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THE CROWN'S OVERLAPPING INTEREST POLICY AND ITS ROLE AS A FACILITATOR IN TREATY NEGOTIATIONS

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Abstract

This paper examines the Crown's overlapping interest policy and some related practices to Fisher and Ury's interest-based model with its role in facilitating consultation between aggrieved Iwi groups on overlapping interest issues and treaty settlement negotiations. The focus of the discussion is the overlapping interest policy, its mechanisms, interest groups' interactions with the policy and some challenges of the policy settings in Treaty settlement negotiations cycles. It takes an objective view of the challenges with overlapping interest issues and juxtaposes submissions from all parties to specific claims.

The paper discusses policy pitfalls repeatedly challenged by interest groups at the Waitangi Tribunal ("Tribunal") and the Crown's responses to established concerns with the policy. It discusses some key Tribunal cases to establish the concerns of interest groups with respect to the overlapping interest policy, the preferred approach through the lens of interest groups as portrayed by the Tribunal and the Crown's responses to the expectations of the Tikanga-based dispute resolution model.

The Crown's facilitative role in cross-interest discussions and the responses to Tribunal findings and recommendations is also discussed, highlighting the recently published updates to the overlapping interest policy. Additionally, the discussions cover how the changes could impact the outcome of Treaty settlements for interest groups and set a course for a more transparent ongoing Maori-Crown relationship.

The statements and opinions expressed in this article do not represent the Crown or its officials' perspective, opinion or position about treaty settlement negotiations or overlapping interests. Thoughts expressed here are reflective of the author's personal research and understanding of the problem.

Word length

The text of this paper (excluding the abstract, table of contents, footnotes and bibliography) comprises approximately 7513 words.

Subjects and Topics

Dispute Resolution in Treaty Settlements

Overlapping Interest Policy

Dispute Resolution - the Maori way

Interest-based negotiation model

Introduction

The New Zealand Treaty Settlement mechanism has been plagued for years by concerns over the Crown's approach to resolving historical claims, which has proven to generate new claims[1] rather than as "the true bridge" to steer the Crown's relationship with Te ao Māori towards sustainable reconciliation.[2] The 'bridge' concept underpins Te Arawhiti's purpose as the departmental agency responsible for enabling Māori- Crown partnerships[3] and transforming the Māori - Crown relationship from historical discontent to a true partnership.[4] 'Te Arawhiti' meaning 'the bridge' acts as the intermediary between Māori and the Crown, and the past and the future.[5] It also represents the steering of the Crown as a Treaty Partner across the bridge into Te Ao Māori.[6] The Crown's pursuit of settling historic breaches is the basis for future Maori-Crown relations,[7] hence, the recognition of grievances arising from historical wrongs is vital to creating lasting Treaty partnerships.

Treaty settlement negotiations are set out in the Crown policy to be based on the principles of good faith, just redress, fairness between claims, and transparency[8] between claimants. The Treaty Settlement framework documents reflect the Crown's default approach to overlapping interest issues is interest-based, after the fashion described in Fisher and Ury's book – Getting to Yes- Negotiating Agreements without Giving in.[9]

In the article "To what extent is the New Zealand Treaty of Waitangi settlement process "interest-based" negotiations?", Grant Morris challenged the Crown's claim of the adoption of an interest-based model as an inaccurate description of interest-based negotiation given all of its processes do not align with the process and stages outlined by Fisher and Ury.[10] This article examines the novelty of Treaty settlements with Maori, the fragility of relationships that necessitates flexibility in operational practices, and the justification that supports taking an extended view of the interest-based model to adapt creative resolutions for the unique overlapping interest disputes.

In the last decade, overlapping interest grievances have been a recurring theme in the Tribunal alongside breaches of the Crown. Several recommendations by the Tribunal repeatedly connected the Crown's failures to the overlapping interest policy framework, which is included

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[1] Waitangi Tribunal *Te Arawa Mandate Report: Te Wahanga Taurua* (Wai 1150, 2005) at 27.
[2] Office of the Treaty Settlements *Healing the past, building a future: A guide to Treaty of Waitangi Claims and Negotiations with the Crown* (June 2018, online ed) at 53.
[3] Te Kahui Whakatau Year-to-Date Progress Report 1 July 2021 – 31 march 2022 (Te Arawhiti- The Office of Maori Crown Relations, Quarterly report, March 2022) at 3.
[4] Te Arawhiti-Office of Maori Crown Relations "Our story-who we are and what we do" <https://tehononga-tearawhiti.justice.govt.nz/ko-wai-tatou/our-story>.
[5] Above n1
[6] Above n1
[7] Waitangi Tribunal *The Crown's Submission: The Hauraki Settlement Overlapping Claims Inquiry Report (*Wai 2840, 2020 n3.3.26) at 9.
[8] Te Arawhiti -Office of Maori Crown Relations "The Red Book" (2021) Overlapping Interest <https://www.govt.nz/browse/history-culture-and-heritage/treaty-settlements/the-red-book/overlapping-interests/the-crowns-understanding-of-customary-interests-and-associations/ >.
[9] Office of the Treaty Settlements *Healing the past, building a future: A guide to Treaty of Waitangi Claims and Negotiations with the Crown* (June 2018, online ed) at 3.
[10] Grant Hamilton Morris "To What Extent is the New Zealand Treaty of Waitangi Settlement Process "Interest-Based" Negotiation?" (2014) Volume 4 Issue No 17 at 4.

in a reference document for all stakeholders and Crown officials. The document is called the 'Red Book' Ka tika ā muri, ka tika ā mua — Healing the past, building a future. [11]

The Tribunal established that the Crown's reactions to interest groups are defined strictly within the confines of the policy, with little or no leeway to tailor options to suit a variety of Claimants, unique claims, Tikanga, history, hapū size, and common challenges peculiar to the various settling groups. The Tribunal went further to note that the scope of the policy is at best room only enough to cherry-pick from a series of redress options developed to address breaches of previous claimant groups.[12] This position sums up the perspectives of most settling groups that have at some point interacted with the Crown and lodged grievances with the Tribunal.

However, there are always two sides to negotiation and for the most part, acknowledgements made by the Crown in Tribunal submissions seem to be inappreciable in Tribunal reports.

The novelty of redresses is a distinctive feature of every negotiation, and most settlements do include "novel" redress options, tailored specifically to meet particular Iwi interests. Though redresses might be similar in a historical context, they are likely different in some form in character. This means the Crown has to be consistently creative in generating redress options that will meet the cultural aspirations of interest groups.

As Fisher and Ury acknowledged: "Invent options for mutual gains,"[13] of the joint interest of parties is an approach that is evolving in the Crown's dispute resolution practice. Creative problem-solving for the preservation of shared interests is now a more consistent feature of the Crown's operating model while precedents in past settlements form a body of knowledge of what's possible. As Grant Morris noted, "In a complex situation, creative inventing is an absolute necessity."[14]

In the Crown's closing submission in the Hauraki Overlapping Claims Inquiry,[15] the Crown acknowledged its processes are not flawless, 'nor does the Crown purport to adopt processes that will never lead to dissatisfaction. The Crown's duties derive from principles that guide its action and in particular, its interactions'. They are conditioned by the Crown's test of reasonableness, practicality, and good faith.[16] For instance, a reasonably informed decision by the Crown would take into account practical realities given there would be limits to what the Crown can offer as redress in certain areas, either based on what's available to offer or fairness to other Maori groups. These standards might not be popularly embraced among settling groups as standards to protect the Crown's independence in dealing with overlapping interest groups, but more importantly, standards to promote fairness across Maori groups and fewer breaches.

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[11] Office of the Treaty Settlements *Healing the past, building a future: A guide to Treaty of Waitangi Claims and Negotiations with the Crown* (June 2018, online ed) at 3.
[12] At 53.
[13] Roger Fisher and William Ury Getting to Yes – Negotiating Agreement Without Giving In (3rd ed, Penguin Group, 2011) at 58.
[14] Grant Hamilton Morris "To What Extent is the New Zealand Treaty of Waitangi Settlement Process "Interest-Based" Negotiation?" (2014) Volume 4 Issue No 17 at 4.
[15] Waitangi Tribunal *The Crown's Submission: The Hauraki Settlement Overlapping Claims Inquiry Report (*Wai 2840, 2020 n3.3.26) at 6.
[16] At 6.

The Overlapping Interest Policy

Following consistent recommendations by the Tribunal and engagement with National Iwi leaders, in the period between 2018 and 2020, the Crown initiated a review process to refine its overlapping interest policy. Before then, there had not been a review of the policy since it was first published in 1999[17]. The outcome of the review is an update of the overlapping interest section of the policy in the Red Book published in December 2021.

In the updated Red Book, overlapping (or shared) interests is described as 'where two or more groups assert customary interests or cultural or historical associations over an area or natural resource that is the subject of historical Treaty settlement negotiations.'[18] It extends the description to recognize overlapping interests can exist between a claimant group and other groups that:[19]

- are in Treaty settlement negotiations;
- have yet to enter negotiations; or
- have settled their historical claims.

Now, the above description of overlapping interest is a departure from the narrower view depicted in the old version of the overlapping interest policy in the Red Book. There, overlapping claims "exists where two or more claimant groups make claims over the same area of land that is subject to historical Treaty claims."[20] It went further to state that:[21]

> "...the Crown can only settle the claims of the group with which it is negotiating, not other groups with overlapping interests. These groups can negotiate their settlements with the Crown. Nor is it intended that the Crown will resolve the question of which claimant group has the predominant interest in a general area. That is a matter that can only be resolved by those groups themselves".

The new policy takes a broader view in recognition of groups on the fringes that have either not engaged with the Crown or fully settled to be engaged in discourses that may invariably affect their interests.

Matters Arising

There have been several opinions and arguments on overlapping interests in recent years. It has been argued that the previous overlapping interest approach was myopic and had a colonial lens over it, and as such resulted in several unresolved grievances and new breaches given the Crown would only negotiate within its own established policy parameters.[22] Some arguments are that new breaches result from ongoing settlements based on the Crown's poor understanding of Tikanga Maori, in that the facilitative approach of resolving overlapping

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[17] Te Arawhiti -Office of Maori Crown Relations "The Red Book" (2021) Overlapping Interest <https://www.govt.nz/browse/history-culture-and-heritage/treaty-settlements/the-red-book/overlapping-interests/the-crowns-understanding-of-customary-interests-and-associations/ >.
[18] Above at 53.
[19] At 53.
[20] Office of the Treaty Settlements *Healing the past, building a future: A guide to Treaty of Waitangi Claims and Negotiations with the Crown* (June 2018, online ed) at 53.
[21] At 53.
[22] Briar Prat and Dr Carwyn "Overlapping Claims and Crown Engagement – will it lead to sustainable reconciliation?" (2018) Jones Maori Law Review.

interest disputes conflicts with the 'Maori- way' and values.[23] These arguments possibly stem from Tribunal recommendations. The Tribunal hinted at this problem in the Te Arawa Settlement Process when it noted that "it is not consistent with the Treaty spirit that the resolution of an unfair situation for one party creates an unfair situation for another".[24]

Another problem relates to the Crown's imposition of 'large natural groupings'[25]. Tribunal findings have emphasized the flaws of the policy, the Crown's processes and practices when negotiating in collective and individual settlements and how the Crown's policies sidelines negotiating parties – an approach quite contrary to a Tikanga-based negotiation model in which Maori would more gladly participate in. [26] The risk of marginalizing smaller Iwi groups and hapū becomes pronounced with the Crown's 'large natural grouping' policy and the approach appears inconsistent with the interest-based model by Fisher and Ury's standards. As noted by Fisher and Ury, "everyone wants to participate in decisions that affect them, fewer and fewer people will accept decisions dictated by someone else".[27] Some of the deficiencies in the policy were further highlighted in The Hauraki Settlement Overlapping Claims Inquiry Report discussed later in this paper.

The Māori Approach – Tikanga-based conflict resolution mechanism

'Tika' means 'to be right' and thus Tikanga Maori focuses on the correct way of doing something.[28] It's important to note that ideas and practices relating to Tikanga Maori differ from one tribal region to another.[29] While there are some constants throughout the land, the details of performance and explanations are different. As such, there is always a need to refer to the Tikanga of the local people to engage correctly.[30]

To streamline the Tikanga-based negotiation approach in the context of treaty settlements, the approach would seek to "bind and lash interest groups together" so that each side accepts a responsibility to uphold the agreement.[31] It seeks to consult widely irrespective of interests, resolve conflict, and repair relationships. It is a tool that could indeed enhance the processes and outcomes the Crown seeks to achieve with the overlapping interest policy.

For Māori to participate properly, they must carry Tikanga with them[32] and given that most overlapping issues are deeply rooted in cultural rights and Whakapapa cross-interest, it seems counter-logical to have an 'all western' mechanism to resolve such grievances.

The Tribunal has noted in several instances that the Crown's policy has been known to prioritise speed and negotiated outcomes, equating them with sustainable outcomes, rather than consensus group interests and due process.[33] It states further that the scope of the Crown's

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[23] James Hudson "Tikanga Maori and the Mediation Process" (LLM Research Paper, Victoria University of Wellington, 1996) at 46.
[24] Waitangi Tribunal *The Arawa Settlement Process Reports* (Wai 1353, 2007) at 27.
[25] At 27.
[26] Waitangi Tribunal *The Hauraki Settlement Overlapping Claims Inquiry Report (*Wai 2840, 2020) at 15.
[27]Roger Fisher and William Ury Getting to Yes – Negotiating Agreement Without Giving In (3rd ed, Penguin Group, 2011) at xxvii.
[28] Hirini Moko Mead Tikanga Maori – Living by Maori Values, (1st ed, Huia Publishers, 2003) at 6 -7
[29] At 7.
[30] At 8.
[31] At 167.
[32] Ngati Whatua Orakei v. Attorney-General [2018] NZSC 84, [2019] 1 NZLR [SC] at 116.
[33] Waitangi Tribunal *The Hauraki Settlement Overlapping Claims Inquiry Report (*Wai 2840, 2020) at 85.

overlapping interest policy is limited to the extent to which the rights of interest groups correspond to the redress offered by the Crown. Settling groups have argued that the Crown's approach fails to recognize that the rights of one interest group may not exist in isolation, but rather are interconnected according to the overarching principle of reciprocity.[34]

As a result, the Crown's seeming inaction to act on Tribunal findings and recommendations regarding overlapping interest claims has continued to contribute to litigations against the Crown and caused significant delays in negotiations. Some of the Crown's reluctance to adopt proposals of this nature have been attributed to the Crown's failure to simply embrace the Tikanga-based model as an alternate cultural dispute resolution instrument, rather than a model seeking to replace the Crown's existing policy and systems in its entirety. A consequence of the Crown's neglect of the Tikanga element has been directly linked to a breakdown in Maori social structures as noted in the Tamaki Makaurau Settlement Process Report in 2007.[35] It's worth noting at this point, however, that in current practice, Tikanga is so woven into overlapping interest negotiation discussions and embraced by the Crown officials to the point that it would be difficult to separate what part of the process is the Crowns' or Tikanga. It seems the policy has only taken a while in documentation to catch up with best practices.

Based on the review of the Crown's submissions in the Hauraki Settlement Overlapping Inquiry Report,[36] some of the overlapping groups implied that a compulsory "Tikanga process" will guarantee that Maori groups will reach agreements that clear a path to settlement. While agreements might result from the process in some cases, they will not in some cases and settling groups may have to fall back on the Crown's processes to resolve the disputes in such circumstances. Taking a cue from previous settlements, in more cases, a resolution would not be reached because 'Tikanga processes and practices' vary from Iwi to Iwi and Hapu to Hapu, so the first hurdle is bringing all overlapping groups/Iwi to the point of agreeing on which Hapu/Iwi's Tikanga practice would be acceptable to all settling groups involved; not because one Tikanga practice is superior to the other, but more to set a fair standard for the dispute resolution process where every participant would have had a fair chance of representation and a process they can own.

It is worth noting that, in practice, the Crown emphatically encourages overlapping groups to engage Tikanga-based approaches that are suitable to them and endeavour to reach an agreement between themselves. This is, by all means, a win-win for both the Crown and parties with overlapping interests in such cases because the Crown's role in facilitating discussions would have been successful, and overlapping groups would have desired outcomes using an approach that supports deeply held cultural beliefs and practices. Parties successfully engaging in this way would more likely lead to fewer post-settlement grievances.

The Crown has stated that "its policy or processes are not prescriptive"[37] on the use of the Tikanga approach, it is for overlapping groups to determine what is tika between themselves.

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[34] Edward Taihakurei Durie "Custom Law" (Research Paper for the Treaty of Waitangi Research Unit, Victoria University of Wellington 1994) at 84.
[35] Waitangi Tribunal *The Tamaki Makaurau Settlement Process Report* (Wai 1362, 2007) at 6.
[36] Waitangi Tribunal *The Crown's Submission: The Hauraki Settlement Overlapping Claims Inquiry Report (*Wai 2840, 2020 n3.3.26) at 10.
[37] At 10.

Separating the People from the Problem

One major characteristic of the Tikanga-based approach seems to be related to Fisher and Ury's principle of separating the people from the problem; where it notes that:[38]

> "Most negotiations take place in the context of an ongoing relationship where it is more important to carry on each negotiation in a way that will help rather than hinder future relations and negotiations."

Based on reviewing some overlapping interest inquiry reports by the Tribunal, it can be concluded that Claimants would rather come together to work side by side to attack the problem instead of each other, as prescribed by Fisher and Ury[39].

However, the Tribunal finds that the Crown's policy and redress responses seem to frustrate Tikanga-based practices and ultimately lead to interest groups turning against each other.[40] The Tribunal did not substantiate this claim with examples to explain how the Crown's facilitative role frustrates Iwi-to-Iwi engagement in real terms.

In the Crown's submission in the Hauraki Inquiry, the Crown posed the question of whether requiring Tikanga processes in Iwi-to-Iwi engagement as a pre-condition to offering any redress would be an equitable requirement for all overlapping groups.[41] The Crown considers that mandating Tikanga processes as a standard pre-condition appears undemocratic, more so in a 'woke' generation. This also raises the question of what Tikanga should be adopted across the board as the standard practice given Tikanga varies from Hapu to Hapu – Iwi to Iwi, how will the Crown measure the effectiveness and appropriateness of the Tikanga practice, not essentially for the benefit of the Crown but as a custodian of all redress? What are the yardsticks that determine the relevance of such a Tikanga approach/process to other participating overlapping groups who come with their variations of tika? How does the Crown balance the interests of overlapping groups that choose not to engage in the Tikanga process because they don't see how the outcomes can be beneficial to them? How does the Crown assess fair outcomes in Tikanga-based processes both in the context of how it would impact redress offerings and equity for already settled Iwi groups? Will it be considered treaty-compliant conduct if the Crown mandates a group that chooses not to engage in a Tikanga-based process?

The Crown cannot possibly answer these questions as a facilitating partner. It would rest on Iwi groups to do so. We can pre-empt that answers to these questions will vary to the extent of the thousands of Hapu Tikanga practices and getting a consensus on tika would be near impossible.

A few cases that triggered the recent changes in the overlapping interest claims policy will be discussed to establish the problem and the need for policy change. We will also consider whether the policy changes reflect previous Tribunal recommendations and address the 'colonial mechanisms' that often conflict with Tikanga-based negotiation.

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[38] Roger Fisher and William Ury Getting to Yes – Negotiating Agreement Without Giving In (3rd ed, Penguin Group, 2011) at 22.
[39] At 12.
[40] Waitangi Tribunal *The Arawa Settlement Process Reports* (Wai 1353, 2007) at 65.
[41] Waitangi Tribunal *The Crown's Submission: The Hauraki Settlement Overlapping Claims Inquiry Report (*Wai 2840, 2020 n3.3.26) at 10.

Highlights of Tribunal's recommendations on Overlapping Interest Policy

The Hauraki Settlement Overlapping Claims

In December 2019, the central grievance against the Crown in The Hauraki Settlement Overlapping Claims[42] was that the Crown had incorrectly allocated redress to Hauraki Iwi and the contested redress would undermine existing individual settlements involving five other claimants and significantly affect the mana whenua and mana Moana rights of those claimants.[43]

As such, it was claimed that the Crown had breached the Treaty principles through its policies, processes, and conduct. In its defence, the Crown argued that it made reasonably informed decisions based on its criteria, and its decisions and actions complied with its duties – notwithstanding the challenges it faced.[44] The Crown Counsel further conceded that the Crown had made mistakes throughout the negotiations[45].

One of the Tribunal's findings was that the Crown did not support a Tikanga-based approach to overlapping redress offers which caused the breakdown in negotiation.[46] For example, Ngai Te Rangi, one of the five Iwi groups contesting redress with Hauraki noted that despite their repeated efforts to resolve its redress disagreements with Hauraki through a familiar approach that would allow discussion on whakapapa, history and relative interest claimed, the Crown failed to enable a space for Tikanga to operate as an instrument for dispute resolution simply because it was not consistent with its policy mechanisms.[47]

The Tribunal echoed the comments in Te Arawa Settlement Process Reports that:[48]

> "resolving overlapping interests through a customary process of decision-making by consensus would have taken longer than the process used by the Crown, however, it would have achieved a more enduring result: a solution that the whole tribe, sub-tribe, or community will own as theirs".[49]

The Tribunal established here that the Tikanga process is a key element that is lacking in the Crown's overlapping interest policy and mechanism and that a failure of the Crown to embrace a Tikanga-based approach directly contributes to the deterioration of relationships between claimant groups and inadvertently undermines the Crown's treaty relationship with claimant groups. The Tamaki Makarau report also drew a clear connection between the Tikanga-based approach and the preservation of relationships.[50] As noted earlier, the Crown does not prescribe the kind of Tikanga process that should apply in overlapping interest discussions, it is a decision for the overlapping interest groups to make between themselves.

The real question here for the Tribunal should be what the Tribunal's yardstick for measuring when or whether a "Tikanga process" has occurred in a negotiation, and whether the process was appropriate and adequate for all overlapping groups. If new grievances emanate from a

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[42] Waitangi Tribunal *The Hauraki Settlement Overlapping Claims Inquiry Report (*Wai 2840, 2020) at 19.
[43] At 19.
[44] At 23.
[45] At 23.
[46] At 35.
[47] At 36.
[48] Waitangi Tribunal *The Arawa Settlement Process Reports* (Wai 1353, 2007) at 65.
[49] At 35.
[50] Waitangi Tribunal *Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007) at 101.

Tikanga based process, will it be fixed by another Tikanga-based resolution mechanism and continue to be subject to that process until it's resolved?

As mentioned earlier, the Crown does not posit that its processes are flawless. The Crown's acknowledgement of the overlapping interest policy flaws came through in the evidence given by the Chief Executive of Te Arawhiti, Lilian Anderson, when she emphasised that the policies set out in the Red Book were merely high-level guides of 'core policy ideals' which gave Iwi an outline of the negotiation process. However, it was not intended to communicate the 'full content of the Crown's policies and procedures.'[51]

In bringing balance to the Crown's approach, Ms Anderson noted that claimant groups are encouraged to lead discussions with other groups. This gives way for the Tikanga model to apply and be appropriately determined by the groups themselves, however, where discussions break down, the Crown will often propose facilitation.[52]

She also noted that the Crown was committed to continuous improvement in its overlapping interest approach by working with Iwi leaders to co-formulate an approach for resolving overlapping issues that would incorporate Tikanga māori. Those changes were targeted at:[53]

- recognising interests of both settled and non-settled groups in redress development;
- early engagement with overlapping groups; and
- support for Iwi-led discussions to address overlapping interests as a way to embrace the Tikanka-based approach

The changes published by Te Arawhiti in December 2021 in its Red Book reflect the Crown's transition in response to its stakeholders and several recommendations by the Tribunal. While giving evidence, the Crown through Ms Anderson admitted in the Hauraki Settlement Overlapping Claims Inquiry that there had been no changes to the wordings of the policy around overlapping interest since it was first published.[54]

Contrary to the Claims, the Crown argued that it did a lot to inform itself of its respective rights and interests, beyond understanding relevant reports of the Tribunal, it also interrogated the underlying records of inquiry, commissioned research, and solicited information from the claimants and engaged genuinely. Claimants argued the Crown's effort fell short.[55] On the test scale of reasonableness, the Crown believed it took reasonable steps to partner with the Claimants, acted in good faith and took reasonable steps to make informed decisions on matters affecting Maori interests. But again, the test of reasonableness is subjective – there is no doubt this will look different from the viewpoint of the Crown and Maori.

The Tribunal found in the Hauraki Inquiry that the Crown's overlapping interest policy was ' vague, unhelpful and inaccurate as a statement of the Crown policy and practice to inform Maori.[56] The Tribunal recommended that the Crown commits to facilitating consultation between aggrieved groups, information sharing and Tikanga-based resolution processes.[57]

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[51] Waitangi Tribunal *The Hauraki Settlement Overlapping Claims Inquiry Report (*Wai 2840, 2020) at 42.
[52] At 44.
[53] At 45.
[54] At 47.
[55] Waitangi Tribunal *The Crown's Submission: The Hauraki Settlement Overlapping Claims Inquiry Report (*Wai 2840, 2020 n3.3.26) at 7.
[56] Waitangi Tribunal *The Hauraki Settlement Overlapping Claims Inquiry Report (*Wai 2840, 2020) at 49.
[57] At 136.

In looking ahead now in light of the changes published in December 2021, the nature of future cases before the Tribunal will test the agility of the policy to the overlapping interest issues, and hopefully, the Tribunal does more to bring to fore what the Crown does differently under the updated policy to drive a more sustainable agreement between parties.

Te Arawa Settlement Process

The Te Arawa Settlement Tribunal[58] represents one of the largest tribes in the country with a population estimated between 36,000 and 40,000 people.[59] In 2003, approximately one half of the Nga Kaihautu o Te Arawa (Te Arawa) engaged in treaty settlement negotiation with the Crown. The other half of Te Arawa chose to pursue a separate path towards settlement but the Crown refused to engage with them in negotiation.[60] This was largely due to their opposition to the 'large natural groupings' policy and application of the overlapping claims policy. The group also had concerns about the Crown's refusal to act on the Tribunal's advice to 'engage in contemporaneous negotiations'[61] with the groups.

In its findings, the Tribunal noted that the essence of the Treaty partnership is:[62]

> "the guarantee to Maori of the rights to exercise tino rangatiratanga (right to rule over themselves – self-determination in accordance with Maori customs and cultural preferences) overall their taonga, in exchange for the Crown's right to exercise kāwanatanga".

In the context of the exchange, each party is then constrained by each other's rights, and thereby committed to each other in partnership.[63]

The Tribunal concluded that the Crown:[64]

- "failed to protect the customary interests of overlapping groups in the cultural sites offered to the Te Arawa; and
- Crown's processes for consulting with overlapping groups were inadequate and failed to recognise and preserve the interests of affected overlapping groups over the cultural redress sites offered to Te Arawa."

The report referenced an attempt by the Crown to review the overlapping claims policy in 2005 following the Ngati Awa Settlement Cross-Claims Report and Ngati Tuwharetoa ki Kawerau Settlement Cross-claim Reports. [65] It was unclear if the review progressed beyond the consultation process at the time. It was noted that one of the reasons the review might not have progressed was that the Crown didn't want its large natural groupings policy to be undermined with precedence in the Te Arawa negotiation[66]. Based on the CE of Te Arawhiti's evidence in the Hauraki Settlement Process Report in 2020 though, it was unlikely there was any review of the policy before the December 2021 update.

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[58] Waitangi Tribunal *The Arawa Settlement Process Reports* (Wai 1353, 2007); The Waitangi Tribunal *The Te Arawa Mandate Report:Te Whahanga Taurua* (Wai 1150, 2005) at 112.
[59] See *The Arawa Settlement Process Reports* (Wai 1353, 2007) at 3.
[60] At 7.
[61] At 4.
[62] At 20-21.
[63] Waitangi Tribunal *Tauranga Moana, 1886-2006: Report on the Post- Raupatu Claims*, (2 Volumes 2010 Volume 1) at 120.
[64] See *The Arawa Settlement Process Reports* (Wai 1353, 2007) at 265.
[65] At 24.
[66] At 25.

While still discussing the Te Arawa claims, the Tāmaki Makaurau Settlement Process also reports breaches by the Crown's approach to overlapping interest claims. In 2007, the Crown had engaged with Ngāti Whātua o Ōrākei to achieve full settlement of treaty claims while the interest of other Tangata whenua groups in Tāmaki Makaurau (Auckland) was affected by the agreement in principle reached between the Crown and Ngāti Whātua o Ōrākei. The Crown was found to be "denying reality" by providing exclusive redress to Ngāti Whātua o Ōrākei and failing to weigh the "dense layers of interest" of all Tangata whenua groups.[67]

The Tribunal concluded that the Crown's overlapping claims policy, whereby the interests of only one claimant group were recognised, was gravely flawed and contrary to Tikanga Māori.[68]

The treaty breaches proposed in the instances above were valid and the grievances cannot be minimised by the Crown's acknowledgement of the mistakes made or even the remedies provided subsequently. However, to address the core issues highlighted in these two cases, first on the Tikanga approach point, the Tribunal must recognise that if the Tikanga-based approach would be sustainable, it needs to recognise a third party in the group as the Crown. No doubt, the Crown can simply identify a pool of redress options for Iwi to divide between themselves through a Tikanga process, but for the redresses to be enduring and lead to a sustainable settlement for all affected groups, Iwi groups cannot dispense with the partnership of the Crown i.e Maori – Crown relationship. If the Crown is regarded as a treaty partner in overlapping interest discourses, then the Crown cannot simply be a spectator in the Tikanga processes, it needs to be drawn in as a true treaty partner.[69] The structure of what a purely Tikanga-based process could look like is unclear at this stage, but if the Crown were to exercise its role in protecting Treaty partners, the assumption is that some of the tests to assess the process could be to check if the process would remain stable, fair, equitable, consistent, and enduring for every tribe or sub-tribe, Hapu or Iwi that chooses to engage in this manner. This opinion does not represent the Crown's position and is more reflective of personal research and understanding of the problem.

Some Updates to overlapping Interest Policy

The 2021 policy is a refinement of the overlapping interest policy section of the Red Book in response to the Crown's participation in Tribunal inquiries and consideration of the findings and recommendations relevant to overlapping interests.

a. Scope of overlapping interest and Assessment of Customary Associations

One of the changes in the updated policy is the Crown's stated approach to engagement and its role in facilitating overlapping interest discussions among groups. The approach in the old policy was that the Crown could only settle the claims of the group with which it is negotiating, not other groups with overlapping interests. The 2021 review acknowledges overlapping interests can exist between claimant groups and other groups that have yet to enter negotiations with the Crown, are in treaty settlement negotiations or have already settled their historical

[67] Waitangi Tribunal, *The Tamaki Makaurau Settlement Process Report* (WAI 1362, 2007) at 47-48.
[68] At 108.
[69] Waitangi Tribunal *The Crown's Submission: The Hauraki Settlement Overlapping Claims Inquiry Report (*Wai 2840, 2020 n3.3.26) at 7.

claims. In defining the Crown's role in an overlapping interest situation, it notes in the Red Book that: [70]

> "…Crown does not consider that it can or should adjudicate whether a group has a predominant interest or any exclusive status in an area. The Crown's role is to support groups to address these issues themselves. The Crown's approach to redress will be informed by the dialogue between groups on these issues."

It's a subtly change in direction for the Crown on how it deals with groups on the fringes that are not in negotiation particularly, but would be affected by the redress offered to Claimant groups. Given the Crown is not bound by the recommendations of the Tribunal, making these changes in consultation with Iwi National leaders, is a step in the right direction to show the Crown's commitment to improving Claimant's experiences and ultimately, a more durable outcome. It is also a pointer to the Crown's commitment to adapt as things evolve and tailor redresses to aggrieved groups by way of exclusive and non-exclusive cultural redresses. Referencing the Tribunal's advice to the Crown in Ngati Tuwharetoa ki Kawerau Settlement, it states – the "Crown's role is one of facilitation and consultation rather than arbitration". These considerations fed into the recently published policy changes, however, before documenting these changes publicly, the Crown officials have been making practical efforts to adjust internal processes to accommodate the recommendations, thereby avoiding a repeat of past mistakes in ongoing negotiations.

b. The Large Natural Groupings policy

The update in this aspect is not significant but most noticeable in the nuances of the operational structure of engagements at the hapu-level in the updated policy. The Crown subtly emphasised that the most viable way for the Crown to continue to engage in Treaty settlements is through the large natural group. In an objective sense, it is possibly the only expedient way for the Crown to continue engaging given the diversity of Iwi groups, tribes and sub-tribes there are to engage. For instance, one Iwi tribe could consist of 110 hapu groups. If the Crown were to engage at the hapu-level in Treaty settlements (which would likely reduce the risk or recurrence of new breaches), the core Crown agencies involved in Treaty settlements (i.e., Te Arawhiti, Department of Conservation, Toitu Whenua Land and Information New Zealand, Waka Kotahi, Ministry of Education, Ministry of Finance, Te Puni Kokiri – Te Tai Hauauru etc) will be overwhelmed on an on-going basis with the administrative work that goes into Treaty settlements and meeting the obligation of offering equivalent redress to all hapu. The scale of that work seems tedious and illogical, and the Treaty settlement budget will likely be swallowed up by the administrative cost of recruiting and training staff to discharge those duties. The scale of human resources and budgetary allowance to meet such demands at the hapu-level cannot even be estimated at this stage.

In consideration of some of the advice from the Tribunal, the updated policy referenced a basis for the change as stated in The Ngati Awa Raupatu Report 1999:[71]

> "…the essence of Maori existence was founded not upon political boundaries, which serve to divide, but upon whakapapa or genealogical ties, which serve to unite or bind. The principle was

[70] Te Arawhiti -Office of Maori Crown Relations "The Red Book" (2021) Overlapping Interest n 14 <https://www.govt.nz/browse/history-culture-and-heritage/treaty-settlements/the-red-book/overlapping-interests/the-crowns-understanding-of-customary-interests-and-associations/ >

[71] Waitangi Tribunal *The Ngati Awa Raupatu Report* (Wai 46, 1999) at 143.

> not that of exclusivity but that of associations. Indeed, the formulation of dividing lines was usually a matter of last resort."

Though the Crown's preference is that hapu-level grievances would be resolved internally within the Iwi circle, the changes acknowledge that there would be some circumstances where there are no mandated representatives for a large natural group that sufficiently meet the Crown's requirement of natural groups. In such cases, the Crown will adapt ways to engage with those existing representatives or hapu bodies, and Waitangi Tribunal claimants about their overlapping interest claim regardless.[72]

c. Engagement and Information Sharing

As emphasised by the Tribunal in the Hauraki Overlapping Interest Claims Inquiry Report, for the Crown to properly inform itself of the respective rights and interests of all groups in an area before making an offer to a claimant group, share information and engage early with overlapping groups,[73] the Crown has committed to ensuring a deed of settlement is not initialled until the Crown is satisfied that all overlapping interests have been addressed.

Apart from the definition of claimants in the Mandate phase of the Settlement process, the policy also now emphasises another element - identifying overlapping groups that are known to have interests in the area of interest. The Crown will continue to do this by publishing information on the claimant group and the historical claims that are intended to be settled and its area of interest. The Crown will then invite submissions and through this process, allow neighbouring groups to express interests in the claimant's group area of interest.

Summary of findings

One of the ways the principles of the Treaty are to be given effect is for the Crown to recognise and accept a moral obligation to resolve historical treaty breaches according to principles set out in the Treaty of Waitangi itself.[74] However, when the Crown fails to recognise, promote, and facilitate Tikanga-based tools in dispute resolution, the Crown end up in a cycle of repeated breaches of its principles of good faith, partnership and active protection of her Treaty partners. Given the several historical grievances that have consistently echoed the same recommendations from the Tribunal, it took too long for the Crown to make practical changes in its processes.

Noting that the Crown's actions are supposedly measured by the yardsticks set out in the Red Book, it only means the Crown's treaty performance levels are assessed against standards set by the Crown itself. This raises the issue of power imbalance where the Crown is the judge of its case.

The Tribunal reinforced the expectation of the Crown's role in the Tamaki Makaurau Settlement process where it referenced comments in the Ngati Tuwharetoa ki Kawerau Settlement Report; that the Crown should hesitate in making quick judgements as an 'arbiter'

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[72] Te Arawhiti -Office of Maori Crown Relations "The Red Book" (2021) Overlapping Interest n14<https://www.govt.nz/browse/history-culture-and-heritage/treaty-settlements/the-red-book/overlapping-interests/the-crowns-understanding-of-customary-interests-and-associations/ >.

[73] Waitangi Tribunal *The Crown's Submission: The Hauraki Settlement Overlapping Claims Inquiry Report (*Wai 2840, 2020 n3.3.26) at 7.

[74] Office of the Treaty Settlements *Healing the past, building a future: A guide to Treaty of Waitangi Claims and Negotiations with the Crown* (June 2018, online ed) at 6.

of whether an objection to redress from a group was valid or not, particularly in cases of cultural redress involving tribal mana and tapu:[75]

> "In the first instance at least, the Crown's role is one of facilitation and consultation rather than arbitration. Only after conciliatory measures [such as facilitated hui or mediation] have been honestly tried and failed, should the Crown feel justified in standing back and simply making decisions on the merits of cross-claimants' objections."

For the Crown to successfully engage with Iwi claimants in a way that recognises tino rangatiratanga, the Crown must 'be able to identify and understand the customs and cultural preferences of those communities.'[76] The Tribunal highlighted a direction for the Crown in its report that, - What this requires is for the Crown to understand, respect, and engage with the Tikanga of the various Iwi and Hapu it works with. The Tribunal also noted that the understanding and recognition of the Tikanga of various Iwi and Hapu forms an important obligation for the Crown to cultivate the living partnership as a treaty partner.[77] In giving effect to the Tikanga-based approach, the Crown must enable processes to be determined by overlapping interest groups themselves, and the preservation of tribal values and relationships is prioritised.

While the Crown focuses on closing a deal with the group it's engaging with, the tendency to worsen situations within tribes with already fragile relationships is heightened. Taking an objective view of some cases that have ended up at Tribunal hearings as 'breaches' by the Crown, it is noted that some cases are layered inter-tribal differences that have gone unresolved for several years. Though these groups often boundary each other, they have found ways to live amicably without triggering explosive differences among each other. In the event any of these groups then choose to engage with the Crown to settle historical differences, the Crown's action would often be seen to provoke the unresolved differences, sparking reactions that end up at the Tribunal. Without exonerating the Crown in all cases, the relationships between tribes were like ticking time bombs waiting to be triggered by a third party, in this case, the Crown.

In many cases like the Te Arawa tribe, the Crown's actions could deteriorate inter-tribal relations. Rather than take a passive position when its actions had led to tribal fallout like this, the Crown must attempt to quickly facilitate reconciliation where possible to minimise the collateral damage of tribal relations that will be turned out at the end of every settlement.

The Crown must remain independent and consistent in its role as a facilitator in overlapping interest conflicts as noted by the Tribunal, "the Crown must exercise its role as an "honest broker"[78] to facilitate reconciliation among conflicting groups.

Given how entrenched Maori tribes are in Tikanga and how this feeds into their social structure, there have been recommendations for the Crown to recognise the Tikanga-based approach as an equivalent dispute resolution system. For instance, R.E. Morar[79] in her article argued that the failure of the Crown to recognise the Tikanga approach as an equivalent legal system will

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[75] Waitangi Tribunal *Ngati Tuwharetoa ti Kawerau Settlement Cross-Claim Report* (Wai 996, 2003) at 54-67.
[76] At 20-21.
[77] At 22.
[78] Waitangi Tribunal *The Ngati Awa Settlement Cross-Claims Report* (Wai 958, 2002) at 88.
[79] Rhianna Eve Morar "Kia Whakatomuri Te Haere Whakamua: Implementing Tikanga Maori as the Jurisdictional Framework for Overlapping Claims Disputes" (Submitted for the LLB(Hons) degree, Faculty of Law, Victoria University of Wellington 2020) at 15.

continue to leave parties with a sense of injustice. Though Tikanga Maori has been given recognition as forming part of the values of the common law, it is only still interpreted in so far as it is in conformity to the underlying values of the 'Western' common law systems.[80] In other words, the validity of Tikanga processes must fit within the legal framework of the common law system for it to be logical or reasonable.

In agreement with Morar's position, the reality is that, as long as Tikanga Maori is interpreted within the common law context, the values of Tikanga will continue to be undermined. The two concepts are born out of the culture of 'a people' with different outlooks and approaches to fairness and equity, and so will their lenses of assessing justice. Using the common law framework as a baseline for Tikanga based dispute resolution is simply emphasising the superiority of the common law as 'the standard'. Nothing in the Tikanga model would likely fit those standards, so in such a case, Tikanga would only be set up for failure. Amokura Kawharu rightly argued that "alternative dispute resolution processes allow Tikanga to apply in a way that is not likely to happen in the courts – where adversarial court systems enable the breakdown of relationships". [81]

Conclusion

The baseline of the Tikanga-based approach is allowing the diversity of interests of settling groups to define the resolution of those conflicts rather than the Crown's one-size-fits-all model. Though the policy aims to empower Maori to implement their processes for resolving disputes, it does not require those interests to be Tikanga-based, nor does it "require the Crown to actively support Tikanga-based processes".[82] While this seems to be fair reasoning, the Crown's policy approach seems more positional than interest-based as Grant Morris[83] argued and as Fisher and Ury noted, "interests define the problem"[84], not the other way round. The policy in all cases appears to pre-determine the problem based on precedence.

A characteristic of the Tikanga-based negotiation approach is its desire for adequate compensation and equivalence, not a revenge for past breaches.[85] So for Maori, the emphasis on the process and how the resolution is achieved sits at the core of Tikanga. For Maori, the process feeds into how the redress is obtained, how involved parties are in the decision making, and how secure the relationship that is birthed out of that process will be. Like Igor Ryzov noted in his book, – The Kremlin School of Negotiation:[86]

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[80] Jacinta Ruru "The failing modern jurisprudence of the Treaty of Waitangi" in Carwyn Jones and Mark Hickford (eds) Indigenous Peoples and the State: International Perspectives on the Treaty of Waitangi (Routledge, New York, 2019) 111 at 118-122.

[81] Amokura Kawharu *Arbitration of Treaty of Waitangi Settlement Cross-Claim Disputes* (29 PLR 295, 2018) at 301-302.

[82] Waitangi Tribunal *The Hauraki Settlement Overlapping Claims Inquiry Report (*Wai 2840, 2020) at 86-87.

[83] Grant Hamilton Morris "To What Extent is the New Zealand Treaty of Waitangi Settlement Process "Interest-Based" Negotiation?" (2014) Volume 4 Issue No 17 at 4

[84] Roger Fisher and William Ury Getting to Yes – Negotiating Agreement Without Giving In (3rd ed, Penguin Group, 2011) at 42.

[85] Hirini Moko Mead Tikanga Maori – Living by Maori Values, (1st ed, Huia Publishers, 2003) at 168

[86] Igor Ryzov The Kremlin School of Negotiation (Translated by Alex Fleming, 1st ed, Canongate Books Ltd, Britain, 2019) at 8.

> "Negotiations aren't the final round in a bout to determine winner and loser; they are a **process** – at times a very long one. This is why from the start you need to rid your minds of any thoughts of negotiations as just another round in a duel. Negotiations should only ever be viewed as a process."

Tribunal findings established that the Crown's approach to overlapping claims is conducted in relative isolation without the perspective of how overlapping groups' interests intersect and how redress offered to one party might affect other groups' interests.

The Hauraki Settlement Overlapping Claims Inquiry Report emphasized how Tikanga can be used to assist the Crown in upholding its duty to avoid creating fresh grievances. The Tribunal advised that adopting a values-based approach is likely to improve the substance of the decision, in that "a satisfactory outcome for all groups is even more likely". This requires the Crown to move away from its one-size-fits-all approach, by embracing a tailored process designed and implemented in terms of parties' values, relationships, and circumstances. The implementation of Tikanga as a policy framework for resolving overlapping claims will provide an opportunity for the Crown to empower parties to transform its relationships with Maori "using traditional practices, customs, and values to resolve issues of tribal significance.[87]

As with every negotiation, It would be impossible to please all parties, so admitting this early in the process might ease some disappointment. Adopting Tikanga won't necessarily mean there will be fewer grievances or breaches registered against the Crown at the Tribunal or reduced litigations in the courts overall, but it would mean that the Crown acted on the advice, shifted position, and kept the goal of mending the Maori-Crown relationship at the heart of Treaty settlements.

Finally, there are two sides to a negotiation, and so are the obligations – while the Tribunal reports highlight the Crown's several failings, Iwi and hapu are not without failings in the context of Treaty settlements too. The obligation of good faith that is at the core of every engagement and Treaty settlement negotiation goes both ways. The obligation to demonstrate true treaty partnership goes both ways.

We cannot mask the wrongs done towards the Crown under the veil of power imbalance. While the Crown might be in a vantage position, 'the Crown' is represented by people first, and mostly people who are driven by the desire to deliver on the aspirations of Iwi at all cost, genuinely sold out to making right the past wrongs. As Fisher and Ury noted, "Negotiators are people first".[88] They went further to say: [89]

> "A basic fact about negotiation, ... is that you are dealing not with abstract representatives of the 'other side', but with human beings. They have emotions, deeply held values, and different backgrounds and viewpoints; and they are unpredictable. They are prone to cognitive biases, partisan perceptions, blind spots, and leaps of illogic. So are we.
>
> ...A working relationship where trust, understanding, respect, and friendship are built up over time can make each new negotiation smoother and more efficient. On the other hand, misunderstandings can reinforce prejudice and lead to reactions that produce counterreactions in a vicious circle; rational exploration of possible solutions becomes impossible and negotiation fails.

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[87] Waitangi Tribunal *The Hauraki Settlement Overlapping Claims Inquiry Report (*Wai 2840, 2020) at 86 -91.
[88] Roger Fisher and William Ury Getting to Yes – Negotiating Agreement Without Giving In (3rd ed, Penguin Group, 2011) at 20.
[89] At 21.

> ...Failing to deal with the 'other side'sensitively as human beings prone to human reactions can be disastrous for a negotiation."

Apart from ensuring negotiations are interest-based, all overlapping groups and the Crown have an obligation towards each other to pay attention to the people problem too. A Crown Negotiator once shared his most valued lesson from twenty-five years of negotiating Maori interests, to be that when you are on a negotiating table with Maori, "take off your Crown hat and listen beyond what they (Maori) are saying or the arrogance that accompanies what's being said. Listen to hear the unsaid, that is where their interests lie. Go all the way or offer to meet halfway. Often, you would find that it will cost the Crown nothing."

The issue of overlapping interest in New Zealand is enigmatic and so should be the methods adopted to resolve them. From the recent policy updates, the Crown has taken a first step towards applying the Tribunal's advice, thus marking the beginning of embracing Tikanga-based resolution techniques more than before, being more culturally sensitive and creative with redress options.

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