunal repeatedly observed that "tribal restoration" is a key component of the settlement process.[196]

However, as detailed above, the effect of the large natural grouping policy has been to, in many cases, force hapu to either amalgamate with a larger group or risk having settlements negotiated without their input. Whether this is compatible with the obligation to protect traditional social structures is questionable.

As Tariana Turia (then an opposition MP) noted during Parliamentary consideration of the Maori Affairs Committee's report on the Ngai Tahu (Ponamu Vesting) Bill, the process "pits... hapu against their own whanaunga because the Crown prefers to deal with one legal iwi corporate structure instead of recognising the treaty rights of the hapu".[197]

This disruption is occurring during a time when, to quote one group of claimants in the Whanganui district, many groups are:[198]

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[195] See the discussion on this point by Justine Munro in "The Treaty of Waitangi and the Sealord deal" (1994) 24 VUWLR 389, 393, referring to the Waitangi Tribunal *Mangonui Report: Wai 17* (Government Printer, Wellington, 1988) and Waitangi Tribunal *Waiheke Report : Wai 10* (Brooker & Friend Ltd, Wellington, 1987).

[196] See Waitangi Tribunal *Turangi Township Remedies Report: Wai 84* (GP Publications, Wellington, 1998), 2.6.3; Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim: Wai 7* (Brooker & Friend Ltd, Wellington, 1987), 14.2; Waitangi Tribunal *Waiheke Report : Wai 10* (Brooker & Friend Ltd, Wellington, 1987), 41.

[197] Tariana Turia (17 September 1997) 563 NZPD 4401-4402.

[198] "Submission from the Mokai Patea Waitangi Claims Committee concerning the inquiry boundary" Wai 903 Doc 2.57, para 5.

> involved in a process of re-establishing our historical and traditional social (political) structures which were destroyed during colonisation. This process will facilitate the long term development including the spiritual and economic advancement of our people.

The group notes that, notwithstanding the rebuilding process, after taking note of the mandate requirements of the claims process they have "had no choice but to form [a] claims committee consisting of representatives of the four hapu / iwi" and that they "also have no choice but to… enter this foreign process to protect [their] interests".[199]

There is a strong argument that the large natural grouping policy is in direct conflict with the Crown's obligations under the Treaty, as it is undermining the process of rebuilding traditional social structures. As Sandra Lee put it during the first reading of the Ngati Turangitukua Claims Settlement Bill:[200]

> [f]or the Crown to insist determinedly that only iwi negotiators will be accepted at the door is, in itself, a grievance. It is generating conflict within hapu who belong to iwi who feel marginalised in terms of their own particular social structures and the responsibilities that attach to them in terms of their tikanga.

Rather than assisting with the rebuilding of the traditional structures, the current process can instead be seen as fostering the growth of larger groups because they are easier for the Crown to deal with.

An analogy can be drawn to the short lived Runanga Iwi Act 1990, the long title of which stated that it was to provide "for the registration by any iwi of a body corporate as the authorised voice of the Iwi".[201] It was through

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[199] "Submission from the Mokai Patea Waitangi Claims Committee concerning the inquiry boundary" Wai 903 Doc 2.57, paras 11-12.
[200] Sandra Lee (5 October 1999) 580 NZPD 19593-19595.
[201] Runanga Iwi Act 1990, long title.

these bodies that the Government was to devolve service provision functions from the old Department of Maori Affairs to iwi.[202]

Annie Mikaere wrote of this Act at the time that it was a breach of the Article Two guarantee of tino rangatiratanga.[203] Her argument was that runanga established under the Act must follow rules set by the Government, otherwise their supply of funds would evaporate.[204] The existence of such strict controls was said to be "anathema to tino rangatiratanga".[205] This sentiment was echoed in submissions to the select committee which considered the Bill, with the added allegation that it breached the Treaty principle of equal partnership.[206] Writing ten years later, Roger Maaka described the Act as "legislative social engineering".[207]

In the Runanga Iwi Act the Government sought to strictly define the form of the bodies which it would deal with. The Government has not been so explicit in the current situation, but the similarities between the settlement process requirements and the Act are striking. While *Healing the Past: Building a Future* notes that "[i]t is for the claimant group to decide who will represent them and to determine an appropriate way to select their representatives",[208] this statement must be read in light of the fact it is not open for claimants to organise in any way they wish. Indeed, the large natural grouping policy means it is not open for them to organise, as many hapu wish,

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[202] See E M McLeay "Two Steps Forward, Two Steps Back: Maori Devolution, Maori Advisory Committees and Maori Representation" (1991) 43 Political Science 30, 37; Interim Report of the Maori Affairs Committee on the Runanga Iwi Bill [1990] AJHR I.10A, 3-4.

[203] A L Mikaere "Maori Issues" [1990] NZ Recent Law Review 122.

[204] Mikaere, above.

[205] Mikaere, above; see also the reporting back of the Maori Affairs Committee on the Runanga Iwi Act Repeal Bill, where the concern of submitters that "rights under the Treaty of Waitangi to govern themselves without interference from the Crown were totally ignored, and that the concept of partnership was undermined by the one-sided accountability" Joy McLauchlan (23 April 1991) 514 NZPD 1417-1419.

[206] Interim Report of the Maori Affairs Committee on the Runanga Iwi Bill [1990] AJHR I.10A, 5.

[207] Roger Maaka "A Relationship, Not a Problem" in Ken Coates and PG McHugh *Kokiri ngatahi: Living Relationships* (Victoria University Press, Wellington, 1998) 203.

[208] Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua : Healing the Past, Building a Future* (Wellington: 2002) 45; see also the comments of Doug Graham at (17 September 1998) 571 NZPD 12125 - "Whilst those rights may be undeniably held by the whanau or the hapu of the time, it is the tribe's right to sit down and ask: ``Have we still got the right structure for us?'' It is not for the Crown to get involved and start telling them what the structure should be."

along hapu lines in order to seek independent negotiations. The Crown has firmly laid out that it will only negotiate at a particular level. The Crown, then, is simply engaging in a more subtle version of the Runanga Iwi Act policy, and the Treaty-based objections to it apply just as strongly.

B Vesting

Furthermore, by vesting assets in what may be the incorrect group, the Crown may be further compounding the Treaty breach caused by refusing to deal with smaller groups. By choosing not to distribute assets to traditional hapu, but to larger settlement entities, the Crown may be prejudicing the redevelopment, growth or even existence of these hapu. This would almost certainly be contrary to the aim of "tribal restoration" as detailed by the Waitangi Tribunal.[209]

One example of where assets have been vested in a larger entity is the Ngai Tahu settlement, where various assets and taonga were vested in Te Runanga o Ngai Tahu. At the Committee of the Whole House stage, amendments were proposed to the settlement legislation that would instead vest these in hapu.[210] The rationale behind these amendments was to "turn back the clock and restore to those people the kaitiakitanga and the property right that was originally under the mana whenua of the tangata whenua of the hapu in these various different areas."[211]

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[209] See Waitangi Tribunal *Turangi Township Remedies Report: Wai 84* (GP Publications, Wellington, 1998), 2.6.3; Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim: Wai 7* (Brooker & Friend Ltd, Wellington, 1987), 14.2; Waitangi Tribunal *Waiheke Report : Wai 10* (Brooker & Friend Ltd, Wellington, 1987), 41.

[210] In support of these amendments, Sandra Lee stated: "I think that the Committee should focus its mind on the fact that the tangata whenua---the real tangata whenua---should be given the right to be the kaitiaki of these properties, because it was those hapu who had the properties taken from them and were denied access to their food-gathering reserves in the first place. It was not a corporate body that was denied access; it was actual hapu that were denied the right to their reserves in the first place." – (17 September 1998) 571 NZPD 12117.

[211] Sandra Lee (17 September 1998) 571 NZPD 12117-12118.

However, the amendments were rejected, and the legislation was passed, vesting the assets in Te Runanga o Ngai Tahu.[212] Sandra Lee was incredulous at this:[213]

> How can it be a treaty settlement when fundamental issues such as mahinga kai are being taken by the Crown and given to a corporate body at the expense of the people who were the original owners?... They were identifiable then when they were taken, and their descendants are identifiable now... They have an absolute right to be the guardians of that which is theirs. But, more important[ly], may I say, they have a need as well. If this is meant to be a durable settlement, it should recognise that need. Those hapu depend on those mahinga kai areas. They have always sustained our people. They sustained us historically, and I can tell members from my personal experience as a member of Poutini Ngai Tahu that they sustain our people still... For the Crown to create a law that says that they have to go to a corporate body, created by the Crown and purporting to be the representatives of people for all purposes as the appropriate way to go about it, is even more onerous than the requirements for consultation under the Department of Conservation legislation.

As this quote illustrates, by handing control of assets to larger groups the rights of hapu are compromised, and their ability to sustain themselves is threatened. If the effects predicted by Sandra Lee are borne out across the Country as a result of settlements, the prospects of a string of new Treaty grievances are increased.

IX JUSTIFIED LIMITATIONS ON TREATY "RIGHTS"?

If it is accepted that the policy as it stands either does, or may potentially, give rise to breaches of the Treaty of Waitangi, recent statements from the Waitangi Tribunal require that it is necessary to consider whether these can be justified.[214]

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[212] see Ngai Tahu Claims Settlement Act 1998.
[213] Sandra Lee (17 September 1998) 571 NZPD 12124.
[214] Waitangi Tribunal *The Petroleum Report: Wai 796* (Wellington, 2003), para 5.9-5.12.

The large natural groupings policy exists for a reason. Dealing with large groupings makes ostensibly 'full and final Treaty settlement' within a modest timeframe a realistic possibility.

The political pressure for a full and final settlement is readily apparent. The Royal Commission on Social Policy in 1988 found that only twenty percent of non-Maori believed that historical Treaty grievances which required redress existed.[215] While one might have expected the rate of acceptance of the need for redress to have increased as the settlement process proceeded, the evidence points to the contrary conclusion. A 1999 study showed that almost 70 percent of a random survey of 1000 New Zealand households stated that they did not believe historical injustices should be remedied.[216] This sentiment can also be seen in the policies of many political parties.[217]

Further, the Waitangi Tribunal itself has noted that "[t]he focus on past grievances is diverting the energies of many Maori away from pressing social and economic needs and is preventing Maori from taking control of their own futures".[218] Thus, there is also an argument to be made that speedy settlements are desirable for Maori as well as for Pakeha.

The question which arises is: does the end result of speedily obtaining "full and final" Treaty settlements justify the means taken to achieve it? If it does, then the dictation of a policy by the Government aimed at expediting the process could be justified.

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[215] Royal Commission on Social Policy *The April Report* (Wellington, 1988) vol 1, 532.
[216] see Kirsten S Carlson *Rhetoric versus Reality: Sovereignty and Tino Rangatiratanga in Aotearoa New Zealand* (MA Thesis, Victoria University of Wellington, 1999).
[217] Notably the National Party, in its perhaps optimistically titled "Time to Move On" Policy on historical Treaty settlements for the 2002 General Election, which would have required all claims to be settled by the end of 2008. – see http://www.national.org.nz/wcontent.asp?PageID=100004949 (Last Accessed 10 June 2003).
[218] Waitangi Tribunal *Business Strategy 1998* (Wellington, 1998), 6.

A The Petroleum Report

The Waitangi Tribunal recently addressed the issue of so called "justified limitations" on rights under the Treaty of Waitangi in its *Petroleum Report*.[219] Here, claimants alleged that the nationalisation of Petroleum resources pursuant to the Petroleum Act 1937 was contrary to Treaty principles. The Crown argued that the expropriation of petroleum in the national interest was a valid exercise of Crown sovereignty under Article One of the Treaty.[220]

The Tribunal took the view that "[w]hile the Treaty guarantees were not absolute, they were fundamental" and that "[f]undamental guarantees cannot be overridden even by an informed government acting in good faith, except in exceptional circumstances".[221] To determine if such 'exceptional circumstances' existed, the Tribunal took the novel approach of drawing an analogy with the approach taken by the Court of Appeal to justified limitations under the New Zealand Bill of Rights Act 1990.[222]

The Court of Appeal's approach was stated in *Moonen v Film and Literature Board of Review* as consisting of a four stage test:[223]

> In determining whether an abrogation or limitation of a right or freedom can be justified in terms of s 5, it is desirable first to identify the objective which the legislature was endeavouring to achieve by the provision in question. The importance and significance of that objective must then be assessed. The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective. A sledgehammer should not be used to crack a nut. The means used must also have a rational relationship with the objective, and in achieving the objective there must be as little interference as possible with the right

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[219] Waitangi Tribunal *The Petroleum Report: Wai 796* (Wellington, 2003).
[220] Waitangi Tribunal *The Petroleum Report* above, para 5.9.
[221] Waitangi Tribunal *The Petroleum Report* above, para 5.10.
[222] Waitangi Tribunal *The Petroleum Report* above, para 5.12.
[223] see *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16 (CA).

> or freedom affected. Furthermore the limitation involved must be justifiable in light of the objective.

Approving the Court of Appeal's test, the Waitangi Tribunal stated:[224]

> These ideas are broadly familiar in Treaty jurisprudence. When faced with an expropriatory statute, the question for this Tribunal reduces to whether the expropriation was reasonably necessary, or whether there was a reasonable alternative available which could have achieved the statutory objective without overriding the fundamental Treaty right. If some form of expropriation can be reasonably justified, the next question is what is the least interference necessary to achieve the policy objective of the statute.

B Application to Settlement Policy

While the approach in the *Petroleum Report* was developed in the context of resource expropriation, it provides a useful lens through which to analyse the decision to negotiate only with 'large natural groupings'.

As was noted above, it appears the large natural grouping policy exists largely to enhance the manageability of the Treaty settlement process by reducing the costs involved, and speeding up the process. This viewpoint has found some sympathy from the Waitangi Tribunal, which stated in the *Pakakohi and Tangahoe Settlement Claims Report* in 2000:[225]

> There appear to us to be sound practical and policy reasons for settling at iwi or hapu aggregation level where that is at all possible. As the Whanganui River Tribunal put it, 'While Maori custom generally favours autonomy, it also recognises that, on occasion, the hapu must operate collectively'.

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[224] Waitangi Tribunal *The Petroleum Report* above, para 5.12.
[225] Waitangi Tribunal *The Pakakohi and Tangahoe Settlement Claims Report: Wai 758* (Legislation Direct, Wellington, 2000), 65.

Consequently, the policy of settling with larger groupings does appear to be in pursuance of an important end (at least from the Government, and the research suggests, from the public's perspective) – a speedy end to historical Treaty claims. However, following the *Moonen* approach, it is necessary to ensure that the extent of any Treaty breaches in furtherance of this policy are proportionate to its outcome.

Key to the consideration of whether any breach is justified is whether the policy constitutes the least possible interference possible to the rights involved.[226] This falls to be examined by reference to the alternative approaches which could have been taken to the issue.

C Alternatives

1 Structural Alternatives

A number of ideas have been floated as to how to "fix" the problem of representation. On the more conservative end of this spectrum of possibilities, Alan Ward argues that smaller groups should have to pursue claims through an iwi structure, but argues that there is a "strong case for this mandating process to be overseen by an independent authority such as the District Court or the Electoral Commission".[227] A similar result could be achieved by strengthening the powers of the Maori Land Court under section 30 of the Te Ture Whenua Maori Act. This would ameliorate some of the problems caused by the Court's inability and unwillingness to get involved in the process by giving disaffected groups a forum in which to air their concerns.

A more radical solution is that favoured by Gover and Baird, who argue that the model of "democratic experimentalism" could be applied successfully

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[226] See *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16 (CA) and Waitangi Tribunal *Petroleum Report*, above, para 5.12.
[227] Alan Ward, *An Unsettled History* (Bridget Williams Books, Wellington, 1999) 177.

to the New Zealand situation.[228] This model, developed by US academics Charles Sabel and Michael Dorf, essentially involves the devolution of governance tasks to individual groups so that they develop their own solutions to these issues.[229] The role of central authorities is very limited - a "central monitor" is responsible for facilitating information sharing, and the Courts have a significantly reduced role.[230]

In the New Zealand situation, the "democratic experimentalism" model would allow an ongoing process whereby Maori, rather than the Crown, are empowered to define the identity of the Maori "Treaty partner" (or, more properly, Treaty *partners*) based on the criteria they choose, thus reflecting both evolving cultural norms and tikanga.[231] The outcome of such a process, argue Gover and Baird, is that groups possess a greater sense of ownership of the process, and that the partnership between Maori and the Crown "is able to evolve organically at a local level, reflecting changes to Maori organisation".[232]

2 Negotiation

While such alternatives may be sufficient to solve some of the more immediate problems, perhaps the most obvious long-term alternative is to negotiate with claimants as to which group is most appropriate to conduct settlement negotiations with, free from any blanket rules such as the large natural grouping policy.

As the Crown currently justifies the policy largely on the grounds of expedience, then surely this is a matter which should have been discussed with claimants prior to the blanket policy being promulgated. It would be very

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[228] Kirsty Gover and Natalie Baird "Identifying the Maori Treaty Partner" (2002) 32 Univ of Toronto L J 39.
[229] Charles Sabel and Michael Dorf "A Constitution of Democratic Experimentalism" (1998) 98 Colum L Rev 267.
[230] Gover and Baird, above, 41.
[231] Gover and Baird, above, 41.
[232] Gover and Baird, above, 41.

difficult for the Crown to argue that it was impractical for it to enter into such discussions with Maori. While they might not have resulted in approval for the policy, a compromise may have been reached which could have ameliorated some of the problems with the current process.

The need for such discussion was recognised by officials at the very onset of the direct settlement process, with cabinet papers noting that the issue of who to deal with "is likely to be particularly controversial for Maori and would require discussion and consultation".[233] Despite the identified need for such discussion, it has never occurred.

A negotiation process would see a dialogue in which Maori and the Crown reach conclusions as to who negotiations are to be held with. Comments made by negotiation expert Ian MacDuff at the onset of the process are instructive. These urged that settlements not be seen as an end in and of themselves, and that the initial focus should be on determining how negotiations will be carried out, rather than what the outcome will necessarily be.[234] As MacDuff stated:[235]

> [i]t cannot be assumed that, for all that we have lived together for some time, we speak the same negotiation language, rely on the same protocols or expect the same things from negotiation.

This conclusion was recently echoed by Craig Coxhead of Waikato University, who noted that:[236]

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[233] Officials Strategy Committee "Treaty of Waitangi Settlement Fund: Size, Shape, Timescale and the Reciprocation from Maori" (28 June 1993) CSC (93) 90, para 67.
[234] Ian MacDuff "The Role of Negotiation: Negotiated Justice" in Geoff McLay (ed) *Treaty Settlements: The Unfinished Business* (Victoria University of Wellington Law Review, Wellington, 1995) 55.
[235] MacDuff , above, 55; see also Dimitri Geidelberg "Direct Negotiation with the Crown in Treaty of Waitangi Claims" (LLB(Hons) Research Paper, Victoria University of Wellington, 1997); Tirawhanaunga Johnson "Process issues in Crown/Maori Treaty Negotiations" (LLB(Hons) Research Paper, Victoria University of Wellington, 1996); Catherine Davis "The Crown's Development of its Proposals for the Settlement of Treaty of Waitangi Claims" (LLM Research Paper, Victoria University of Wellington, 1996).
[236] Craig Coxhead "Where are the Negotiations in the Direct Negotiations of Treaty Settlements?" (2002) 10 Waikato LR 13, 32.

> [f]or a claims process to obtain some acceptance and approval from Maori, given past experience, it would seem certain that Maori will need to be involved in the future development of the claims process. As a major partner within the settlement process Maori need to be afforded the opportunity to participate in the development of the settlement processes.

It is difficult to speculate as to what the outcome of such a process might be, but it would certainly assist in identifying the best way to proceed. In the absence of such discussion, it would appear to be very difficult for the Crown to assert that its process was that which imposed the least interference on Treaty rights.

D Balancing

Any changes to the structural processes would almost certainly be more difficult, time consuming, and costly than the Crown's current policy. However, they provide a means by which settlements could be achieved without the problems associated with unilateral definition.

It is very difficult to determine what precisely is required without entering into the negotiations which, as MacDuff and Coxhead point out, should have occurred years ago.

The proportionality exercise would require a balancing of whatever these additional costs are against the extent of any breaches of the Treaty. As discussed above, the scope for new grievances is large, and the effects of the policy are wide reaching. In many cases settlements have removed the ability of smaller groups to seek redress for their grievances. Given that the very basic step of negotiation was not taken, and has not been subsequently taken, it is very difficult to see how the Crown could seek to argue that its current policy can be seen as constituting the least possible interference to Treaty rights.

As such, the current settlement process may both create settlements that will not stand up, and also, in and of itself, create new Treaty grievances.

X *A WAY FORWARD?*

Given that the current process has some key flaws, it is necessary to at this point consider how these can be remedied, if the settlement process as a whole is not to be compromised.

As noted above, there is an array of possibilities for change – ranging from minor tinkering with the current arrangement, such as that advocated by Alan Ward,[237] to a more fundamental shift in the current structural arrangements, such as that proposed by Baird and Gover.[238]

Simply picking one of these models and hailing it as a panacea for the ills of the process would be myopic. It would fail to recognise that one of the key problems with the current system is that the Crown has unilaterally imposed a process upon Maori.

A better approach would be to conduct the negotiations which MacDuff[239] and Coxhead[240] argue should form the basis of settlement policy. In this way, the interests and issues of both the Crown and claimants can be recognised and worked through.

Past experience shows that this will be a slow and difficult process. Given the speed with which the current settlement process is progressing, it is a process which needs to be commenced urgently.

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[237] Alan Ward *An Unsettled History* (Bridget Williams Books, Wellington, 1999) 177.
[238] Kirsty Gover and Natalie Baird "Identifying the Maori Treaty Partner" (2002) 32 Univ of Toronto LJ 39.
[239] Ian MacDuff "The Role of Negotiation: Negotiated Justice" in Geoff McLay (ed) *Treaty Settlements: The Unfinished Business* (Victoria University of Wellington Law Review, Wellington, 1995) 55.
[240] Craig Coxhead "Where are the Negotiations in the Direct Negotiations of Treaty Settlements?" (2002) 10 Waikato LR 13, 32.

XI CONCLUSION

The direct settlement process, which has developed over the past decade, has now crystallised into a series of policies aimed at providing redress for past Treaty of Waitangi grievances. Under these policies, the Crown is seeking to negotiate comprehensive settlements covering all of the claims in a given area. In order to ensure they are final, the Crown, upon settlement legislates to remove any avenue by which the settlement could be challenged or reconsidered.

In the rush to achieve these settlements, the Crown has decided on a policy of negotiating only with "large natural groupings". The effect of the policy has been to shut out the smaller groups which traditionally dominated Maori society, unless they amalgamate into larger groups. The policy is not based on tikanga, or on a desire from Maori to be defined in this way, but exists simply because it is easier for the Crown to do so.

The effects of the policy are increasingly manifesting themselves as the settlement process progresses. Recent years have seen a number of hapu whose claims have been sidelined by the process take their disputes through the Courts and Waitangi Tribunal only to find they are both unprepared and unwilling to help.

Given that these groups are unwilling to negotiate within the structure imposed by the Crown, and are not assisted by the Courts, they are finding their access to redress abrogated by settlements negotiated without their consent or involvement. The frequency with which this occurs is likely to increase under the current Government's policy of speeding up claims processes, especially in the behemoth Central North Island claim.

These problems raise two very important questions for the settlement process – whether the settlements will stand up, and whether the process is a breach of the Treaty in itself.

History tells us that if settlement programs are not handled correctly, they will be inadequate and will have to be revisited by future Governments. The flaws with the current process are alienating many groups, creating a very real risk that some supposedly "full and final" settlements will prove not to be, and instead require re-opening and re-negotiation.

Also, there is the very real possibility that the process itself is adversely affecting the redevelopment of traditional Maori social structures, and is therefore creating new Treaty grievances. While recent commentary from the Waitangi Tribunal suggests it may be possible to say such breaches are justifiable if they are in pursuit of an arguably desirable goal, such as final Treaty settlements, it is doubtful whether such a justification would apply to the current situation.

Given the problems with the policy, it is surely incumbent upon the Office of Treaty Settlements to closely scrutinise this policy, and any alternatives, in order to ensure that it is both achieving its aim, and not simply creating new grievances while attempting to 'heal the past'. The best way to start this process is to do what should have been done almost a decade ago – commence negotiations with claimants, free from the constraints of a non-negotiable bottom line on the level at which negotiations will occur.

APPENDIX A – BIBLIOGRAPHY

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