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Cross-Claims and the Obligations of the Crown under The Treaty of Waitangi

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Abstract

The Treaty of Waitangi settlement process occupies a significant role in New Zealand. Though it aims to start the healing of historical grievances, the process has often created and deepened grievances because of its inability to respond to the dynamic relationships that exist between Māori. Over the course of several settlements, the Crown has demonstrated poor understandings of tikanga, the relationships between iwi and its own role in creating disputes and grievances, deepening the very wounds it wishes to heal. This paper reconceptualises the Crown's obligations in order to respond to these concerns, focusing on the challenges presented where multiple iwi have interests in the same area of land (cross-claims). It argues that the Crown must act as an honest broker and facilitate the resolution of cross-claims. This requires the Crown to actively and meaningfully engage with iwi in order to understand their perspectives and grievances, and reflexively adapt settlement processes in order to better reflect those perspectives and grievances.

Keywords: Treaty of Waitangi, Crown obligations, honest broker approach, cross-claims, overlapping claims, Waitangi Tribunal, duty of consultation

I Introduction

The Treaty of Waitangi is continuously shaping contemporary understandings of New Zealand. After over a century of neglect and abuse, the Crown has slowly begun to address Māori grievances stemming from breaches of the Treaty, and a significant shift in legal and social attitudes has followed. The Crown has increasingly focused on getting settlements achieved and a keystone of Government policy has been the speedy settlement of Treaty claims.[1] As the historical settlement process (arguably) draws to a close however, it is crucial that the Crown reflects on its relationship with iwi going forward.[2] It is understandable that the Crown wants to "get a deal" and start rebuilding its relationships with Māori. Yet pursuing a deal relentlessly can easily come at the expense of the relationship between the Crown and iwi, and crucially the relationship between the Crown and *other* iwi not involved in the particular settlement.

Throughout the settlement process there have been many instances where one iwi or hapū has felt aggrieved by the way the Crown has approached its settlement with another iwi or hapū. Too often the Crown has myopically focused on the deal it is negotiating with one iwi at the expense of its relationships with other iwi and hapū. Ignoring other iwi and hapū plays in to the Pākehā tendency to homogenise Māori and to assume that all iwi have the same interests and histories,[3] a tendency that is at stark odds with the primacy individual Māori afford to their relationships with their particular iwi.[4] A failure to acknowledge this nuance is problematic in and of itself, but in the Treaty settlement process that failure plays out vividly in what are known as overlapping claims or cross-claims.

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1 Christopher Finlayson "Submission to the Standing Orders Committee Re: Procedures for historical Treaty of Waitangi Settlement bills" (7 February 2011); and "Labour sets historical Treaty claim deadline" (17 August 2014) Radio New Zealand <www.radionz.co.nz>.

2 Carwyn Jones *Tāwhaki and Te Tiriti: A Principled Approach to the Constitutional Future of the Treaty of Waitangi* (2013) 25 NZULR 703 at 704–705. I say "arguably" because it is an open-question whether and to what extent the Crown's obligations end upon settlement legislation being enacted, especially if issues around the interpretation of that legislation arise. The recent political furore over the proposed Kermadec Islands Sanctuary is a clear example of this: Mihingarangi Forbes "Govt to delay Kermadec Ocean Sanctuary Bill" (14 September 2016) Radio New Zealand <www.radionz.co.nz>.

3 Carrie Wainwright *Maori Representation Issues and the Courts* (2002) 33(3) VUWLR 179 at 181.

4 Te Puni Kōkiri *A Profile of Iwi and Māori Representative Organisations* (March 2011) at 6.

A cross-claims dispute arises when multiple iwi have claims to the same taonga,[5] usually an area of land available as redress for a particular Treaty settlement.[6] Ordinarily one iwi will be engaged in settlement negotiations with the Crown (the negotiating iwi) and other iwi will raise their concerns from outside those particular negotiations (the non-negotiating iwi). In such situations the Crown has taken varying approaches to the disposition of the land, from ignoring the claims of iwi non-negotiating iwi,[7] to refusing to return the land to any iwi.[8] Unresolved claims can potentially drag through alternative dispute resolution and the courts over many years, and may even potentially be the basis for restraining future settlements by the Crown.[9] A poor handling of cross-claims thus invariably deepens grievances and harms the relationships the Crown has with different iwi, creating more breaches of the Treaty and undermining the entire aim of the Treaty settlement process.

This paper reconceptualises the Crown's obligations to better accommodate the challenges of cross-claims disputes. It argues that the Crown's Treaty obligations need to better reflect the possibility of cross-claims, and that this possibility requires a different approach and a less "deal-focused" mind-set. The Crown needs to take a holistic, reflective approach when it engages with a particular iwi in the Treaty settlement process, and it must actively tailor its views and approach during the process in response to actual or potential involvement from other iwi. This approach is referred to as the "honest broker" approach.[10] The Crown cannot simply assume it owes the same obligations and can take the approach to any iwi it deals with; rather it must acknowledge that its obligations vary depending on the

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5 Wherever a particular Māori word or concept is defined without footnotes, I have utilised a combination of peer input and guidance from Te Aka, the Māori Dictionary <maoridictionary.co.nz>. Definitions of many concepts in this paper are difficult and potentially controversial; I especially appreciate any and all criticisms of my writing in this regard, as there are obvious limits to a Pākehā writer's understanding in this context.

6 For example Waitangi Tribunal *The Ngāti Tūwharetoa Ki Kawerau Settlement Cross-Claim Report* (Wai 996, 2003) [*Ngāti Tūwharetoa Report*] at 2.

7 For example Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007) [*Tāmaki Makaurau Report*].

8 Office of Treaty Settlements *Ka tika ā muri, ka tika ā mua: Healing the past, building the future* (March 2015) at 54.

9 See *Ngāti Hurungaterangi v Ngāti Wahiao* [2016] NZHC 1486, where iwi were engaged in a drawn-out cross-claims dispute (involving mediation, arbitration, and this appeal) over particular areas of land; and *Ngāti Whātua Ōrākei Trust v Attorney General* [2016] NZHC 347, where the Trust claimed, inter alia, that the Crown's proposed settlement with several other iwi breached the terms of its settlement with Ngāti Whātua.

10 Waitangi Tribunal *Reports on the Impacts of the Crown's Settlement Policies on Te Arawa Waka and Other Tribes* (Wai 1353, 2007) [*Te Arawa Waka*] at 75.

circumstances facing each individual iwi, circumstances that include the possibility of cross-claims arising.

This approach is necessarily abstract because the wide variety of histories, perspectives and grievances among iwi requires the Crown to avoid a "one size fits all" approach. By taking a more open-minded approach, the Crown guards against the risk that it deepens grievances by (unintentionally) picking a side in a pre-existing dispute between iwi, and ensures that it gathers the necessary input from iwi that minimises the likelihood of a cross-claim arising. The Crown has to actively ensure it is appraised of potential cross-claimants and their perspectives throughout the Treaty settlement process, and where possible must aim to facilitate resolution of any disputes between those iwi created by that process. There is a fine line between facilitation and adjudication of these disputes, but if the Crown aims to build better relationships with iwi and heal the grievances it has created through breaches of the Treaty, it must ensure it walks that fine line appropriately.

This paper is divided into five substantive parts. Part II provides some context and explains how cross-claims arise, drawing on tikanga Māori and the Treaty settlement process. This centralises tikanga in the paper, just as tikanga and Māori understandings should be at the centre of the Crown's approach to cross-claims. Part III sets-out the well-known Treaty Principles created by the courts and explains why they are a not an effective framework for establishing the Crown's duties in this area. The Crown's duties need to be based on a perspective that is grounded in tikanga and Māori relationships, and the general articulation of the principles by the courts are not. Part IV instead focuses on the Waitangi Tribunal's jurisprudence, using it to explain why a holistic open-minded approach is needed in the settlement process. This jurisprudence tailors the principles to reflect the perspectives and difficulties involved in cross-claims, and helps properly set-out the challenges and ideas that should form the Crown's duties in this area.

Finally, Parts V and VI establish why the Crown has to take the honest broker approach to cross-claims. Part V articulates the principled reasons and particulars of the Crown's duties and Part VI discusses how those duties would affect several of the ways the Crown has responded to cross-claims in the past. The Crown has to maintain ongoing consultation with iwi to ensure it understands their perspectives, and has to ensure it facilitates resolution of disputes as consistently with tikanga as possible. This paper is structured in a way that, as much as possible, centralises tikanga and those perspectives, helping the reader to understand their importance to cross-claims and the Crown's obligations.

II The Basis of Cross-Claims

A Tikanga and Cross-Claims

Since tikanga and the relationships between iwi underlie cross-claims, both the Crown's duties and this paper need to start by discussing tikanga Māori. As tikanga underlies the disputes and perspectives involved in cross-claims, it is always relevant to their resolution and it must be centralised and understood by the Crown when it responds to them during the Treaty settlement process. It needs to be readily acknowledged that it is almost impossible to try to summarise tikanga.[11] However, any attempt to engage with the challenges of cross-claims must understand and engage with the sources of those disputes and the potential grievances created by them, so some summary is necessary.[12]

To begin, tikanga can be understood as the "right" way of doing things, the customs and rules "which have been developed over time and which are deeply embedded in the social context" of iwi.[13] Tikanga has been recognised as being part of the common law of New Zealand,[14] and it can be conceptualised as a form of law.[15] Defining the ideas that are core to tikanga is not a straightforward exercise. There are, however, some core ideas that can generally be seen as being part of tikanga Māori, at least insomuch as they feature in the Waitangi Tribunal reports and court cases involving cross-claims disputes. These include whānaungatanga (relatedness, especially as between different iwi and hapū), whakapapa (genealogy and the process of determining mana, rights and ancestry), utu (reciprocity of actions to maintain balance), mana (spiritual prestige, force, influence), kaitiakitanga (guardianship, especially of the environment) and several others.[16]

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11 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 1; and Eddie Durie *Custom Law: Address to the New Zealand Society for Legal and Social Philosophy* (1994) 24 VUWLR 325 at 325.

12 *Tāmaki Makaurau Report*, above n 7, at 19.

13 Te Aka: The Māori Dictionary, above n 5, definition of "tikanga". See also Natalie Coates *The Recognition of Tikanga Māori in the Common Law of New Zealand* (2015) 1 NZ L Rev 1 at 4; and Linda Te Aho *Tikanga Māori, Historical Context and the Interface with Pākehā Law* (2007) 10 Yearbook of New Zealand Jurisprudence 10 at 10–11.

14 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94] per Elias CJ (dissenting); and *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184. See also Coates, above n 13, at 13.

15 Coates, above n 13, at 4; and Andrew Erueti "Māori Customary Law and Land Tenure: An Analysis" in Richard Boast and Others *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) at 41–42. Whether tikanga *is* "law" in a Pākehā sense is a complex and hotly debated question.

16 Erueti, above n 15, at 42; Durie, above n 11, at 328–330; Te Aho, above n 13, at 11; and Coates, above n 13, at 4.

It is important to acknowledge however that tikanga is flexible, creating subtly different norms to reflect particular situations.[17] It also varies between iwi, with different norms and ideas manifesting differently depending on the traditions and histories of particular iwi.[18] In some cases tikanga may refer to and draw on the kind of broad ideas noted above, but in other cases it may be more appropriate to think of tikanga as being intensely region—or iwi—specific, with little (if any) applicability to other iwi or regions.[19] Similarly, any process responding to cross-claims will have to be flexible and adapt to the different perspectives of iwi in different regions

This helps to explain how several iwi can have claims to the same land available for redress as part of a particular Treaty settlement.[20] First, Māori do not necessarily understand themselves as belonging to a single iwi or hapū, but rather as part of a rich ancestral tapestry that may weave between different iwi and hapū.[21] Since that is the case, it can sometimes be challenging to definitively state which iwi or hapū has the mana in a given area. Since the rights in land derive from these relationships the land itself is subject to similar challenges.[22] That challenge is compounded by the fact that generally iwi and hapū did not define their rohe (borders) in fixed ways. Boundaries between iwi existed in terms of whakapapa and mana, not fixed lines; the imposition of fixed lines between iwi tends to reflects European norms rather than tikanga Māori.[23] At the point that individual Māori may belong to multiple iwi, all of which lacked distinct borders between their rohe, it becomes easy to understand how multiple iwi could have claims to the same land.

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17 Erueti, above n 15, at 42; and Law Commission, above n 11, at 4. For an example of this, see Moana Jackson *It's Quite Simple Really* (2007) 10 Yearbook of New Zealand Jurisprudence 32 at 33–34.

18 Carwyn Jones "Māori Dispute Resolution: Traditional Conceptual Regulators and Contemporary Processes" in Morgan Brigg and Roland Bleiker *Mediating Across Difference: Oceanic and Asian Approaches to Conflict Resolution* (University of Hawai'i Press, Honolulu, 2011) 115 at 124–125.

19 Law Commission, above n 11, at 28; Ani Mikaere *Tikanga as the First Law of Aotearoa* (2007) 10 Yearbook of New Zealand Jurisprudence 24 at 24; and Stephanie Milroy *Ngā Tikanga Māori and the Courts* (2007) 10 Yearbook of New Zealand Jurisprudence 15 at 21.

20 The focus of this paper reflects the constraints of space and the fact that most cross-claims involve land. A cross-claim involving another form of tāonga might well require different obligations of the Crown. Consider, for example, "tāonga works" and "tāonga-derived works": Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 30 and 41–42.

21 Wainwright, above n 3, at 181–182.

22 Grant Young *Tuhonohono: Custom and the Native Land Court* (2010–2011) 13–14 Yearbook of New Zealand Jurisprudence 213 at 218–219; and Joseph Williams *Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law* (2013) 21 Wai L Rev 1 at 4.

23 Waitangi Tribunal *The Ngāti Awa Raupatu Report* (Wai 46, 1999) at 131–134.

Further, many of the disputes underlying cross-claims can be traced back to breaches of the Treaty and the turmoil of history. Throughout the 19th Century, there are many cases of iwi moving (sometimes under duress) from areas of traditional rohe to new areas, displacing other iwi who themselves moved.[24] If one iwi had a connection to an area of land later occupied by another, that first iwi does not necessarily lose their connection, and the respective claims by both the first and second iwi have to be weighed up and assessed in accordance with tikanga.[25] To add to that complexity both Crown action and the Native Land Court have caused significant breaches of the Treaty, confiscating land and reallocating it without proper regard for tikanga or the mana of iwi involved in disputes. [26] Those actions increased the potential for disputes over land, and the legacies of the Crown's past actions are often visible in modern cross-claims disputes. All of this helps to explain how a cross-claim dispute can arise, and why it is often not easy to resolve it.

B The Treaty Settlement Process

Though cross-claims have their origins in tikanga and historical breaches of the Treaty, the way that the Treaty settlement process is structured means that it is often cause as well as context for a particular cross-claim. Since tikanga is the basis for many of the interests and grievances that underlie cross-claims, the fact that the Treaty settlement process can cut across tikanga means it often exacerbates disputes and promotes further grievances. Much has been written about the Treaty settlement process and it is outside the scope of this paper to consider it in detail.[27] However, two key aspects of the Treaty settlement process need to be discussed, as each one increases the likelihood and severity of cross-claims. These are first the determination of whether particular individuals have a mandate to negotiate on behalf of an iwi, and secondly the determining of what cultural or economic redress is to be provided to the negotiating iwi.

The first of these, the mandate determination, is the process by which the Crown decides who it is willing to negotiate with in respect of a particular settlement. The Crown has a strong preference for negotiating with "large natural groupings" of Māori, rather than

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24 Judith Binney, Vincent O'Malley and Alan Ward "Wars and Survival" in Judith Binney (ed) *Tangata Whenua: A History* (Bridget Williams Books, Wellington, 2015) at 236–237.

25 Young, above n 22, at 213. Young suggests that any determination like this must be arbitrary, a somewhat nihilistic position critiqued below.

26 *Ngāti Hurungaterangi v Ngāti Wahiao*, above n 9, at [41]; and see generally David Williams *'Te Kooti Tango Whenua': The Native Land Court 1864–1909* (Huia Publishers, Wellington, 1999).

27 For example Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008); Nicola Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington 2014); and Mikaere, above n 19.

discrete iwi or hapū.[28] Before it is willing to start settlement negotiations with a particular iwi or hapū, it has to be satisfied that it is negotiating with a) such a grouping and b) that the particular representatives it is engaging with have authority to negotiate on behalf of that grouping. Since the "grouping" preference does not relate to Māori ideas of whakapapa or identity, there is a risk that discrete iwi and hapū can be blended together as part of the mandate process. If those involved agree to that blending—and on the representatives of the blended group—then this process may work, but if they do not then disputes and grievances inevitably arise.[29] Those disputes and grievances may be resolved internally within or between the iwi and hapū involved, but if they are not they can easily form the basis of a cross-claim.[30]

As the Waitangi Tribunal has noted however, the "large natural groupings" approach the Crown takes is understandable, especially in the context of the Crown's desires for speedy resolution of settlements.[31] Further, if this criteria is going to be kept by the Crown (as this paper assumes) the Crown cannot simply assert itself into the middle of disputes within or between iwi as to how they should engage with it during the settlement process; to do so would be imperialistic and in breach of the Treaty.[32] That creates a difficult dilemma for the Crown: it wishes to swiftly resolve the grievances iwi have, but the process it uses to achieve this creates more grievances itself.

That dilemma is also visible in the way the Crown decides what redress to offer as part of Treaty settlements. Poor handling of redress negotiations can also create cross-claims, and any grievances can be worsened by the Crown's preconceptions about how redress should be managed. The Crown provides three main forms of redress as part of a settlement: economic redress, cultural redress and a Crown apology (which is based on an agreed historical record). Commercial redress is directed to forms of economic compensation, whereas cultural redress focuses on taonga.[33] Whether particular redress is cultural or economic is determined by the Crown, as the Crown applies certain financial constraints

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28 Office of Treaty Settlements, above n 8, at 39.

29 Waitangi Tribunal *The Te Arawa Mandate Report* (Wai 1150, 2004) at 113–114.

30 Jessica Andrew "Administrative Review of the Treaty of Waitangi Settlement Process" (2008) 39 VUWLR 225 at 232. Andrew notes several examples of such disputes; see also Waitangi Tribunal, above n 29.

31 *Tāmaki Makaurau Report*, above n 7, at 12.

32 John Dawson and Abby Suszko *Courts and representation disputes in the treaty settlement process* (2012) 1 NZ L Rev 35 at 39–40.

33 Office of Treaty Settlements, above n 8, at 81 and 90.

to the overall fiscal size of the settlement package (including a need to keep packages equitable as between iwi).[34]

How the Crown determines all of this is controversial however. There is evidence to suggest that potential redress is fixed prior to negotiations beginning,[35] and Crown determinations of what redress is available have often not been well-received by iwi.[36] In the cross-claims context however, these problems become more acute, because of the risk the Crown faces in becoming chained to certain preconceptions about which iwi ought to receive land available for settlement. If the Crown myopically focuses on the evidence and perspective of the iwi it is negotiating with, non-negotiating iwi are likely to have their evidence and perspectives discounted or undervalued by the Crown. Inevitably the Crown focuses on getting a deal, but in doing so it is at significant risk of ignoring all of the potential overlapping interests in the land it is offering to the negotiating iwi.[37] That risk can play out in cross-claims and grievances as the non-negotiating iwi attempt to push the Crown to recognise their interests, damaging the settlement process and undermining the healing of grievances.

C An Example

All of this context may be difficult to take in, so it is helpful to ground it with a particular example. In *Ngāti Hurungaterangi v Ngāti Wahiao* (*Ngāti Wahiao*), the High Court was faced with an appeal from an arbitration determining how land provided by the Crown as redress should be allocated as between several iwi.[38] Three areas of land had been placed in a trust after the Crown's settlement with the iwi involved in the appeal, and the arbitration panel had determined that the land should be divided equally between the appellants and the respondent. The trust had provisions for allocating the land through alternative dispute resolution mechanisms, but negotiations broke down and the parties proceeded to arbitration.[39]

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34 At 83–84; and Crown Forestry Rental Trust *Aratohu Mo Nga Ropu Kaitono: Guide for Claimants Negotiating Treaty Settlements* (November 2007) at 16.

35 Grant Morris *To what extent is the New Zealand Treaty of Waitangi Settlement Process "Interest-Based" Negotiation?* 4 VUWLR 82/2014 at 5.

36 Māmari Stephens *Kaumātua, Leadership and the Treaty of Waitangi Settlement Process: Some Data and Observations* (2002) 33 VUWLR 321 at 329–330; and Craig Coxhead *Where are the Negotiations in the Direct Negotiations of Treaty Settlements?* (2002) 10 Waikato L Rev 13 at 21.

37 Waitangi Tribunal *Ngāti Awa Settlement Cross-Claims Report* (Wai 958, 2002) [*The Ngāti Awa Report*] at 77–78.

38 *Ngāti Hurungaterangi v Ngāti Wahiao*, above n 9.

39 At [26] and [32]–[34].

How did the dispute reach this point? The origins of the dispute are complex and involve many of the factors discussed above. Though there were four iwi involved in the appeal, all four have common ancestry through the line of Tūhourangi, with the ancestral links dividing at a certain point in time between the appellants (represented by Ngāti Whakue) and the respondent. This means that all four share interests in the lands subject to the dispute.[40] The lands were however subject to a Native Land Court investigation, in which the Court "overwhelmingly" found in favour of Ngāti Whakue, allocating most of the relevant land to specific members of that iwi.[41] The appeal turned on much of this history, and this demonstrates just how much tikanga and the histories of the iwi and land involved in a dispute affect the cross-claims based on that dispute.

Yet this dispute also reflects the concerns above about the role of the Treaty settlement process in exacerbating grievances. This land was part of the Crown's Central North Island (CNI) forests that have been subject to extensive litigation and negotiation. The Crown had been pushed to negotiate with CNI iwi in good faith to ensure that the forests were returned,[42] but the Crown's approach to its "large natural groupings" criterion alienated half of the CNI iwi and led to their seeking a Waitangi Tribunal investigation into the whole process.[43] The Tribunal considered the process deeply flawed, and that it created "a state of turmoil" between the various iwi involved.[44] In light of this the Crown and all the CNI iwi agreed to create a trust to hold the forest lands, and the trust deed contained provisions to allow for the resolution of particular disputes like the *Ngāti Wahiao* case.

If all of this appears complicated and multifaceted that is because it is. Cross-claims draw on almost two centuries of different perspectives and grievances. The way they are handled often deepens and divides those perspectives and grievances further. This one dispute playing out in the courts reflects disputes and divisions involving both tikanga and Pākehā legal processes, and going back at least as far as the mid-19th Century. In some ways that should not be surprising; if tikanga has at its core a deep focus on relationships, then a dispute involving multiple iwi should be expected to be this multifaceted.[45] Indeed, tikanga

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40 At [12].

41 At [20].

42 *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 143 (CA) [the *Forests* case] at 152–153.

43 *Te Arawa Waka*, above n 10, at 7–10. There is an even deeper history of Tribunal Reports and disputes summarised by the Tribunal but which there is no space to cover here.

44 At 75.

45 Williams, above n 22, at 3–4; and Mereana Hond *Resort to Mediation in Maori-to-Maori Dispute Resolution: Is it the Elixir to Cure All Ills?* (2002) 33 VUWLR 155 at 158.

is at the heart of these disputes and should be expected to be, since they are disputes between multiple iwi. If the Crown wishes to meaningfully respond to cross-claims then it has to ensure that its response is as respectful of that tikanga as possible.

III The Treaty Principles and Cross-Claims

A The General Principles in this Context

The Crown's duties need to be conceptualised in a way that reflects the different perspectives at play in a cross-claim and which centralises tikanga, since tikanga underlies the dispute between the iwi involved in the cross-claim. The Crown's Treaty obligations are usually understood in terms of the Treaty principles articulated by the courts.[46] The Treaty principles thus provide a logical starting point for examining the Crown's obligations when responding to cross-claims. Unfortunately however, the principles as articulated by the courts do not reflect the perspectives and difficulties of the cross-claims process, and crucially do not centralise tikanga in the way that the honest broker role requires.

To explain why that is so, it is helpful to begin with the classic articulation of the principles from *New Zealand Māori Council v Attorney-General* (the *SOE* case):

- the relationship between the Crown and Māori is founded on the principle of utmost good faith;[47]
- this relationship creates responsibilities that are analogous to fiduciary duties;[48]
- the duty on the Crown is one of "active protection";[49]
- the Crown must consider particular claims and grievances in a reasonable and practicable way;[50]
- there is not a duty of consultation per se,[51] but there is a duty on the Crown to make an informed decision, which consultation may assist with;[52] and

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46 Office of Treaty Settlements, above n 8 at 25–26. The actual principles the Crown uses are not the same as the principles below, but they clearly draw heavily from them.

47 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [the *SOE* case] at 664 per Cooke P, at 682 per Richardson J, at 704 per Casey J and at 715 per Bisson J.

48 At 664 per Cooke P.

49 At 664 per Cooke P and at 674 per Richardson J.

50 At 664 per Cooke P.

51 At 665 per Cooke P.

52 At 683 per Richardson J.

- there is a duty on the Crown to provide redress to iwi for breaches of the Treaty,[53] and redress ought to be provided unless there were especially exceptional circumstances.[54]

The first three principles describe the nature of the relationship between the Crown and iwi. The Crown has to deal with Māori in the utmost good faith, and Māori must reciprocate in the same way. This idea of reciprocity is at the heart of the Treaty relationship as articulated by the *SOE* case, and is how the Court understood the "spirit" of the Treaty (as opposed to the two conflicting versions of its literal text).[55] The emphasis on the "spirit" of the Treaty is important, because it signifies a tacit rejection of the ongoing dispute over the meaning of the Treaty and the version that ought to be considered authoritative.[56] For reasons developed below, this rejection has significant bearing on the ability of the Treaty principles to accommodate Māori understandings of relationships, and as discussed these understandings must be at the centre of attempts to resolve cross-claims.

The relationship dynamic is further complicated by the specific duty of active protection. Though the courts have consistently stopped short of saying the Treaty relationship is a fiduciary one, they clearly intended the Crown to owe obligations of a quasi-fiduciary nature to Māori. Correlative with that intention are (presumably) the same ideas that underpin a fiduciary relationship, namely that the non-fiduciary is in some way vulnerable vis-à-vis the fiduciary.[57] It is not axiomatically true that a fiduciary needs to intervene in the vulnerable parties' affairs over which they are a fiduciary, but insomuch as a fiduciary is expected to always act in the best interests of the vulnerable party this kind of relationship carries with it potential pressures that are unhelpful given the complex, multifaceted nature of cross-claims.[58] In particular, it is necessary to stress that the Crown owes quasi-fiduciary duties to *all* iwi, and since that is the case the duties of active protection the Crown owes may intersect and conflict just as much as the interests of the relevant iwi do.[59]

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53 At 693 per Somers J.

54 At 664–665 per Cooke P.

55 At 663 per Cooke P.

56 Erin Matariki Carr "The Honour of the Crown: Giving Effect to the True Purpose of the Treaty of Waitangi" (LLB (Hons) Thesis, Victoria University of Wellington, 2014) at 8; and Claudia Orange *The Treaty of Waitangi* (Bridget Williams Books, Wellington, 2013) at 47–49 and 53–56.

57 Andrew Butler "Basic Concepts" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at 28; and *Hodgkinson v Simms* [1994] 3 SCR 377 at [25].

58 Butler, above n 57, at 33.

59 *Te Arawa Waka*, above n 10, at 75. This paper assumes that, as the Crown owes quasi-fiduciary duties to *Māori*, in the context of the Treaty (which the Crown signed with representative of particular iwi

In this respect, it is necessary to consider the latter three principles because they provide more guidance as to the substance of the Crown's duties (and ergo how it might act when its duties to different iwi conflict). The duty on the Crown to act reasonably and practicably is an important one and it must be remembered that the Crown's duties in this regard are contextual.[60] Since cross-claims are so complex and multi-faceted, the substance of the Crown's duties has to reflect two competing challenges: the need to ensure that the Crown is as fully appraised as possible of the relevant facts and perspectives involved in the dispute, and the need to ensure the Crown's duties are not so onerous as to be impracticable.

Even given those challenges however, it is not clear that the rejection of a duty of consultation in this context makes sense. If the Crown needs to make informed decisions throughout the Treaty settlement process, then it will necessarily need to consult with any iwi who have (or might have) a potential cross-claim, because otherwise it will not be informed of their perspectives and histories, and these are clearly relevant to the decisions the Crown is making. It is important to acknowledge that consultation can be costly and time-consuming, and issues around the *extent* of consultation are dealt with in Part V. The courts have held however that there must be consultation on "major issues" affecting iwi.[61] Given the significance of land to iwi, and the significant potential for grievances, the general rule against consultation is not applicable here.

Similarly much of the general jurisprudence around just redress is difficult to fit within the rubric of cross-claims. The general duty noted above is significantly glossed by later jurisprudence. There is no duty on the Crown to provide a specific form of redress,[62] and Crown actions may proceed if they do not "materially impair" the ability of the Crown to provide redress.[63] Such statements may make sense in some contexts, but land is more than a mere commercial asset to Māori; it is taonga, and as such land at issue in a cross-claim may be of immense spiritual importance to the iwi involved.[64] If a standard such as

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and hapū) it must owe similar duties to iwi. That seems intuitive (and the Waitangi Tribunal certainly assumes it to be), but it may not be intuitive to all readers.

60 *New Zealand Maori Council v Attorney General* [1994] 1 NZLR 513 (PC) [the *Broadcasting Assets* case] at 517.

61 The *Forests* case, above n 42, at 152.

62 *New Zealand Maori Council v Attorney General* [1996] 3 NZLR 140 (CA) [the *Radio Frequencies* case] at 158–159.

63 *New Zealand Maori Council v Attorney General* [2013] NZSC 6, [2013] 3 NZLR 31 [the *Mighty River Power* case] at [125] and [149].

64 Te Puni Kōkiri *Ko Ngā Tumanako o Ngā Tāngata Whai Whenua Māori: Owner Aspirations Regarding the Utilisation of Māori Land* (April 2011) at 13–14.

"materially impair" treats land as a "commercially substitutable" asset, it is deeply disrespectful of the relationship iwi have with the land, and likely to damage Crown relations with iwi.[65] The protection of tāonga is at the "foremost" of the Crown's obligations.[66] At the point the Crown is *already willing* to transfer particular land as part of a settlement to an iwi, the contextual concerns underlying this jurisprudence fall away, and it is far better to focus on land as tāonga.

B Centring Māori Perspective

These observations suggest that the Treaty principles—as understood at the general, high-level articulated by the courts—need significant reworking if they are to be helpful in the resolution of cross-claims. There is significant scope for that to occur (as demonstrated below in Part IV), but before doing so it is necessary to discuss the relationship between these general principles and Māori understandings of the Treaty. Since tikanga and the relationships between iwi are a core part of the context to cross-claims, Māori understandings of the Treaty—and the Treaty settlement process—need to be at the forefront of any framework for resolution of these disputes. Placing them there also helps to ensure that the Crown sticks to its honest broker role and avoids imperialistically arbitrating disputes between iwi.

It is worth realising then that the principles in the *SOE* case do not align with Māori understandings of the Treaty. Māori never understood themselves to be ceding sovereignty when they signed the Treaty, and the Waitangi Tribunal has held that they did not in fact give up sovereignty.[67] Māori and Pākehā did both understand that cooperation was necessary in the framework of the Treaty. There is significant difference between the two groups however as to the basis from which that cooperation occurred however, and the current constitutional framework we have is a "compromise" that does not meaningfully give effect to the rangatiratanga Māori understood themselves to be retaining when they signed the Treaty.[68] Rangatiratanga would have ensured Māori were able to be ruled by tikanga, "the first law of Aotearoa" and that they could determine their own disputes in accordance with tikanga as a part of that.[69]

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65 See the comments in the *Broadcasting Assets* case, above n 60, at 524–526.

66 At 517.

67 Waitangi Tribunal *He Whakaputanga me te Tiriti: The Declaration and the Treaty* (Wai 1040, 2014) at 526–527 [*The Declaration and the Treaty*].

68 Jones, above n 2, at 713–714.

69 Mikaere, above n 19, at 25.

Those arguments have significant force in their own right, but within this context they need to be effected as much as possible. It is clear that tikanga and Māori understandings of relationships lie at the heart of the complex matrix that gives rise to cross-claims, as discussed in Part II. Since that is the case, any resolution of cross-claims will need to have a significant understanding of tikanga, if it is not done completely in accordance with tikanga. This requires more than iwi simply having an input into the Treaty settlement process; it requires a genuine dialogical approach, one that requires the Crown to be open-minded about how it effects Treaty settlements and willing to actively adapt its perspective and approach in response to what iwi suggest to it.[70] It is unlikely that the Crown can tailor its process so that it is completely consistent with tikanga, not least because the whole Treaty settlement process is built upon assumptions of Crown sovereignty that do not accord with tikanga. Yet if the Crown wishes to meaningfully ensure that it builds better relationships and heals grievances, it has to push itself to do so.

IV Tailoring the Treaty Principles

A The Tāmaki Makaurau Report

Instead of using the general Treaty principles articulated by the courts, the Crown can better understand its honest broker role by drawing on the jurisprudence of the Waitangi Tribunal. The Tribunal has, unlike the courts, grappled extensively with the challenges created by cross-claims and has appropriately centred tikanga and the different perspectives of iwi when it has done so. An examination of that jurisprudence reveals some of the deeper problems cross-claims pose, particularly in terms of how the Crown should fulfil its honest broker role. Different reports have taken very different approaches and understanding why they have done so is critical to ensuring that the Crown's duties meaningfully address the concerns and grievances raised by cross-claims. To help understand the jurisprudence a divide has been drawn between *The Tāmaki Makaurau Settlement Process Report* (*Tāmaki Makaurau Report*) and earlier reports of the Tribunal into cross-claims.[71]

The *Tāmaki Makaurau Report* was an urgent inquiry into the settlement negotiations between the Crown and Ngāti Whātua o Ōrākei (Ngāti Whātua). Concerns were raised by other iwi and tangata whenua within Tāmaki Makaurau (central Auckland), particularly that the Crown was prioritising the claims of Ngāti Whātua and disadvantaging other iwi who were not yet at the same stage of negotiations with the Crown. The claimant groups considered that the Crown had not properly considered the interests of other iwi within

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70 Jones, above n 2, at 715.

71 *Tāmaki Makaurau Report*, above n 7.

Tāmaki Makaurau, and that those iwi had strong claims to several of the specific parcels of land being transferred to Ngāti Whātua under the proposed settlement.[72]

The Tribunal agreed, and recommended significant changes to the approach that the Office of Treaty Settlements (OTS) had chosen:[73]

> one strong group in a district and work[ed] exclusively with it to agree on a settlement… This achieves the objectives of the Crown and the settling group. But meanwhile, the other Māori groups in the district are left out… Meetings are held once there is a settlement on the table, and by then the parties' interests are polarised.

This conclusion reflects how the Crown engaged with the other iwi in comparison to Ngāti Whātua. The Crown had a strong pre-existing relationship with Ngāti Whātua thanks to earlier negotiations between the parties.[74] In contrast other iwi had little to no contact with the Crown, were not told how to fit the "large natural grouping requirement" the Crown insisted on, and were only informed of the particulars of the settlement once it was essentially agreed.[75] This obviously prioritises Ngāti Whātua over those other iwi. But perhaps the most damning aspect of the whole process was that, even when it described Ngāti Whātua as the "predominant" iwi in Tāmaki Makaurau, the Crown refused to acknowledge that it was ever affecting the interests of any other iwi.[76] This hopelessly myopic approach to the cross-claims caused significant grievances among all the iwi involved, and though it has to be acknowledged that (following the Tribunal's recommendations) a settlement involving all iwi was reached,[77] these grievances are now playing out in complex litigation between all of the iwi and the Crown.[78]

All of this means the Crown must act in a way that avoids polarising the interests of different iwi in the settlement process. The Crown has an obligation to "improve relationships" which requires it to both improve its relationships with different iwi *and* to improve (or at least not damage) the relationships iwi have with one another.[79] The

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72 At 1.

73 At 1–2.

74 At 7 and 18.

75 At 55.

76 At 92 and 95.

77 Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, s 3; and Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Deed, Crown–Ngā Mana Whenua o Tāmaki Makaurau (signed 5 December 2012), at 2.

78 *Ngāti Whātua Ōrākei Trust v Attorney General*, above n 9.

79 *Tāmaki Makaurau Report*, above n 7, at 1.

Tribunal made several recommendations about how the Crown should act in these circumstances:

- it must adopt standards of engagement and consultation that go beyond ordinary administrative law requirements;[80]
- it ought to consult with all iwi in a particular region prior to starting negotiations with any one iwi, so that it can tailor its processes to reflect the particular circumstances in that region;[81]
- it needs to have clear processes and timeframes for ensuring that any iwi it is not negotiating with knows when they will be able to begin negotiations;[82] and
- it has an overriding obligation to treat iwi equitably and to respect the relationships that exist between iwi.[83]

It should be clear that the recommendations in the *Tāmaki Makaurau Report* essentially mirror the concerns and arguments made earlier in this paper. Since there can be so many different, interwoven relationships between iwi that markedly affect the Treaty settlement process, the Crown will inevitably create grievances if it does not know of and respect those relationships. That is why active consultation and engagement with those iwi is so important; it prevents the kinds of issues that were so visible in this report. If the Crown acts as an honest broker and works with iwi to understand the perspectives they have and the processes they wish implemented, it is far less likely to make the kind of mistakes it made in this case.

B The Earlier Reports

Yet not all reports the Waitangi Tribunal has made in this area are as critical of the Crown as the Tribunal in the *Tāmaki Makaurau Report* was. Some earlier Tribunals were much more sympathetic to the Crown, even going so far as to endorse processes used by it to respond to cross-claims similar to those used in Tāmaki Makaurau. Understanding why those tribunals did so is crucial to ensuring that the meaningful, responsive role the Crown must have actually reflects the true difficulties of the cross-claims process. In *The Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report* Ngāti Maniapoto claimed that the Crown's proposed settlement with Ngāti Tama gave that iwi land which Ngāti Maniapoto

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80 At 18 and 43.

81 At 13 and 106–107.

82 At 93.

83 At 6–7.

had interests in.[84] Similarly in *The Ngāti Awa Settlement Cross-Claims Report*, the Tribunal considered claims by several iwi that the Crown's proposed settlement with Ngāti Awa gave that iwi land which other non-negotiating iwi had interests in (this latter report was part of the nexus of disputes surrounding the *Ngāti Wahiao* dispute described above).[85]

In both claims, the Tribunal found that the claims were not made out, essentially because the Crown retained the capacity to provide other land and redress to the claimants.[86] On the face of it then, the Tribunal's findings in this regard are problematic, for the same reasons applying the general Treaty principle of redress to cross-claims is problematic. The fact that other land might be available to claimants belies the fact that land is *not* commercially substitutable and is taonga, and with respect it is ridiculous and unhelpful to suggest that cross-claims are not situations to which "tikanga really speaks" for the reasons discussed in Part II.[87]

Despite these unfortunate findings these two reports do make some other findings that need to be discussed. First, the reports emphasise that any granting of exclusive redress will necessarily affect the interests of other iwi.[88] As discussed in Part II, the dynamics of tikanga and inter-iwi relationships mean that many areas of land will have overlapping interests from different iwi, so this observation affects most of the land available as exclusive redress in settlements. Even though the Crown should be aiming to create as robust a process and positive a result as possible, it is often going to be the case that its actions will affect (and potentially harm) the interests of other iwi. That point can be accepted even if the conclusion of these reports (that no attention should be paid to the specific land passing under a settlement) is rejected.[89]

Secondly, these reports emphasise how the Crown can aggrieve the negotiating iwi if it halts its settlement process with that iwi in response to claims from non-negotiating iwi. The speedy approach to settlements discussed in the introduction of this paper cannot be dismissed as merely politically expedient; it reflects a desire to start the healing of

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84 Waitangi Tribunal *The Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report* (Wai 788/800, 2001) [*The Ngāti Tama Report*].

85 *The Ngāti Awa Report*, above n 37.

86 *The Ngāti Tama Report*, above n 84, at 15; and *The Ngāti Awa Report*, above n 37, at 73–74.

87 *The Ngāti Awa Report*, above n 37, at 76. It might seem unnecessary for this to be said, but despite these problematic findings the Crown relies on these reports as endorsing its approach to cross-claims: Office of Treaty Settlements, above n 8, at 54. This is hardly the hallmark of good faith negotiating.

88 *The Ngāti Tama Report*, above n 84, at 15.

89 At 15; and *The Ngāti Awa Report*, above n 37, at 76.

grievances that stretch back over a century and a half.[90] If the Crown represents to an iwi that it wants to start that healing process, and then backtracks, that backtracking plays into the ongoing narrative of Treaty breaches and grievances that iwi has going back to 1840.[91] This concern is more than just a "very serious" impediment of the settlement process; it is a concern that suggests that, if the goal of the honest broker mind-set is to minimise grievances created by cross-claims, then the mind-set has to meaningfully accommodate the interests of negotiating iwi as well as non-negotiating iwi.[92]

C Harmonising the Jurisprudence

At this point the following observations can be made: first that an honest broker role is an effective means of ensuring that the Crown is appraised of the relationships and perspectives it needs to understand to ensure it helpfully responds to cross-claims. Secondly, the way the Crown responds to cross-claims concerns can cause it to breach obligations it owes to iwi who are already engaged in settlement negotiations with it. And thirdly (reiterating the points made in Part III), the Crown's obligations need to be tailored to better reflect tikanga and Māori understandings of relationships. The aim of this paper is to draw these threads together to strike a balance between the interests of the negotiating iwi and the non-negotiating iwi.

The honest broker approach is the best way to strike that balance, but before discussing how it does so it is important to emphasise the possibility of avoiding these kinds of issues. The *Tāmaki Makaurau Report* suggested that the Crown consult with all iwi in a particular region prior to beginning negotiations with particular iwi, with the aim of learning of the relevant relationships in the region and to establish processes for individual (or even collective) settlement negotiations with the iwi in the region.[93] If processes can be established earlier in the process before interests are "polarised" then it is readily possible to harmonise the interests of the negotiating iwi with the non-negotiating iwi, because in-effect all of the iwi are negotiating with the Crown.[94]

If that is the case then all iwi will be able to influence the Crown's approach and perspective, and there will not be (at least in relation to the particular settlement process)

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90 Chris Finlayson "We're all on the same page with Treaty settlements" (1 February 2010) New Zealand Herald <www.nzherald.co.nz>.

91 *The Ngāti Tama Report*, above n 84, at 22.

92 At 22.

93 *Tāmaki Makaurau Report*, above n 7, at 13 and 106–107.

94 At 1.

non-negotiating iwi. All of the reports discussed above criticise the Crown for the language it used in its processes and for being "obtuse" in its explanations of its policies to iwi.[95] If iwi have been engaged in the process prior to the beginning of particular settlements and understand the Crown's approach, then many of the concerns articulated in the *Tāmaki Makaurau Report* about the Crown's treatment of non-negotiating iwi fall away because those iwi have at least been actively engaged with the Crown and have some idea of how they can engage in the process going forward.

There will however be situations where this approach do not work. It is possible that the consultation process result in the Crown adopting a perspective that some iwi find disrespectful of their mana despite the Crown's best efforts, or it may be that particular iwi do not engage in that process due to internal disputes over negotiation mandates or other issues.[96] This brings in to focus a balancing exercise that is crucial to this whole area: on the one hand, the Crown owes obligations to the negotiating iwi to negotiate with that iwi in good faith; and on the other hand, the Crown owes obligations of active consultation to non-negotiating iwi. This problem has been referred to as the "first cab off the rank" problem, and there is a difficult balance to strike between ensuring that the negotiating iwi's attempts to settle their grievances are not frustrated, and that non-negotiating iwi are not made worse-off by the particular settlement the Crown reaches with the negotiating iwi.[97] Any legal framework that wishes to meaningfully respond to the grievances caused by cross-claims has to be able to determine how to respond to this problem in any given settlement.

V The Crown's Duties in the Settlement Process

Saying that the Crown should be an honest broker does not necessarily respond to the complex balancing exercises required by cross-claims. It may be that the difficulties involved prevent perfect balancing of the various interests and considerations involved; that is a problem with many forms of negotiation.[98] Yet that is not a reason to shy away from tackling these challenges. At this point it is helpful to set-out again what this paper argues the role of the Crown should be in the resolution of cross-claims. The Crown ought to be an honest broker that actively and meaningfully engages with iwi, seeking to

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95 *The Ngāti Awa Report*, above n 37, at 84.

96 For example: *Ngāti Tūwharetoa Report*, above n 6, at 66. See also Dawson and Suszcko, above n 32, at 41–42.

97 *The Ngāti Tama Report*, above n 84, at 18.

98 Morris, above n 35, at 10–11.

incorporate their perspectives into the settlement process. The Crown needs to be willing to tailor its perspectives and understandings based on what iwi tell it, and it needs to ensure as much as possible it centres Māori perspective in the process.

A The Crown's role in the dispute

To act as an honest broker however the Crown has to be facilitator and not arbitrator, and it is arguable whether the Crown can be the former and not the latter. Since iwi often have different perspectives and interests in the settlement process, the Crown is at significant risk of essentially picking a side. That is what it did prior to the *Tāmaki Makaurau Report* and it arguably did so in the earlier Waitangi Tribunal reports as well. It reflects the variety of relationships in tikanga and the richness of those relationships that there is no one Māori perspective the Crown can adopt.[99] Dawson and Suszcko argue that the courts should generally avoid intervening in internal disputes between or within iwi because doing so is likely to undermine the right of iwi to self-determination and disrespect the dynamics of the dispute; a similar argument can be made about intervention by the Crown.[100] This argument is strengthened by the need to respect, as much as possible, rangatiratanga and the corresponding right for iwi to determine their own disputes, something already endorsed as critical to this area in Part III.[101]

This is a powerful objection, but it is ultimately an off-point one. Saying that the Crown should avoid intervening in internal disputes within or between iwi presupposes that the Crown *can* avoid doing so. In a cross-claim any action the Crown takes reverberates in tikanga and affects the mana and relationships of the iwi involved in the dispute. Three examples serve to demonstrate the point, all of which occur at a point in time where the Crown is engaged in settlement negotiations with negotiating iwi and other non-negotiating iwi are aggrieved by the way those negotiations are occurring:

- first, the Crown can continue negotiations with the negotiating iwi, but if it does so it is likely to be taken as affirming the status of that iwi within the particular region it is from (and thereby potentially alienating the non-negotiating iwi);[102]
- secondly, the Crown can halt or delay negotiations with the negotiating iwi, but doing so will aggrieve the negotiating iwi as discussed in Part IV; and

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99 Wainwright, above n 3, at 181.

100 Dawson and Suszko, above n 32, at 44.

101 *The Declaration and the Treaty*, above n 67, at 526–527; Jones, above n 2, at 713–714; and Mikaere, above n 19, at 25.

102 *The Ngāti Tama Report*, above n 84, at 20.

- thirdly, the Crown can facilitate the resolution of the dispute by suggesting the use of dispute resolution mechanisms or a trust, a model used in the *Ngāti Wahiao* case and discussed in more detail in Part VI.

Each of these approaches necessarily affects the dynamics of the dispute. The first two situations have been canvased above in terms of the "first cab off the rank" problem, but even the latter option requires the Crown to make decisions, such as to who it involves in discussions, who acts as trustees, what land will be placed in trust and what kind of mechanisms should be used to facilitate resolution of the dispute. And in situations where a trust or alternative dispute resolution mechanism is used, the Crown still has to decide whether it continues settlement negotiations with the negotiating iwi and on what terms, triggering the "first cab off the rank" problem. This should not be surprising; as discussed in Part II, the Crown understandably has various criteria for settlements such as the "large natural grouping criteria" and its criteria for redress, and these criteria affect the dynamics of the Treaty settlement process significantly. It has also irrevocably entered itself into the nexus of the dispute based on its past breaches of the Treaty and through institutions such as the Native Land Court. In fact simply having a Pākehā legal system will affect the dynamics of inter-iwi dispute resolution and the way tikanga can be used to resolve such disputes.[103]

Since this is the case it is unhelpful to suggest that the Crown stay out of disputes within and between iwi. Despite the findings of the Tribunal in the *Tāmaki Makaurau Report* it is possible that the reason the Crown did not wish to criticise the evidence and perspective of Ngāti Whātua was precisely because it wanted to avoid again imperialistically undermining Māori perspective.[104] If so that is a laudable mind-set to have, but it nonetheless still falls victim to the Tribunal's observations that by doing so the Crown was delegitimising the perspective of other non-negotiating iwi.[105] There will always be different perspectives and interests at play in the settlement process, and the Crown has to accept that it cannot always uncritically accept the perspective of the iwi it is negotiating with. Rather than ignoring the realities of the settlement process, the Crown must instead aim to have as sympathetic and informed perspective as possible. That is the best way to guard against the Crown becoming

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103 Mikaere, above n 19, at 26.

104 The Crown was at pains in this report (and still is in contemporary documentation) to emphasise that it does not intend to affect the dynamics of inter-iwi relationships: *Tāmaki Makaurau Report*, above n 7, at 66; and Office of Treaty Settlements, above n 8, at 53.

105 *Tāmaki Makaurau Report*, above n 7, at 92 and 95.

a problematic "arbiter" of the dispute and to ensure it maintains as respectful and facilitative role as possible.[106]

B A Duty of Consultation

This then requires us to consider how the Crown should achieve that kind of tailored, reflective role. To achieve that, the Crown must actively engage and consult with iwi to understand the potential issues raised by a Treaty settlement and develop tailored policies to reflect that particular settlement. Thus the first, and probably most important, goal of the honest broker approach is to create a legal mechanism by which this consultation is achieved. That mechanism must however be more than simply a policy approach; it needs to have the force of law and be treated with the same seriousness as the general Treaty principles in Part III are treated.

The most effective way to achieve all of this is to implement a duty of consultation. As noted in Part III, the courts general rejection of such a duty is not applicable here; further such a duty of consultation creates a framework that moves beyond ordinary administrative law principles as recommended in the *Tāmaki Makaurau Report*.[107] The form of this duty is easy to sketch however because it is in effect copying the Canadian approach, where there is a general duty of consultation that requires federal and provincial governments to consult with indigenous peoples.[108] That approach rightly puts the burden on the Crown to ensure adequate consultation has occurred in any given case,[109] with the extent of consultation required dependent on the circumstances.[110] The duty arises whenever the Crown has actual or constructive knowledge that an indigenous people's interests might be affected by a particular Crown decision.[111] And depending on the extent of the interests affected the duty may give rise to a corresponding "duty to accommodate", which requires the Crown to take steps to ensure that any infringements of indigenous peoples' interests are minimised.[112]

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106 *Ngāti Tūwharetoa Report*, above n 6, at 51.

107 *Tāmaki Makaurau Report*, above n 7, at 18 and 43. See also *Corbiere v Canada (Minister of Immigration and Northern Affairs)* [1999] 2 SCR 203 at [62] per L'Heureux-Dubé J.

108 *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 [*Haida*] at [16]–[18].

109 *Gitxaala Nation v Attorney General* [2016] FCA 187 (Canadian Federal Court of Appeal) [*Gitxaala*] at [185].

110 *Haida*, above n 108, at [39].

111 At [36]–[38].

112 *Gitxaala*, above n 109, at [180].

How should this law apply in the cross-claims context? At first glance it appears to strongly support the honest broker approach argued for in this paper. It puts the burden on the Crown of ensuring consultation has occurred, and since cross-claims are mentioned so frequently in official documentation, it appears impossible for the Crown to deny it had actual knowledge that a non-negotiating iwi's interests might be affected by a particular settlement.[113] Since the interests iwi have in the land affected by cross-claims are so significant, and since land is taonga, it is similarly impossible for the Crown to deny that the duty of consultation would require significant steps in *any* cross-claim. In fact it appears inarguable that, under Canadian law, the Crown would be under a duty to accommodate the interests of non-negotiating iwi as part of any Treaty settlement.

That first impression only takes us so far however. In Part III, it was noted that there may be concerns about the *extent* of consultation required in any given cross-claim. There the concerns were framed as being in terms of cost, but to those concerns can be added the problems created by the concurrent obligations owed by the Crown to both negotiating iwi and non-negotiating iwi and discussed in Part IV. Say for example the Crown has reached the point in negotiations where it suggests particular areas of land that might be available as redress for the negotiating iwi. Since almost all land available for redress will contain the interests of multiple iwi, unless the Crown has managed to involve all of those iwi in the particular settlement process there is a risk that providing the land to the negotiating iwi will aggrieve non-negotiating iwi. That seems to clearly require, under the tenets of the Canadian case law, that the Crown inform those non-negotiating iwi of the particular land available and accommodates their interests in it. Yet in doing so the Crown arguably breaches of confidentiality owed to the negotiating iwi (by disclosing negotiation positions and offers made by that iwi for example) and certainly risks aggrieving them if settlement negotiations stall over the non-negotiating iwi's interests.[114]

We can better balance the interests of the negotiating iwi by co-opting the spectrum analysis used in Canadian jurisprudence. The duty of consultation creates a spectrum of situations where it applies, with different requirements of the Crown depending on the strength of the indigenous group's interests and other relevant factors.[115] As noted above, that law would place cross-claims at the "high" end of the spectrum, but that does not mean that the Crown's obligations have to be static throughout the entirety of a particular

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113 See generally Office of Treaty Settlements, above n 8, and especially at 53–54.

114 The Crown requires negotiations to be conducted in confidence: at 52. A full discussion of these issues is outside the scope of this paper.

115 *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council* [2010] SCC 43, [2010] 2 SCR 650 at [36].

settlement. Instead, the Crown's obligation to engage non-negotiating iwi should evolve based on factors such as:

- how strong the relationships between non-negotiating iwi and the Crown are;
- how much the Crown has engaged with non-negotiating iwi during the particular settlement;
- any concerns about the particular region or area where the settlement is occurring;
- any pre-existing relationships between negotiating and non-negotiating iwi (including pre-existing tensions, common ancestors etc); and
- the extent to which settlement negotiations have proceeded with the negotiating iwi.

If the Crown has consistently engaged with non-negotiating iwi throughout the negotiations, and they have not objected to (or are even supportive of) the approach the Crown has taken thus far, then the obligations on the Crown will lessen because it has ensured that it has considered their perspectives. The Tribunal has suggested that the extent of prejudice as perceived by the non-negotiating iwi is highly relevant to its determinations, and the Crown should similarly be able to place significant weight on the views of non-negotiating iwi.[116] That does not mean that the Crown can abandon consulting with those iwi (especially if those iwi have not been informed of the particular land being offered as redress).[117] Rather it simply acknowledges that the Crown's obligations should naturally adapt if it can reasonably believe that its processes are supported by the iwi potentially affected by them.

Flowing from this, negotiating iwi need to acknowledge that the Crown's obligations extend to all iwi and that the Crown has to look beyond the particulars of its individual relationship with the negotiating iwi. Similarly, the Crown needs to ensure that iwi are aware that, in any given settlement, negotiations may need to evolve or even slow in response to concerns of non-negotiating iwi. Both of these steps help lessen the risk of interests becoming polarised in the negotiation and of confidence being breached, essentially because they shift the parameters of the negotiating process away from a more adversarial model.[118] The Crown already notifies iwi that it requires settlements to be free

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116 *Ngāti Tūwharetoa Report*, above n 6, at 66.The possibility that members of a non-negotiating iwi supported the negotiating iwi in its claims weighed heavily with this Tribunal and led to it refusing to find the Crown in breach of the Treaty.

117 *Haida*, above n 108, at [43].

118 Palmer, above n 27, at 310.

of potential cross-claims, and this is simply a more honest articulation of a more helpful position.[119]

None of these concerns should detract from the general thrust of the Canadian case law as it applies here however. The Crown must act as an honest broker and, as best it can, accommodate the interests of both negotiating and non-negotiating iwi within the settlements it reaches. How it should do so in any given case will be fact-specific and potentially difficult, but the Crown must always acknowledge its obligation to take an "expansive approach" that preserves relationships and avoids grievances.[120]

C A Reflective, Facilitative Approach

The aim of the Crown then should always be to create processes that are much more flexible and sophisticated, for those processes are far more likely to lead to it improving its relationships with iwi. Important though the duty of consultation is, it would be a mistake to focus solely on that duty when considering the Crown's responsibilities.[121] Instead, we need to establish ways in which the Crown can tailor its processes and understandings based on what it learns from fulfilling its duty to consult. This section discusses three interrelated ways the Crown can do this:

- the Crown should, wherever possible, allow iwi to determine for themselves how a particular dispute is resolved;
- as part of this, the Crown should actively suggest ways and provide means by which resolution of disputes is facilitated; and
- the Crown should minimise the usage of structures and policies that require iwi to comply with particular standards of governance, size or similar.

With that in mind, the best way of ensuring a durable settlement consistent with tikanga is to allow the iwi involved in a cross-claim to resolve their dispute between themselves. That resolution might take the form of an agreement to parcel and divide the land at issue, or to establish a trust to hold the land (and on which members of each of the iwi involved in the dispute serve as trustees). Or it might simply be an agreement as to a dispute resolution scheme that places the land in trust until the scheme is completed, as was done in the *Ngāti Wahiao* case. It would perhaps be too much to suggest that these kinds of negotiated

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119 Office of Treaty Settlements, above n 8, at 27.

120 *Ngāti Tūwharetoa Report*, above n 6, at 52.

121 *Tāmaki Makaurau Report*, above n 7, at 1; and Dwight Newman *Revisiting the Duty to Consult Aboriginal Peoples* (Purich Publishing, Saskatoon, 2014) at 88.

agreements are likely to fully satisfy each iwi involved, but they are far more likely to have that effect than any adversarial process initiated after negotiations break down.[122]

This sort of process will always be somewhat tense, especially if these negotiations are occurring against the backdrop of a particular settlement whereby the parties' interests have become polarised. Nonetheless it would be a mistake to assert, as some writers have, that any resolution along these lines must be "arbitrary".[123] To be sure iwi have to make this agreement within the context of a system that is not particularly consistent with tikanga, and as discussed in Part III simply having Crown sovereignty undermines rangatiratanga and the original compact represented by the Treaty. Yet denying that any agreement between iwi created in this context is legitimate disempowers those iwi and denies their rangatiratanga in deciding how to resolve their dispute. A core part of the settlement process is giving back some control to iwi and providing them the means to "regain some of their autonomy".[124] The Crown can always make the process more responsive to the tikanga and rangatiratanga of the iwi involved, and to say otherwise dismisses the tikanga and rangatiratanga of those iwi.

The Crown cannot simply stay out of this process.[125] Instead it needs to take a role as facilitator, actively providing suggestions and support where necessary to help resolve these claims. One way the Crown can do this is to suggest other methods that have been used by iwi to resolve their disputes, such as those mentioned above. The Crown can also provide funding for iwi to hold hui to discuss and mediate their dispute, and suggest places where that hui might take place. Or in situations where the Crown has to make a decision as to resolution of the claims, it could itself appoint an independent expert to assist its decision-making, or refer a matter to the Māori Land Court.[126] Ultimately though, a significant part of the Crown's role is simply to be available and to listen to iwi as they resolve their dispute. Many of the concerns iwi had about the Crown's various approaches to cross-claims have focused on the fact that the Crown did not meaningfully communicate

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122 Timothy McCabe *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (LexisNexis, Markham, 2008) at 114–115.

123 Young, above n 22, at 213.

124 Waitangi Tribunal *The Mangatū Remedies Report* (Wai 814, 2013) [*Mangatū Remedies Report*] at 131.

125 *Te Arawa Waka*, above n 10, at 73–75.

126 Gina Hefferan *Post-Settlement Dispute Resolution: Time to Tread Lightly* (2004) 10 Auckland U L Rev 212 at 241–243; and Te Ture Whenua Maori Act 1993 ss 27, 30 and 61.

or engage with non-negotiating iwi.[127] Addressing those concerns by simply being more engaged is a significant step in and of itself.

Finally, there are parts of the current settlement process that may in some cases preclude both an agreement being reached between iwi and push the Crown into the role of arbiter. Beyond the Crown's requirements for "large natural groupings" and its ideas about redress the Crown imposes several other requirements on the settlement process such as governance requirements on the entities that receive redress.[128] It should be readily acknowledged that some Māori have benefited from the kinds of accountability measures the Crown sees as beneficial.[129] And these requirements often reflect concerns that without them settlement redress will not be managed in the best interests of iwi, concerns shared by both the Crown and iwi themselves.[130]

However insisting on these requirements creates significant trade-offs. If these requirements obstruct iwi from resolving their disputes they are contributing to the grievances of those iwi.[131] And the more Crown brings rigid ideas of "what works for Māori" to the settlement process, the less likely post-settlement entities will reflect the rangatiratanga and tikanga that are crucial to effectively resolving disputes within or between iwi.[132] Assuming the Crown continues this approach though, it can do several things as honest broker. It can suggest governance entities that reflect the circumstances of the iwi involved in the dispute. If the iwi involved prefer to represent themselves at the hapū level for example, then the Crown can suggest that the post-settlement entity prioritises the hapū of the iwi involved.[133] And if post-settlement redress involves the interests of multiple iwi then the Crown will need to help bridge discussions between the iwi involved as to the entity they might choose between them.[134] All of the Crown's

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127 *Tāmaki Makaurau Report*, above n 7, at 8; and *Te Arawa Waka*, above n 10, at 31.

128 Office of Treaty Settlements, above n 8, at 69–71. See also Crown Forestry Rental Trust, above n 34, at 254–255.

129 Te Puni Kōkiri, above n 4, at 7–8.

130 Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase* (NZLC SP 13, 2002) at 6–7; and Waitangi Tribunal *He Kura Whenua Ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) [*He Kura Whenua Report*] at 273–275.

131 Newman, above n 121, at 132–133.

132 Jones, above n 18, at 134.

133 Crown Forestry Rental Trust, above n 34, at 251. See also the examples in Law Commission, above n 130, at 19–20.

134 Office of Treaty Settlements, above n 8, at 55. If these discussions need to be started early internally by the negotiating iwi, ipso facto they should be started early between iwi in the case of cross-claims.

suggestions, whether about governance entities or generally, may not be especially helpful to iwi. Yet simply making those suggestions and seeing why they are not helpful assists the Crown in understanding the circumstances and relationships at play in the cross-claim, and that understanding is itself valuable to the honest broker role.

VI Addressing the Challenges

A Picking Winners

This discussion could be criticised as being somewhat abstract, and in some ways that is an inevitable consequence of the flexibility and holistic thinking embedded in the honest broker role. Nevertheless any abstract discussion can become easier to understand if it grounds itself with a few concrete examples. This final substantive part of the paper examines three different approaches the Crown has utilised when cross-claims have arisen during a settlement, and sketches how as honest broker approach would have acted. The first, and hopefully less common, approach taken by the Crown is simply to pick a "winner" of a cross-claim dispute. The original Tāmaki Makaurau settlement is an example of this and it provides helpful guidance as to what the ideal Crown approach should look like in practice.[135]

To repeat the observations made in Part IV, the Crown adopted a flawed process in Tāmaki Makaurau whereby it picked a "winner"—Ngāti Whātua—and negotiated more or less exclusively with that iwi, ignoring the potential claims of other iwi in the region. The Crown already had a strong relationship with Ngāti Whātua and leveraged that relationship with the aim of achieving a swift settlement, viewing other iwi as ancillary and unimportant to its objectives.[136] This led to the Crown failing to meaningfully consult or engage with those other iwi, and a proposed settlement that cut-across the mana of those iwi by assuming that Ngāti Whātua was the "predominant" iwi in the region.[137] By working exclusively with an iwi the Crown already had such a strong relationship with, and by alienating the other iwi in Tāmaki Makaurau, the Crown essentially picked Ngāti Whātua as a "winner" and left other iwi with no idea whether or how they fitted into the Crown's settlement process. Such an approach cuts across the diversity of perspectives contained in tikanga, deepens grievances already held by non-negotiating iwi and is at its core a Crown arbitration process that is anathema to the crucial centring of iwi perspective and rangatiratanga argued for in this paper.

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135 *Tāmaki Makaurau Report*, above n 7.

136 At 7, 18 and 55.

137 At 92 and 95.

The Crown itself realised how problematic this approach was when it negotiated a broader and more inclusive settlement for the region after the Tribunal's report.[138] It would have been far better for the Crown to have engaged in pre-negotiations in Tāmaki Makaurau so it could have avoided picking sides in the way that it did, but as discussed in Part IV settlements will often need to be progressed with individual iwi without this kind of regional approach. If the Crown has an honest broker mind-set while it is progressing settlements in this way then there are two things that it needs to keep in mind.

First, the Crown has to realise that that the negotiating iwi will lead evidence and perspective that minimises the mana and interests of other iwi in particular areas. That is not necessarily because the negotiating iwi is acting to thwart the interests of non-negotiating iwi. Rather it simply reflects the fact that different iwi will have experienced different grievances and understand those grievances differently.[139] The Crown however has to have a broader perspective that considers the perspectives of *all* the iwi in the region, lest it become anchored to a particular perspective. Prior to the Tribunal's report the Crown sought a historical account from Ngāti Whātua that it could "live with" rather than trying to consider the interests or perspectives of non-negotiating iwi.[140] As discussed in Part IV the Crown has to be willing to question the perspective of the negotiating iwi, supplementing it with the perspectives of non-negotiating iwi obtained through consultation. That approach ensures the Crown acts as honest broker and crafts a settlement package that respects the interests of non-negotiating iwi.[141]

Secondly, the Crown must be keenly aware of the relative disadvantage between negotiating and non-negotiating iwi as to their ability to research their claims. The Crown does not generally provide funding for iwi to research their claims,[142] but the negotiating iwi will potentially have received funding from other sources and will have had more time to prepare its research.[143] Thus if the Crown simply weighs up the different evidence as led it will more readily accept the negotiating iwi's evidence, as it originally did in Tāmaki Makaurau. It is doubtful whether the Crown should be averse to providing iwi research

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138 Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act, s 3; and Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Deed, above n 77 , at 2.

139 *Mangatū Remedies Report*, above n 124, at 27.

140 At 51.

141 *Ngāti Tūwharetoa Report*, above n 6, at 58.

142 Office of Treaty Settlements, above n 8, at 37 and 49.

143 For example the Crown Forestry Rental Trust. Crown Forestry Rental Trust, above n 34, at 23.

funding, but at the least the Crown could commission an independent expert to research the concerns and interests of non-negotiating iwi.[144] Regardless the honest broker cannot make assumptions about non-negotiating iwi based purely on the material they lead. In Canada the possibility of interests is enough to trigger caution and the duty to consult, and similar caution is warranted here.[145]

B The Use of a Trust

Instead the honest broker approach should cautiously aim to facilitate iwi resolving their dispute between themselves, as discussed in Part V. A potentially more attractive approach taken by the Crown then is to place the land in trust while the iwi involved in the cross-claim resolve the dispute themselves. Such trusts tend to provide for the land to be looked after by a governing body (potentially with representatives from all iwi involved in the cross-claim, and perhaps also the Crown) and to be transferred outside of Crown ownership. The terms of the trust provide for a dispute resolution process to help facilitate the dispute, and several examples tend to start with negotiation using tikanga and then move to other forms of dispute resolution (mediation and arbitration) if negotiations cannot resolve the dispute.[146]

Such an approach seems attractive for several reasons. First, it minimises the Crown's role in the dispute and facilitates agreement between iwi at least as to how discussions are to progress. Secondly, it ensures that the land is transferred out of Crown ownership, a sign of good faith on the part of the Crown. And thirdly, such arrangements allow for Māori to resolve disputes in ways that promote tikanga rather than requiring them to engage in a settlement process which (at best) considers tikanga tangential to its aims.[147] Though these claims are all true to an extent, the true picture is more complex. Insomuch as negotiations may break down, pushing iwi towards arbitration and litigation is likely to deepen divides already deep as a result of the cross-claim, a harm which sits uncomfortably with the Crown's obligation to preserve inter-iwi relationships (and these methods may also be markedly inconsistent with tikanga).[148]

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144 *Ngāti Tūwharetoa Report*, above n 6, at 57. See also *Mangatū Remedies Report*, above n 124, at 132.

145 *Haida*, above n 108, at [36].

146 See eg *Ngāti Hurungaterangi v Ngāti Wahiao*, above n 9 at [32]–[35]; and *Te Runanga O Ngāti Manawa v CNI Iwi Holdings Ltd* [2016] NZHC 1183 at [25]–[35].

147 Hond, above n 45, at 159; and Hefferan, above n 126, at 239–240.

148 Hefferan, above n 126, at 227–228; and *Ngāti Tūwharetoa Report*, above n 6, at 47.

Further (and as discussed in Part V) simply deciding that the land should be placed in trust necessarily requires the Crown to reach some view as to the merits of the cross-claim. The Crown need not pick a "winner" by suggesting a trust, but simply engaging with other iwi who are contesting the potential offering of land to an iwi the Crown is negotiating with will inevitably be taken as the Crown indicating it considers the other iwi to have arguable claims to that land.[149] And since the Crown will be transferring the land out of its ownership (and eventually to iwi) presumably it will also seek appropriate governance structures in the trust itself or in the entities iwi will use to receive the land from the trust, triggering the concerns discussed in Part V. This means that the Crown still occupies a powerful role in the resolution of the dispute this way and must maintain the honest broker mind-set.

In this role the Crown faces two competing concerns: first, it wishes post-settlement entities to comply with its expectations of governance, and secondly it also needs to recognise the rangatiratanga of the iwi involved in the dispute.[150] The Crown will invariably have some requirements of these trusts, and its focus should be on how to implement these requirements with minimal impact on the iwi involved in the dispute. The Crown can draw on its experience in the settlement process by assisting in the drawing up of the dispute resolution terms of the trust deed. Courts on appeal have split as to the role of tikanga in this process, and the Crown may be able to help iwi clarify how much of a role tikanga should have at different stages of the process and focus their discussions on that issue.[151] The Crown can also assist iwi in clarifying their expectations of the process. Particularly in cases where the Crown has failed to avoid polarising the interests of iwi, negotiation and mediation may be unable to resolve issues of tikanga and mana and thus be of limited use in resolving the concerns underlying the dispute.[152]

Finally the Crown's general role in creating meaningful engagement with and between the iwi involved is crucial here as well. Mediation of the dispute will only work if the iwi involved trust the process and feel secure that it will respect their interests.[153] The Crown thus has a role, consistent with its obligation and aim to preserve relationships, to ensure that the process of creating the trust deed achieves these two aims. By meaningfully engaging all iwi in the process early and up to the point this trust deed is created, the Crown

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149 *The Ngāti Tama Report*, above n 84, at 17; and *The Ngāti Awa Report*, above n 37, at 76.

150 *He Kura Whenua Report*, above n 130, at 275.

151 *Ngāti Hurungaterangi v Ngāti Wahiao*, above n 9, at [130]–[137]; and *Te Runanga O Ngāti Manawa v CNI Iwi Holdings Ltd*, above n 146, at [82]–[90].

152 Hond, above n 45, at 164.

153 At 162.

helps to ensure that the interests of the party are not polarised and that this kind of iwi-focused dispute resolution is successful.[154] Further, the more all the iwi are involved in the process, the more likely the terms of the trust will reflect the different understandings of tikanga and dispute resolution that exist within each of those iwi.[155] All of this means that, if the Crown does have particular requirements of the trust deed and the dispute resolution process, it is at least ensuring the effects of those requirements are minimal.

C The Current Approach

Even if these trusts are the best way for the Crown to satisfy its obligations, it will not be able to use them in every case. The final approach that can be discussed is the Crown's current approach, contained in OTS's explanation of its settlement policies (the Red Book).[156] The Red Book states that the Crown prefers cross-claimants to resolve their dispute between themselves rather than have the Crown make a decision.[157] It does however acknowledge that in some situations the Crown will have to make a decision, and states that when it does it will be guided by two principles:[158]

- the Crown's wish to reach a fair and appropriate settlement with the claimant group in negotiations, and;
- the Crown's wish to maintain, as far as possible, its capability to provide appropriate redress to other claimant groups and achieve a fair settlement of their historical claims.

This clearly does not provide either negotiating iwi or non-negotiating iwi much certainty as to how the Crown will act in this situation, although the framing of these principles as competing concerns mirrors the "first cab off the rank" discussion in Parts IV and V. Three things can be said about this approach. First, an emphasis on iwi resolving a cross-claim between themselves is positive insomuch as it centres those iwi and their right to determine their dispute between themselves, although if the Crown sees itself as having no role in that process it is not acting as an honest broker.[159] Second, that emphasis suggests that the trust-based approach discussed above is one the Crown will seek to use in order to achieve resolution by iwi of their own claims, but the lack of clarity as to the decision-making process suggests it is still emphasising the clear and meaningful engagement needed to ensure this dispute resolution process works well.[160] Finally, and on a positive note, the

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154 *The Ngāti Awa Report*, above n 37, at 88.

155 Jones, above n 18, at 134.

156 Office of Treaty Settlements, above n 8.

157 At 54.

158 At 54.

159 *Ngāti Tūwharetoa Report*, above n 6, at 51.

160 Hond, above n 45, at 162.

Red Book repeatedly acknowledges the extent to which cross-claims can intersect with a particular settlement, which at least means the Crown has given some thought to the concerns discussed in this paper.[161]

Given the lack of clarity around the current OTS approach to cross-claims, significant certainty could be achieved by the Crown adopting the honest broker approach. That would at least give a principled basis to the flexibility that (presumably) underlies its vague approach.[162] Two aspects of the current approach require further comment however: the Crown's approach to governance entities and its approach where there are cross-claims in an area of land available as exclusive redress for a particular claimant. The Crown in a general way sets out questions iwi should ask themselves about potential governance entities, and these questions reflect the Crown's concerns as to what form a governance entity must be in.[163] Given that these kind of questions provide some certainty to iwi prior to negotiations, it would be helpful for the Crown to create a similar list of questions or concerns about a particular cross-claim to the iwi involved before they start their own negotiations. To be sure, such a list may colour and affect the dynamic of any negotiation or mediation between the iwi.[164] Yet by insisting that the negotiating iwi's settlement be "free" of cross-claims the Crown has already done that, and at least this way it meaningfully explains to the iwi what its concerns in a particular case might be.[165]

Finally, the Crown has made it clear that "[w]here there are valid overlapping claims to a site or area, the Crown will only offer exclusive redress in specific circumstances."[166] This is simultaneously laudable and problematic. It is laudable because it recognises that the Crown cannot act as arbiter of the dispute and simply give land to a single iwi. And since the specific circumstances includes Crown forestry land, the Crown is clearly envisaging the possibility of multiple "winners" of a dispute if it can give different portions of forestry land to different iwi.[167] Yet it is also problematic. There is no additional clarity as to what "specific circumstances" trigger the possibility of exclusive redress being granted, which risks undermining meaningful engagement with iwi. More problematically though, it hints

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161 See generally Office of Treaty Settlements, above n 8.

162 Palmer, above n 27, at 147. Palmer bases his views on OTS' approach up to 2008, but given the legacy of many of OTS' decisions I respectfully doubt whether OTS was either flexible or open-minded at the time he was writing.

163 Office of Treaty Settlements, above n 8, at 70–72.

164 Hond, above n 45, at 164.

165 Office of Treaty Settlements, above n 8, at 27.

166 At 55.

167 At 55.

at the possibility that, where cross-claims to a particular area of land arise, the Crown may simply not give that land to anyone. Even if it is remote, the fact that all of the iwi involved could lose the land unless they resolve their dispute may be enough to make resolution feel coerced and therefore ineffective.[168] This is a difficult balancing exercise and the Crown is in a difficult position. This possibility must only be exercised as a last resort, and it is deeply questionable whether it should be so clearly signalled to iwi before their negotiations even begin.

VII Conclusion

Overall then the Treaty settlement process is not particularly effective at either recognising tikanga Māori or responding to the particular challenges created by cross-claims. Perhaps that is because the process was generated against the backdrop of the Treaty principles articulated by the courts, or perhaps the Crown has not taken on board the suggestions made by the Waitangi Tribunal. Ultimately though the current approach of the Crown is not the right one to bring to these situations. The Crown has to recognise its role in the dynamics of the dispute, actively consult the iwi involved and tailor its processes to reflect the dispute. It cannot rush the healing process, and it has to restrict itself to a facilitative role. To do so is not only more consistent with tikanga Māori, but is also much more likely to lead to the healing of grievances that the Crown wants to occur.

This is what is so important about the honest broker role: it focuses on acknowledging the effects the Crown's decisions have on the iwi involved in a cross-claim and determining how it can alter or minimise those effects. The amount of consultation and reflection required by the honest broker approach means that it will be difficult to speedily resolve Treaty settlements. If the Crown is obliged to meaningfully engage with iwi, then that will often mean that the Crown needs to take the time to engage with iwi in-depth and in an ongoing way, and consultation to that degree takes time.[169] Yet taking that time ensures the process respects tikanga as much as possible, centres Māori understandings of the relationships involved and ultimately minimises the risk of further grievances being created. Every settlement involves different iwi, with different histories and perspectives, all of whom may have different relationships with—and expectations of—the Crown and

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168 Hond, above n 45, at 164.

169 Marc Gramberger *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making* (Organisation for Economic Cooperation and Development, Paris, 15 November 2001) at 22–23.

each other. The honest broker approach ensures the Crown is cautious, fully-informed of those differences and fulfils its obligations under the Treaty.

The Treaty settlement process will look significantly different if the Crown adopts the honest broker approach. The Crown will likely face difficulties tailoring its approach based on what it learns from iwi, and creating an approach that meaningfully responds to cross-claims is difficult.[170] The process was never going to be straightforward however.[171] If the Crown wants to build meaningful relationships with iwi, then it has to have the clear communication, honesty and open-mindedness that are critical to any successful relationship.[172] Perhaps as part of the honest broker approach the Crown will build towards conversations with iwi that genuinely take on-board their perspective and better incorporate their understandings of the Treaty relationship into our constitutional structures.[173] Certainly one of the strongest parts of the honest broker approach is the necessity it places on the Crown building respectful relationships with iwi that meaningfully consider their perspectives. Even if the Crown never goes beyond altering the Treaty settlement process however, simply developing a process that leads to less grievances is significant in and of itself. It may be difficult to develop that process, but it has to be asked:[174]

> Is it really impractical to suggest that it is possible to secure a settlement with one group without alienating its neighbours and relatives?

The text of this paper is 12,566 words excluding footnotes, cover page and appendices.

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170 *The Ngāti Awa Report*, above n 37, at 74.

171 Rosanna Price "No 'happy ever after' for Treaty settlements – Minister Chris Finlayson" (16 June 2016) Stuff <www.stuff.co.nz>.

172 Palmer, above n 27, at 23.

173 Jones, above n 2, at 715–716.

174 *Tāmaki Makaurau Report*, above n 7, at 7.

VIII Appendix One: A Brief Discussion of Voice and Narrative

When I first suggested this topic to my supervisor, he rightly told me that it would be a challenge. Part of that challenge was entering an academic space where there has been little discussion of the issues I have addressed, but the far greater challenge was trying to generate the right narrative and perspective to bring to these issues. It is my view that Pākehā writers who wish to meaningfully contribute to discussions around the Treaty relationship have to try and adopt the same perspective I argued the Crown should adopt in this paper: they have to meaningfully engage with different Māori perspectives when they write. This brief discussion explains how I attempted to do that when writing this paper, and sets out a few thoughts I have for other Pākehā writers who wish to do something similar.

The most important part of writing in this space is, I think, to acknowledge that there are likely to be concepts and ideas that you read yet do not fully understand. For myself, writing as a Pākehā who cannot speak Māori, that happened often. Friends and colleagues would often sigh at my inept attempts to pronounce Māori words, or having somewhat problematic views that needed correcting, or simply at how little I knew about this subject. That can be embarrassing; no one likes to admit they do not understand something, or that they might have some views that are problematic.[175]

Even if the reader is less inept than me however, it is crucial to realise however that the difference in perspective goes *much* deeper. As Hall puts it: "We all write and speak from a particular place and time, from a history and culture which is specific. What we say is always 'in context', *positioned*."[176] One does not simply cease having a Pākehā perspective because one wants to not have one. If you consider all of the ways in which Pākehā learn about the Treaty settlement process, most of them are not particularly sophisticated (or even sympathetic). And as Regan argues "*how* people learn about historical injustices" forms a core part of how they engage with narratives and arguments based on those injustices.[177] What little compulsory teaching I had focused on how there were two

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175 Paulette Regan *Unsettling the Settler Within: Indian Residential Schools, Truth Telling and Reconciliation in Canada* (UBC Press, Vancouver, 2010) at 19.

176 Stuart Hall *Cultural Identity and Diaspora* (1990) 2 Identity: Community, Culture Difference 222 at 222 (emphasis in original).

177 Regan, above n 175, at 11 (emphasis in original). Regan discusses these influences in the Canadian context but I consider her thinking equally applicable to New Zealand.

different versions of the Treaty and that Māori had not understood the Pākehā version.[178] That is obviously far less than the entirety of Māori experiences and grievances in this area, and if those experiences shape Māori narratives then there is a significant gulf between my Pākehā understanding and that of Māori.

It would then be a mistake, in my view, to attempt to write using a Māori perspective. Such a perspective absolutely does exist, and there are clear differences between the styles of Māori and Pākehā scholars; some Māori scholars use traditional stories and proverbs in their writing to help centre their arguments,[179] whilst others explain their perspectives on issues by drawing on the stories and experiences they have been told by others or that they have experienced themselves.[180] Those styles are impressive and those scholars powerful in the ways they write, and I admire them for being able to write in the ways they do. Some Pākehā writers may write using similar techniques, but I have not read any at law school myself (and certainly I have never been taught to write that way at law school).

But that is beside the point. Those scholars have experienced a very different world to my own and have a perspective that differs from my own. Their own lived experiences colour the way they write, and I greatly doubt that I could simply tailor my own perspective to account for those differences. It was a common suggestion that I try to write using the same narrative techniques and perspective that Māori scholars do. Putting aside my own hopeless lack of creativity, I am genuinely unsure how exactly a Pākehā writer would do that. A Pākehā writer does not know the stories that the scholars referred to above draw on. Nor have they experienced the experiences that those writers draw on. Any attempt to write using a Māori perspective thus risks masking the underlying assumptions and gaps in the author's perspective whilst pretending to have the understanding and legitimacy that comes with having that perspective.[181]

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178 I learnt a little more than most as I took Year 13 History, which went into more depth on the Treaty relationship (albeit through the lens of a Pākehā curriculum). From my experience very few schools teach New Zealand history in any depth and very few students took it when it was offered.

179 For example Jones, above n 2, at 703; Paerau Warbrick "O ratou whenua" in Nicola Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington 2014) 92 at 92.

180 For example Warbrick, above n 179, at 96–100; Jackson, above n 17, at 33–34; and Erika Te Hiwi "Disrupted Spaces: Racism and the lived experience of Maori identity formation" (paper presented to the Proceedings of the National Maori and Pasifika Psychologies Symposium, November 2008).

181 Linda Tuhiwai Te Rina Mead "Nga Aho O Te Kakahu Matauranga: The Multiple Layers of Struggle by Maori in Education" (PhD Thesis, University of Auckland, 1996) at 108–109. What Mead is effectively arguing is that 'sympathetic' Pākehā men shut down Māori women who attempt to engage

This is evident at a high level in the way Pākehā legal systems treat tikanga: even if contemporary legal discourse might be more sympathetic to Māori, that law is still steeped in subconscious ideas of destructive colonialism that contort and delegitimise Māori experiences.[182] This led Jackson, in discussing UN developments on indigenous rights, to question whether those developments would ever be capable of responding to indigenous peoples' perspectives if they were based off of international law norms that deny indigenous groups their nationhood and humanity.[183] The same problem occurs at a micro-level with individuals, albeit in different (and less visible) ways; whenever a Pākehā author like myself writes about the kinds of issues in this paper, there is a risk that what looks like a sophisticated perspective is very much the same Pākehā assumptions repackaged in nicer language. I do not think the suggestion that I write using a Māori perspective was itself problematic, yet I also think those who suggested it do not appreciate how much of our individual perspective is shaped by assumptions anathema to that perspective.

Further to the point, I am not sure it is appropriate for a Pākehā writer to try and write this way. I acknowledge that there are many deep debates as to the role of a person in a position of privilege when discussing issues faced by those without privilege.[184] There is also a need to account for the effects of privilege and unlearn the experiences of privilege.[185] Yet I cannot help but question whether it is possible to unlearn *all* of the experiences that colour one's perspective, and whether a focus on the unlearning process risks masking the extent to which there are still aspects of a writer's perspective that lead them to have potentially problematic views. And if any Pākehā writer even slightly forgets that they risk invading the space within which Māori writers are having their own discussions, discussions which are based on the perspectives and experiences discussed above. I learned much writing this paper, but above all else I learned that there is a lot that I do not know, and I do not think I can or should enter those spaces at the expense of those already within them. Perhaps that

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in discourse within academia by calling them radical or suggesting they are disrespecting tikanga. This is a powerful example of my concerns about Pākehā claiming to have a 'Māori perspective'.

182 Moana Jackson *The face behind the law: The United Nations and the rights of indigenous peoples* (2005) 8(2) Yearbook of New Zealand Jurisprudence 10 at 14; and Mikaere, above n 19, at 26.

183 Jackson, above n 182, at 15–16.

184 This debate is complex and I cannot possibly explain all of the different facets of it here. One aspect worth noting however is the debate over whether and how the experiences privileged people have of oppression should influence their views. Regan for example who draws on her own lived experiences working with indigenous victims of state-sanctioned abuse in Canada in forming her views: Regan, above n 175, at 12–13. This is worth noting because it is those experiences privileged people have that tend to form the basis of their views about the subject matter they are discussing.

185 For example Regan, above n 175.

is a heresy to admit in academic writing, but if a writer in this space is going to be intellectually honest I think they have to admit that possibility is a significant one.

So what can other Pākehā writers do? Well if my perspective is worth anything, I have a few suggestions. First, be willing to ask for help from Māori scholars and to ask a variety of them. Different people always have different ideas and perspectives, and the more people you talk to the more meaningful your engagement becomes. Secondly, read a lot and reflect on what you have read. As Graber puts it, enter an imagination space where you can better understand how iwi might experience the very personal grievances you are discussing and where you critique your own assumptions and ideas about the Treaty settlement process.[186] Thirdly, look forward to the fact that there is a lot to be learnt from engaging with different perspectives, and that we tend to receive our "deepest learning" from "unfamiliar territory".[187] There are hard limits to my knowledge in this area and this paper is not based on a fully-informed view, but I take some solace from the amount that I have learned from reading and reflecting on the views and experiences I have engaged with.

Finally, remember that engaging in this space is important. Jones argues convincingly that the goal of the Treaty relationship should be to create a dialogical constitutional conversation between Māori and Pākehā, one that has the Treaty at its centre.[188] If that conversation is to be meaningful, Pākehā have to be willing to respect Māori tikanga as being equal in legal force and importance to the common law.[189] If we can become a little "unsettled" in our perspective as Pākehā, then I think we are much more likely to write with a perspective that helps to meaningfully engage in the conversation Jones envisages.[190]

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186 David Graeber *Dead zones of the imagination: On violence, bureaucracy and interpretive labor* (2012) 2(2) HAU: Journal of Ethnographic Theory 105 at 117–119.

187 Regan, above n 175, at 18.

188 Jones, above n 2, at 715.

189 At 715–716. This is contrast to the status quo where Māori perspective has to fit within Pākehā understandings and frameworks.

190 Regan, above n 175, at 18.

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