

The “False Generosity” of Treaty Settlements: Innovation and Contortion

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A. Introduction

In Aotearoa New Zealand the ways in which indigenous claims to lands and waters are addressed are often looked to as good, or even best, practice by indigenous peoples around the world. While things are far from perfect, in recent decades Māori have succeeded in changing perceptions about the Treaty of Waitangi as the foundation of the nation, and work steadily continues on settling outstanding Treaty claims. The resulting Treaty of Waitangi settlements are negotiated arrangements which aim to remove a sense of historical grievance and achieve significant rebuilding of the Māori economy. They are seen by some as dynamic and powerful steps towards economic independence, as a means of recognising special relationships to lands and waters, and a necessary prerequisite to improved relationships between the state and the indigenous Māori in the future.¹ Critics see the settlements and the processes followed to reach them as too heavily weighted in the government’s favour.² They argue that the settlements do not sufficiently compensate for actual losses. They are said to pit Māori against Māori. Diverse claimant groups are effectively forced to negotiate within standardised and fixed parameters. For these and other reasons, the settlement agreements, policies and processes have been labelled as divisive and compromising self-determination.³

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1 Joe Williams, High Court Judge “Truth and Reconciliation in Aotearoa and Canada” (Transcript of presentation to Te Piringa Faculty of Law, University of Waikato, September 2009). See also Linda Te Aho “Ngā Whakataunga Waimāori: Freshwater Settlements” in Nicola R Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) at 102, 112–113.

2 For an excellent critique of the settlement process, see Ani Mikaere “Settlement of Treaty Claims: Full and Final or Fatally Flawed?” (1997) 17 NZULR 425 at 452–455.

3 Ani Mikaere, above n 2, at 34.

This chapter reflects upon recent developments in the area of Treaty of Waitangi settlements in order to assess whether iwi have paid too high a price for what might be described as innovative and pragmatic agreements. As the Chapter title suggests, what some see as innovation, others see as contortion. Part II sets out a brief background to Treaty settlements and offers insights into how negotiations are conducted.⁴ It also highlights interesting developments regarding lands returned to iwi and the involvement of claimant groups in the governance and management of natural resources. New Zealand's recent endorsement of the United Nations Declaration on the Rights of Indigenous Peoples (Declaration) provides a new dimension within which to consider Treaty settlements. Part III of the chapter concludes with some observations as to how the Declaration might assist Treaty settlement negotiators in the future.

B. Treaty Settlements

1. Background

Māori are tangata whenua (people of the land) who descend from Papatūānuku, the Earth Mother, and Ranginui, the Sky Father. As a response to British settlement, rangatira (chiefs) signed Te Tiriti o Waitangi (the English version of which is known as the Treaty of Waitangi) which guaranteed the continuation of tino rangatiratanga – authority and control over their lands, waters and other treasures. The inconsistencies between the English and Māori texts of Articles 1 and 2 have spawned many different interpretations of the Treaty, and ongoing debate.⁵ Setting aside the principle of *contra proferentum* (ambiguity will be construed against the party that drafted an agreement), the way around the debate has been to invent the concept of ‘the principles’ of the Treaty, the meaning of which was the subject of the landmark *Lands Case*.⁶ There, Māori opposed the proposed transfer of Crown lands to newly established state owned enterprises as a breach of section 9 of the State Owned Enterprises Act 1986, which provides: “Nothing in this Act shall permit the Crown to act in a manner inconsistent with the principles of the Treaty of Waitangi.”⁷ With no definition or explanation of what was meant by “the principles of the Treaty of Waitangi” it was effectively left to the courts to distil these principles and what they might require in particular contexts. In the now famous words of Court of Appeal

4 The author has served as a specialist advisor to negotiation teams and as Treaty negotiator for the Ngāti Koroki Kahukura settlement. See, Ngāti Koroki Kahukura Claims Settlement Act 2014. Many of the examples in this chapter come from those negotiations.

5 For example, the Waitangi Tribunal recently concluded that Māori did not cede sovereignty: Waitangi Tribunal *Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040) at ch 10 [*Te Paparahi o Te Raki Inquiry*].

6 *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 at 651.

7 State Owned Enterprises Act 1986, s 9.

president, Sir Robin Cooke (as he was then) the Treaty principles: "require the Pakeha and Māori Treaty partners to act towards each other reasonably and with the utmost good faith. That duty is no light one. It is infinitely more than a formality".⁸

Rangatira consented to the Treaty on the basis that they and the representatives of the British Crown who also signed, were to be equals, though they were to have different roles and different spheres of influence. The detail of how this relationship would work in practice, especially where the Māori and European populations intermingled, remained to be negotiated over time on a case-by-case basis.⁹

Over time, the combined impact of land confiscation, public works takings and the operations of institutions like the Native Land Court has been to strip from Māori the lands and waters necessary to sustain their people. The development of European farming practices which involved draining wetlands and led to the gradual silting of rivers, compounded the effect by destroying traditional food sources. Later decisions of the government to use their rivers to generate hydro-electricity worsened their plight. What had once been prosperous and flourishing communities became remnants.¹⁰ Struggles for restorative justice and redress have been part of a larger set of goals and aspirations, at the heart of which is rangatiratanga.¹¹

The Waitangi Tribunal was established in 1975 against a backdrop of increasing pressure from Māori to have such grievances addressed by the Crown. Under its establishing statute, the Treaty of Waitangi Act 1975, any Māori person who claims to be prejudicially affected by the actions, policies or omissions of the Crown in breach of the Treaty of Waitangi may make a claim to the Tribunal.¹² The Tribunal then has the power to inquire into the claim. On 21 September 1992, Cabinet agreed on general principles for settling Treaty of Waitangi claims. This date then became the cut-off date for historical claims, so that consistent comparisons could be made between the redress provided to different claimant groups. Historical claims are those arising out of Crown acts or omissions before 21 September 1992. Contemporary claims arise out of Crown actions or omissions after that date.¹³ A recent example of a contemporary claim

8 *New Zealand Māori Council v Attorney General*, above n 6, at 667.

9 *Te Paparahi o Te Raki Inquiry*, above n 5, at 528.

10 These are the conclusions of Erik Olsen, a historian who peer reviewed the historical account for the Ngāti Koroki Kahukura Deed of Settlement 2012.

11 Roger Maaka and Augie Fleras *The Politics of Indigeneity* (1st ed, Otago University Press, Dunedin, 2005) at 26–63.

12 Treaty of Waitangi Act 1975, s 6(1).

13 Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua: Healing the Past and Building a Future* (2nd ed, Office of Treaty Settlements, Wellington, 2015) at 23, www.govt.nz/assets/Documents/Red-Book-Healing-the-past-building-a-future.pdf accessed 4 October 2016 [The

is the National Freshwater and Geothermal Resources Claim (Wai 2358) lodged in response to the Government's proposed plan to offer for sale up to 49% of the shares in state owned enterprises that generate power from water.¹⁴ The Tribunal was asked to address the key question of what rights and interests (if any) in water and geothermal resources were guaranteed and protected by the Treaty of Waitangi and whether the proposed sale amounted to a Treaty breach. This was lodged as a contemporary claim on the basis that the proposed sale was the Treaty breach, rather than the historical 'taking' of water bodies by government regulation. Oral histories form a significant part of claimants' cases and are intended to inform the Waitangi Tribunal as to how a claimant group established their customary interests in a particular area and how those interests were maintained. In order for a claim to be successful claimants must demonstrate that they suffered harmful consequences as a result of a Crown Treaty breach. The Tribunal decides whether, on the balance of probabilities, the claim is "well-founded". The Tribunal publishes its findings and recommendations in a report. Except in very limited circumstances, Waitangi Tribunal recommendations are not binding on the Crown.¹⁵ In order to achieve a settlement, an inquiry by the Waitangi Tribunal will need to be followed by negotiations between the claimant group and the Crown. This results in a Deed of Settlement, which is then enshrined in a Settlement Bill that is adopted by Parliament.¹⁶

The other way to achieve a settlement is to enter into direct negotiations with the Crown, bypassing the Waitangi Tribunal. Claimant groups may be eligible to enter direct negotiations where, usually after having lodged a Tribunal claim, they can satisfy the Crown that they are the correct claimant group. Direct negotiations are generally quicker and less expensive for claimants who must decide whether the therapeutic value of taking time to go through the Tribunal outweighs the opportunity costs from likely delays in receiving redress. Settlements are intended to "heal the past and build a future" with the Crown acknowledging the grievance and then providing a "fair, comprehensive, final and durable settlement"; as well as establishing an ongoing relationship between the Crown and the claimant group based on the principles of the Treaty of Waitangi.¹⁷

Red Book].

14 Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012).

15 The Tribunal has the power to make binding recommendations for the return of land that is subject to a Crown forestry licence and certain lands owned, or formerly owned, by a state-owned enterprise or a tertiary institution, or former New Zealand Railways lands, that have a memorial (or notation) on their certificate of title advising that the Waitangi Tribunal may recommend that the land be returned to Māori ownership (see <<http://www.justice.govt.nz/tribunals/waitangi-tribunal/about/frequently-asked-questions>>).

16 Copies of the deeds are available at <<https://www.govt.nz/organisations/office-of-treaty-settlements/>>.

17 The Red Book, above n 13, at 77.

In moving that the Ngāti Koroki Kahukura Claims Settlement Bill be enacted, Hon Christopher Finlayson, Minister for Treaty of Waitangi Negotiations, chose these introductory words:¹⁸

[w]e gather in this House to consider, to debate, and to address matters of State and matters of Government—matters that often define us as a nation. Very few things can be more defining than the occasion of a third reading of Treaty settlement legislation. This is an occasion that brings the Crown and iwi together for a common purpose: to reconcile past differences and to seal our shared commitment to a more enlightened and rewarding future together.

Justice Joe Williams, Māori scholar and High Court judge, has described Treaty settlements as fusing two pathways to justice – that of aboriginal title claims (which are based on residual common law rights), and Waitangi Tribunal processes which render Māori as victims blaming the state for the consequences of colonisation and “modern imbalances”.¹⁹ Justice Williams has further described the process of negotiating Treaty settlements as “the most dynamic and powerful process in the transitional justice game, a politically realistic approach to the results the Government is prepared to put up with”.²⁰

2. The Parameters of Treaty Settlement Negotiations

Justice Joe Williams provides a fitting description. The Crown defines the parameters for negotiation and redress, and claimants are expected to negotiate within those parameters if they want their claims resolved. For example, in 1997, Cabinet adopted specific principles for natural resource redress relating to rivers, lakes, minerals and forests.²¹ In 2010, Cabinet approved a number of further guidelines for involving iwi in natural resource management in Treaty settlements to be considered as Crown “bottom lines”.²² The Resource Management Act 1991 (RMA) sets out a comprehensive regime for the sustainable management of natural resources.²³ While central government retains some responsibility to influence this regime through mechanisms such as national

18 (9 December 2014) 702 NZPD 1277 <http://www.parliament.nz/en-nz/pb/debates/debates/speeches/51HansS_20141212_00000009/finlayson-christopher-ng%C4%81ti-koroki-kahukura-claims-settlement>.

19 Joe Williams, above n 1, at 3. It is well documented that Māori occupy the bottom rung of social and economic strata, see generally the work of Dr Tahu Kukutai, such as Tahu Kukutai “Making Visible the Big C: Colonisation and Indigenous Health and Wellbeing” (paper presented to The Australian Sociological Association (TASA) Conference: Reflections, Intersections and Aspirations: 50 years of Australian Sociology, Melbourne, 2013).

20 At 10.

21 Cabinet Minute, “natural resource redress”, 1997, CAB (97) 46/16A; Cabinet Minute, “natural resource redress”, 1997, CAB Min (97) 46/35.

22 Cabinet Minute, “natural resource redress”, 2010, CAB Min (10) 24/3 Rev 1.

23 Section 5 defines “sustainable management”.

environmental standards and national policy statements,²⁴ day-to-day control is devolved to local government. Regional councils and local authorities (local government) prepare plans that regulate the use of land, air and water within their jurisdiction and specify when and where proposed activities may require consents to permit certain use.²⁵ Collectively the Crown's Treaty settlement principles for natural resource redress specify, among other things, that redress should not intrude on the powers and functions of local government who should retain final decision making rights over natural resource management.²⁶ Although the RMA requires local government to take iwi resource management plans into account when making certain decisions relating to the making and changing of plans,²⁷ the RMA is clear that there is no duty for local government to consult on resource consents.²⁸ Cabinet has prescribed that two "standard arrangements" be available in Treaty settlements for facilitating dialogue between iwi and local authorities on RMA matters: a Māori advisory board and a joint council committee.²⁹ These arrangements provide opportunities for iwi to have input into both planning and consenting processes under the RMA. As noted below, the tribal-specific agreements negotiated with Waikato-Tainui and Whanganui tribes in relation to the Waikato and Whanganui rivers also contain measures intended to facilitate tribal engagement with RMA processes associated with the rivers.³⁰

Negotiations on behalf of the Crown are carried out by the Office of Treaty Settlements in conjunction with other Ministries and Government Departments whose staff religiously operate within these parameters. Any significant deviation from these standard arrangements would require Cabinet approval. This "rule by administrative fiat" has never been formalised by statute and consequently claimant groups are left with no remedy when the Crown itself does not obey them or unilaterally changes them.³¹ The courts frequently refuse to review Treaty settlement policy or agreements given their political, non-justiciable nature.³²

24 Resource Management Act 1991, ss 43-58A.

25 At sections 30 and 31.

26 Cabinet Minute, "natural resource redress", 2010, Cab Min (10) 24/3 Rev 1.

27 Resource Management Act 1991, s 61.

28 Section 36A.

29 Cabinet Minute, "natural resource redress", 1997, CAB (97) 46/16A; Cabinet Minute, "natural resource redress", 1997, CAB Min (97) 46/35; Cabinet Minute, "natural resource redress", 1997, CAB Min (10) 24/3 Rev 1. See also, RMA, sections 36B-36E.

30 See also the discussion of co-management agreements in Chapter 6 of this volume, Erueti and Down "International Indigenous Rights and Mining in Aotearoa New Zealand".

31 Ani Mikaere, above n 2. See also Linda Te Aho "Contemporary Issues in Māori Law and Society: The Tangled Web of Treaty Settlements, Emissions Trading, Central North Island Forests, and the Waikato River" (2008) 16 Wai Law Rev 229 and the references cited therein.

32 See generally *Milroy v Attorney General* [2005] NZAR 562. For a general discussion of legal

Despite these constraints, skilled negotiators have operated on behalf of claimant groups to achieve innovative settlements. But the impact of Treaty settlements upon Māori must also be seen as a form of contortion – with claimant groups feeling forced to work within a framework not of their making, and that goes nowhere near fully compensating them for their actual loss: politically, economically, culturally, environmentally or spiritually.

3. Relativity and Actual Loss

Perhaps the best example of the tensions Māori face in achieving these settlements lies in the task of creating value when constrained by the Crown's relativity policy of 1994. The policy fixed the total fiscal value of all Treaty claims at \$1 billion. In 1995 negotiators for two powerful tribal groups, Waikato-Tainui and Ngāi Tahu, persuaded the Crown to agree to ratchet clauses in their settlements in return for taking the leap of faith to be the first to settle comprehensively their historical claims. In essence, the clauses allow for these two groups to each receive an additional 17% of the final fiscal sum spent on settlements in the event the total exceeds \$1 billion.³³ As a result, all later settlements that have been reached have been benchmarked against these two settlements. Relativity clauses have not been made available for claimant groups that settled later. Although this 'fiscal envelope' policy was officially rescinded in 1996, it continues to have a major impact on the relativities of settlements. Waikato-Tainui and Ngāi Tahu have already triggered their relativity clauses. Waikato-Tainui has received additional cash sums. Current evidence suggests that the total value of all claims may exceed \$2 billion. With no recourse to a relativity clause, it is not surprising that there are some claimant groups who feel that they have not been treated equitably. The relativity policy may well be the subject of contemporary Treaty claims arising out of the settlement process itself.³⁴

A major criticism of Treaty settlements, even for the larger groups who settled early, is that they do not compensate for actual loss. The Crown's fiscal envelope policy has meant that claimants "settle" for some 1–2% of actual loss. In clause 2.3 of the Waikato-Tainui deed of settlement, the Crown acknowledges that the contribution of the confiscated land to the development of New Zealand is estimated to have a value as at 1995 of \$12 billion.³⁵ Yet, the cash quantum

challenges to Treaty settlements, see Baden Vertongen "Legal Challenges to the Treaty Settlement Process" in Nicola R Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) at 65.

33 Alan Ward *An Unsettled History: Treaty Claims in New Zealand Today* (Bridget Williams Books, Wellington, 1999) at 55, 57.

34 Jeremy Gardiner "Achieving enduring settlements" Post Treaty Settlements <<http://posttreatysettlements.org.nz/achieving-enduring-settlements>>.

35 Waikato-Tainui Deed of Settlement 1995, cl 2.3.

of the settlement was \$170 million. In order to achieve settlements, claimant groups are compelled to agree to standard clauses acknowledging that it is “not possible to fully compensate” them for all loss and prejudice suffered and that they “intend their foregoing full compensation to contribute to New Zealand’s development”.

This point is often highlighted in parliamentary debates by members of New Zealand’s Green Party. Member of Parliament, Denise Roche, explained her party’s position in relation to the Ngāti Koroki Kahukura Claims Settlement Bill:³⁶

This bill addresses just a tiny fraction of what Ngāti Koroki Kahukura have endured . . . and yet there are some New Zealanders who have no understanding of the history and who will declare this Treaty settlement, and all Treaty settlements, a gravy train. My response to that is to remind those people that in 2010 this Government bailed out South Canterbury Finance to the tune of \$1.7 billion. This settlement is a drop in the bucket—and those people did not lose their land . . . [We] do not believe that it is full compensation, and we must acknowledge the generosity of this iwi, who will accept this settlement . . . and all the people of New Zealand benefit from that generosity.

Innovation has occurred where skilled claimant negotiators have added value to settlement packages over and above the relative cash quantum without breaching the Crown’s (now unofficial) relativity policy. Structuring sale and lease back arrangements of Crown-owned commercial properties and mechanisms such as a “single purchaser discount” have enabled some claimant groups to increase the number of properties acquired with their fixed Treaty credits.³⁷

4. Returning Ancestral or Traditional or Tribal Lands

I riro whenua atu, me hoki whenua mai
Land was taken, land must be returned

Land is central to indigenous identity. Te Ture Whenua Māori (Māori Land Act) 1993 recognises that land is a “taonga tuku iho of special significance to Māori”, an inheritance from the past to be protected and enhanced for future generations.³⁸ Land was confiscated and alienated in other ways that have

36 (9 December 2014) 702 NZPD 1289 <http://www.parliament.nz/en-nz/pb/debates/debates/speeches/51HansS_20141212_00000044/roche-denise-ng%C4%81ti-koroki-kahukura-claims-settlement>.

37 Claimants may “purchase” redress properties with the cash quantum allocated to their settlement. Claimant negotiators have successfully argued that the fact that a claimant group is a single purchaser saves the Crown transaction costs. This translates into an overall “discount” in the price of the redress properties, thus enabling claimants to purchase more properties with their settlement cash.

38 Te Ture Whenua Māori 1993, Preamble and s 2.

been acknowledged by the Crown in many settlements as Treaty breaches.³⁹ A fundamental premise of many Treaty settlements is that land should be returned as an important part of an overall redress package. Often, as a result of having been dispossessed of certain significant lands for over a century, many claimant groups seek that the lands returned be inalienable and/or vested in the names of important ancestors. This has resulted in new forms of title being created such as that created in the Waikato-Tainui lands settlement of 1995.⁴⁰ By that settlement certain lands were vested in the name of the first Māori King, Pōtatau Te Wherowhero (1770–1860), an ancestor representative of the Waikato-Tainui peoples. The inalienable status comes with constraints to developing the lands.⁴¹

There are two key examples of government policy that contorts land redress. First, lands returned to claimant groups are likely to be subject to public access and conservation conditions. For example, Ōkahu Bay, a prime piece of beachfront property in central Auckland was returned to Ngāti Whātua o Ōrākei under its Treaty settlement in 2012. The Ngāti Whātua settlement states that Ōkahu Bay will be a new form of title, *whenua rangatira* (chiefly land), which is deemed a Māori reservation under the Reserves Act 1977 and set apart for the common use and benefit of Ngāti Whātua o Ōrākei *and the citizens of Auckland* (emphasis added).⁴² These provisions ensure public access and continue reserve protections for prime Auckland real estate, while symbolically overlaying the land with a deemed Māori reservation status. Notably, the Ngāti Whātua settlement in relation to Ōkahu Bay reaffirms and continues an arrangement made in 1991, which is an early example of co-management regimes between iwi and government established under Treaty settlements.⁴³ Under this arrangement, the fee simple title to the returned lands is registered in favour of Ngāti Whātua's Trust Board, but the reservation is jointly administered by Ngāti Whātua and the Auckland City Council through a Reserves Board which comprises three representatives of Ngāti Whātua and three representatives from the Council.⁴⁴ By statute, the land is managed, financed and developed at the expense of the Council in view of the land, including foreshore, being kept for the public as well as the enjoyment of Ngāti Whātua. The chairperson (and the casting vote) is reserved for a Ngāti Whātua representative in recognition of title and territorial authority.⁴⁵

This arrangement did not come about easily.⁴⁶ Like many other settlements

39 Waitangi Tribunal *The Taranaki Report – Kaupapa Tuatahi* (Wai 143, 1996).

40 Waikato-Tainui Deed of Settlement 1995.

41 Deed of Settlement between Her Majesty in right of New Zealand and Waikato 1995, cls 4.1 and 4.4. See also Deed Creating Waikato Raupatu Lands Trust 1995, cl 7.

42 Ngāti Whātua o Ōrākei Claims Settlement Act 2012, s 60.

43 Orakei Act 1991.

44 Ngāti Whātua o Ōrākei Claims Settlement Act 2012, s 66 and Sch 4.

45 Schedule 4.

46 Sections 6 and 7.

of this kind it was born of conflict and collision. Following a government announcement of a housing development destined for their ancestral lands, tribal members and supporters of the Ngāti Whātua occupied and refused to leave those lands for 506 days – the longest and perhaps most famous of protest actions in New Zealand history. On 25 May 1978, the government sent in a massive force of police and army personnel to evict them. Hundreds of protesters were arrested and their temporary buildings and gardens were demolished. A young tribal member lost her life during the ordeal. Ten years later the Waitangi Tribunal supported the hapū's claims to the land.⁴⁷ In the words of the late Sir Hugh Kawharu, the inaugural chairperson of the Reserves Board:⁴⁸

... from the trauma and the ashes the Crown restored title to Orakei's 150 acre 'Whenua Rangatira' . . . The arrangement has worked successfully and without untoward incident since its inception in 1992 . . . It is a benign but efficient regime; and here at least the mana of Ngati Whatua stands tall, intact and protected . . . [P]ublic access to the foreshore of Okahu Bay has been unrestricted from the day title returned to Ngati Whatua.

5. Mountain Ownership and Management

Mountain ownership and management is an important part of Treaty settlements in Aotearoa. However, the return of whole mountains and mountain ranges is rendered unachievable given relativity constraints – their value would eclipse the fiscal envelope. Instead, settlements have included the return of significant mountains, the title to which are then “gifted to the nation”;⁴⁹ or the return of mountain peaks only, fragments of the whole.⁵⁰ A recent departure from established patterns in Treaty settlements is seen in the case of the Ngāti Koroki Kahukura settlement and provisions for Maungatautari, the ancestral mountain of the Ngāti Koroki Kahukura iwi. Maungatautari is deemed to be a “reserve” under the Treaty settlement. Traditionally the mountain and its forests offered shelter and provided physical sustenance for Ngāti Koroki Kahukura. They have kept their fires of occupation alight through the turbulence of inter-tribal conflict and colonisation, and have continued to live close to the mountain ever since. While the mountain has a rich human history, the Crown acknowledges that Ngāti

47 Waitangi Tribunal *Report of The Waitangi Tribunal on The Orakei Claim* (Wai 9, 1987) at 149–152.

48 As quoted in Pat Sneddon “Rangiratanga and Generosity: Making the Connections” (Paper presented to the Philanthropy New Zealand Conference, 2004). This settlement predates the amendments made in 2005 to the Resource Management Act 1991 that included new sections to explicitly provide for joint management agreements between and councils and iwi authorities – sections 36B, D and E.

49 Ngāi Tahu Claims Settlement Act 1998, ss 15, 16.

50 See, for example, Affiliate Te Arawa Iwi and Hapu Claims Settlement Act 2008, s 105.

Koroki Kahukura are the iwi with “dominant mana whenua” rights and interests in respect of Maungatautari.⁵¹ With iwi and local government support, a major restoration project was initiated by the members of the community to remove introduced pests and predators from the mountain, and restore to the forest a healthy diversity of indigenous plants and animals on the brink of extinction, including 47 kilometres of predator-proof fence enclosing 3400 hectares.⁵² However, Ngāti Koroki Kahukura were not to know that their agreement to support the restoration project years prior to their Treaty settlement negotiations would result in them being denied the return of the Crown lands within the mountain reserve lest the return prejudice “the community endeavor” in establishing the project. Claimants sought to change the name of Queen Elizabeth II on the title of Maungatautari but were told by Crown negotiators they would have to accept that title be vested in a new construct called “Te Hapori o Maungatautari” (the community of Maungatautari) with non-indigenous peoples being represented by the Waipā district’s mayor.⁵³ Ngāti Koroki Kahukura would not enjoy even the symbolic reality of the mountain being “returned” to them for a moment in time. Nor would title to the mountain be vested in the name of an appropriate ancestor with inalienable status. The politics of volatile reaction from non-indigenous peoples in the rural community meant that such options were denied to them.⁵⁴ Te Hapori o Maungatautari is not a legal entity, nor a co-governance body. Not only was it incomprehensible that the Crown would allow such public reaction to influence decisions that denied their ancestral rights, Ngāti Koroki Kahukura is left to grapple with the implementation of these new concepts. The iwi will at least, have more say in how the reserve will be administered in the future, another example of the growing trend towards co-management. Experienced politician, Hon Nanaia Mahuta, recognised that:⁵⁵

There has been a very gracious acknowledgment made by Ngāti Koroki Kahukura to the people of the Waipā District and, in fact, to New Zealand for the future management of the Maungatautari maunga. I want to put on the record that that is huge and significant.

Public access is guaranteed. Reserve restrictions in favour of conservation values are imposed as per other settlements. Such restrictions make sense in terms of this particular settlement. However, they may be too onerous where

51 Ngāti Koroki Kahukura Claims Settlement Act 2014, s 70.

52 <http://www.sanctuarymountain.co.nz/the_project>.

53 Ngāti Koroki Kahukura Claims Settlement Act 2014, s 82.

54 Nikki Preston “Critic Slams Iwi ‘Pirates’” *Waikato Times* (online ed, New Zealand, 21 November 2010); Bruce Holloway “Maungatautari Landowner Backs Maori” *Waikato Times* (online ed, New Zealand, 10 March 2011) [accessed 29 February 2016].

55 (9 December 2014) 702 NZPD 1279 <http://www.parliament.nz/en-nz/pb/debates/debates/speeches/51HansS_20141212_00000016>.

reserve lands are in urban areas and suitable for development. Negotiating for the removal of reserve status is difficult for claimant groups and often comes at a significant cost to other aspects of settlement packages.

6. Settling Freshwater – Co-Management and Co-Governance

Twists and turns of a legal nature also appear in settlements involving lakes and rivers. There is a diverse range of views amongst Māori about who might own water. Many iwi and hapū assert ownership of water largely because ownership is the strongest tool possible for the purpose of restoring and protecting waterways, but also to support rights of accessing water for their own commercial purposes. Others are of the view that one cannot own an ancestor and would express their rights in different ways.⁵⁶ Freshwater settlements avoid the issue of water ownership on the basis of the Crown's policy that "no-one owns water". The Te Arawa Lakes Settlement Act 2006 follows a history of challenge by the iwi in relation to the ownership, governance and management of water bodies in their territory. However, instead of the thirteen freshwater lakes the settlement vests the fee simple estate of the lake *beds* in the iwi. The Te Arawa example is of particular note because it creates a disturbing form of title that certainly fits the dual descriptors of legal innovation and contortion. The Crown is deemed the owner of a new construct, the "Crown stratum", which is defined as the space occupied by water and the space occupied by air above each lake bed, thus precluding the ability of the iwi to claim ownership to the water or the airspace.⁵⁷ In addition to the vesting of lakebeds the settlement establishes a co-management entity comprised of the iwi and regional and district councils.⁵⁸ The vision of this entity is for the lakes and their catchments to be preserved and protected for the use and enjoyment of present and future generations.⁵⁹ The vision recognises and provides for the iwi's traditional relationship with their ancestral lakes, and the iwi provide cultural advice on all aspects pertaining to the lakes.

The growing number of these freshwater co-management regimes provide more freedom for Māori to carry out customary activities, and have led to more collaborative planning processes, joint projects, and generally more effective relationships between local government and Māori.⁶⁰ The settlements have

56 For a summary of the debate, see IC Solutions Ltd, "Report to the Iwi Advisory Group from the Freshwater Iwi Leadership Regional Hui, Whiringa a Rangī" 2014 at 11 <<http://iwichairs.maori.nz/our-kaupapa/fresh-water/>>.

57 Te Arawa Lakes Settlement Act 2006, s 23.

58 Section 48.

59 Section 49.

60 For example, the Waikato Regional Council Healthy Rivers Plan Change project and process: <http://www.waikatoregion.govt.nz/healthyivers/>.

provided funding for restoration projects and have paved the way for an increase in the use of traditional knowledge indicators to monitor and assess the health and well-being of waterways.

The Waikato-Tainui River settlement is considered as the high water mark of these types of co-management arrangements.⁶¹ This settlement requires a joint management arrangement between iwi and local government⁶² (prior settlements simply encourage local government to build relationships with claimant groups), effectively forcing local government to negotiate new ways of conducting planning and consenting processes under the RMA in order to achieve the overarching principle of the settlement: to restore and protect the health and wellbeing of the Waikato River for future generations.⁶³ The settlement also included a scoping study and substantial clean-up fund to improve the health and wellbeing of the Waikato River. This was provided alongside the settlement;⁶⁴ in other words, it was not intended to be redress and was outside of quantum. Cabinet has determined that scoping studies and clean-up funds should not be included in settlement negotiations generally⁶⁵ and this means that Crown negotiators will only progress remediation activities alongside settlements in what they consider to be exceptional circumstances.⁶⁶

The Waikato-Tainui River settlement is also notable for a provision that explicitly defers any conversation about ownership of water.⁶⁷ The Crown and Waikato-Tainui acknowledge that they have different concepts and views regarding relationships with the Waikato River (which the Crown would seek to describe as including "ownership") and that the settlement is not intended to resolve those differences. If the Crown or a Crown entity proposes to create or dispose of a property right or interest in the Waikato River the Crown must first engage with Waikato-Tainui in accordance with the principles described in the settlement.⁶⁸

61 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010. See also, Linda Te Aho "Indigenous Challenges to Enhance Freshwater Governance and Management in Aotearoa New Zealand – The Waikato River Settlement" (2009) 20 *Journal of Water Law* 285. See below for a discussion about the Whanganui River settlement which provides an opportunity for more effective recognition of the rights and interests of the River through affording the River legal personality.

62 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 41.

63 Section 3.

64 Waikato-Tainui Raupatu Deed of Settlement 2010, cl 15 provides for co-management funding and an education endowment fund.

65 CAB Min (09) 12/11.

66 In later settlements, other iwi have succeeded in negotiating for clean-up funds, but no other iwi has achieved the same level of funding, \$210 million. For example, Whanganui iwi secured \$30 million: Ruruku Whakatupua 2014 (the Deed of Settlement for the Whanganui River) cls 7.1 and 7.2.

67 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, ss 64 and 90.

68 Section 64(3).

Like the relativity clauses, these water clauses have only been made available to select claimant groups.⁶⁹ Even so, in light of the Waitangi Tribunal's findings in relation to rights and interests, the absence of these clauses should not jeopardise other claimant groups from asserting claims to water.

In its Interim report on the National Freshwater and Geothermal Resources Claim, the Waitangi Tribunal addressed the key question of what rights and interests (if any) in water and geothermal resources were guaranteed and protected by the Treaty of Waitangi? It reached a bold conclusion:⁷⁰

Maori had rights and interests in their water bodies for which the closest English equivalent in 1840 was ownership. Those rights were then confirmed, guaranteed, and protected by the Treaty of Waitangi, save to the extent that the Treaty bargain provided for some sharing of the waters with incoming settlers . . . The nature and extent of the proprietary right was the exclusive right of hapu and iwi to control access to and use of the water while it was in their rohe.

In the context of the current discussions between the Crown and Māori about how to give effect to rights and interests in freshwater,⁷¹ the Crown is seeking detailed information about mechanisms to appropriately recognise such rights and interests from indigenous perspectives. It is generally accepted by Māori that the various co-management arrangements referred to above deal primarily with the restoration and protection of the health and wellbeing of the waterways, not the issue of recognising their rights and interests in their water bodies.⁷²

7. Legal-Personality

A recent development that has stirred interest in the Treaty settlements arena for its innovative nature is an agreement signed between the Crown and Whanganui iwi.⁷³ Settlements such as those that relate to the Waikato,⁷⁴

69 For example, Whanganui negotiated a "water" clause, Ruruku Whakatupua, above n 51, cl 9, but a request from Ngāti Koroki Kahukura for such a clause was denied.

70 Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) at 110.

71 In *The New Zealand Māori Council v Attorney General* [2013] NZSC 6, the Supreme Court noted the Crown's acceptance that some hapū will have interests in particular waters and their interests are protected by Article 2 of the Treaty of Waitangi.

72 IC Solutions Ltd, "Report to the Iwi Advisory Group from the Freshwater Iwi Leadership Regional Hui, Whiringa a Rangi" 2014, at 11.

73 See Te Awa Tupua (Whanganui River Claims Settlement) Act 2017. See also, Linda Te Aho "Ruruku Whakatupua Te Mana o te Awa Tupua – Upholding the Mana of the Whanganui River" (2014) 5 Māori Law Review <<http://maorilawreview.co.nz/2014/05/>>.

74 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

Waipā⁷⁵ and Kaituna Rivers,⁷⁶ and the Te Arawa Lakes settlement,⁷⁷ have established co-management regimes, and have recognised to varying degrees Māori conceptions of the environment.⁷⁸ For example, the Waikato-Tainui River settlement recognises that to Waikato-Tainui the river is an ancestor, which has a prestige, authority and a life force of its own.⁷⁹ The Whanganui River settlement recognises the river as an indivisible and living whole comprising the Whanganui River from the mountains to the sea, incorporating its tributaries and all its physical and metaphysical elements.⁸⁰ However, the settlement goes a step further. In recognising the profound relationships that Whanganui iwi have with their ancestral river, the settlement accords legal personality to the Whanganui River, providing an opportunity for more effective recognition of the rights and interests of the river.⁸¹ The Whanganui settlement, like that in relation to the Waikato River, provides for a clean-up fund, and compels local government relationship agreements. Part 5 of the settlement establishes a co-governance group ("Te Kōpuka") comprising iwi, local and central government, commercial and recreational users and environmental groups. The purpose of the group is to act collaboratively to advance the environmental, social, cultural and economic health and wellbeing of the Whanganui River. While the RMA provides legislative rights to ensure Māori interests are recognised to varying degrees in decision making,⁸² case law illustrates that these rights remain vulnerable when weighed against other priorities.⁸³ This is why Māori have turned to Treaty settlement processes. The Whanganui River settlement states that the post-settlement governance entity has an interest in the river greater than the public generally when balancing the competing interests outlined in the RMA, and should therefore have an increased ability to influence decision making in the day-to-day management of the river.⁸⁴ There is innovation too, in the redress included in relation to protecting the river's rapids, which may well assist iwi and the river in any future proposals to dam the river for water storage, given climate change challenges.⁸⁵

75 Nga Wai o Maniapoto (Waipa River) Act 2012.

76 Tapuika Claims Settlement Act 2014, s 114.

77 Te Arawa Lakes Settlement Act 2006.

78 Linda Te Aho "Ngā Whakataunga Waimāori: Freshwater Settlements" in Nicola R Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) at 102.

79 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, Preamble.

80 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 12.

81 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 14.

82 Resource Management Act 1991, ss 6, 7 and 8.

83 Jacinta Ruru "Undefined and Unresolved: Exploring Indigenous Rights in Aotearoa New Zealand's Freshwater Legal Regime" (2009) 20 *Journal of Water Law* 236.

84 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 72(d).

85 Drought is a common feature of New Zealand's climate. In 2013, New Zealand experienced

In the context of current debates about how the Crown might recognise Māori proprietary rights and interests in freshwater,⁸⁶ there are other notable features of the Whanganui settlement. Firstly, the Deed of Settlement makes elaborate statements about ownership of water, not seen in other settlements. The Crown confirms its position that no one, including the Crown, owns water.⁸⁷ While Whanganui iwi do not view their relationship with water in terms of ownership in a strict sense, they also assert that its rights and responsibilities in relation to the Whanganui river (an indivisible and living whole being) are of a proprietary nature.⁸⁸ The parties agree that this settlement is not intended to derogate from a freshwater policy review process being carried out simultaneously by the Government, which, among other things, addresses the issue of Māori proprietary rights and interests in water.⁸⁹ To avoid doubt, the Deed of Settlement confirms that the vesting of the riverbed does not create proprietary interests in water.⁹⁰ That being said, the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 gives effect to the Whanganui River Deed of Settlement. Of particular interest is the definition of the “bed”: the space of land that the waters of the Whanganui River cover at its fullest flow without overtopping its banks.⁹¹ It includes the subsoil, the plants attached to the bed, *the space occupied by the water and the airspace above the water* (emphasis added).⁹² This approach differs to that discussed above in relation to the Te Arawa Lakes Settlement.⁹³

Yet for all of its innovation, the settlement still falls short of the recommendations made by the Waitangi Tribunal in its substantial report on the Whanganui River in 1999.⁹⁴ There, the Tribunal found that as at 1840 the Whanganui River and its tributaries were possessed and controlled by the iwi and that the extinguishments of Māori river interests in the particular context

the worst drought in history. On average, every year or two somewhere in New Zealand experiences a drought. It is foreseeable that there will be more need to store water beyond what can be naturally sourced at any one time and stopping the natural flow of a river, particularly at the site of rapids, has proven to be an effective and popular way to do this in New Zealand (see <<https://www.niwa.co.nz/climate/information-and-resources/drought>>). This redress should provide the iwi with a stronger voice in decision-making over any proposals to dam the Whanganui River.

86 Ruruku Whakatupua Te Mana o te Awa Tupua 2014, clause 9.2

87 Ruruku Whakatupua Te Mana o te Awa Tupua 2014, clause 9.3.

88 Ruruku Whakatupua Te Mana o te Awa Tupua 2014, clause 9.3.

89 Ruruku Whakatupua Te Mana o te Awa Tupua 2014, clause 9.4.

90 Ruruku Whakatupua Te Mana o te Awa Tupua 2014, clause 9.5. See also Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 46(1)(a).

91 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 7.

92 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 7.

93 See text above relating to the Te Arawa Lakes Settlement Act 2016. The Waikato River Settlement did not involve the return of riverbeds.

94 The Waitangi Tribunal *Whanganui River Report* (Wai 167, 1999) at 343–345.

were inconsistent with Treaty principles.⁹⁵ The Tribunal recommended that the Crown negotiate with the iwi having regard to two forward looking proposals. First, that the river *in its entirety* be vested in an ancestor or ancestors of the iwi (emphasis added).⁹⁶ Secondly, any resource consent application in respect of the river would either require the approval of the iwi governance entity, or that entity could be added as a “consent authority” in terms of the RMA to act with the current consenting authority.⁹⁷ Both would need to consent to any resource consent application.⁹⁸ Under the settlement while, as noted above, the iwi interest has additional weight in RMA planning and consent processes, the iwi’s consent is not required for the use of water, though the parties acknowledge that this may change in the future following the freshwater review process.

While it is too early to assess the effectiveness of the innovation in this settlement, it appears to provide the strongest opportunity for more effective participation by Māori in planning processes of all freshwater settlements to date.

C. Future Implications – United Nations Declaration on the Rights of Indigenous Peoples

Notwithstanding the progress made through all the tribunal reports and court cases from the 1980s, and the consequential changes in legislation and official policy, I would still rank the day that New Zealand gave support to the declaration as the most significant day, in advancing Maori rights, since 6th February 1840.

Sir Edward Taihākurei Durie, 2010⁹⁹

Māori, like many other indigenous peoples around the world have sought to affirm indigenous rights via international institutions, and have long been part of the Declaration negotiations. The self-determination framework, and in particular Article 3, is at the heart of the Declaration.

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 3 equates most with tino rangatiratanga. The issue for all claims relating to lands and resources is control over use. There are other powerful articles in the Declaration, such as Article 25, which provides that:

95 The Waitangi Tribunal *Whanganui River Report* (Wai 167, 1999) at 261.

96 The Waitangi Tribunal *Whanganui River Report* (Wai 167, 1999) at 343

97 The Waitangi Tribunal *Whanganui River Report* (Wai 167, 1999) at 343–344.

98 The Waitangi Tribunal *Whanganui River Report* (Wai 167, 1999) at 343–344.

99 Tracy Watkins “Judge hails big advance for Maori” stuff.co.nz (online ed, New Zealand, 22 April 2010).

Indigenous Peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied or used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26 goes further to provide that States shall give legal recognition and protection to these lands, territories and resources and such recognition shall be conducted with due respect to the customs and traditions of the indigenous peoples concerned.

The Declaration also contains a number of articles that require free, prior and informed consent. According to Article 32:

States shall consult and cooperate in good faith with the indigenous peoples concerned . . . in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

One way of viewing the Declaration is that it fleshes out and provides more clarity and certainty around the meaning of the short articles that make up the Treaty of Waitangi (as expressed by Sir Edward Taihākurei Durie). On this view, the rights expressed in the Declaration may be of assistance to claimant negotiators in addressing the power imbalance and further expanding the parameters of Treaty settlement negotiations. It is of some concern that the New Zealand Government plays down the importance of the Declaration, stressing its non-binding nature, noting “[i]t is an expression of aspiration; it will have no impact on New Zealand law and no impact on the constitutional framework.”¹⁰⁰ New Zealand’s formal endorsement of the Declaration was also diluted with numerous references to New Zealand’s “existing frameworks”, “own distinct approach” and “existing legal regimes” which would “define the bounds of New Zealand’s engagement with the aspirational elements of the Declaration.”¹⁰¹

These attitudes will change in time.¹⁰² With respect, there is a strong argument that the articles of the Declaration more appropriately reflect the “principles of the Treaty” than those espoused by the Courts. The approach of the Courts has been the subject of academic critique on the basis that while the *Wi Parata v The*

100 Pita Sharples, Minister of Maori Affairs “UNPFII Opening Ceremony New Zealand Statement” (speech to United Nations Permanent Forum on Indigenous Issues, New York, 19 April 2010).

101 NZ *Hansard* Ministerial Statements: UN Declaration on the Rights of Indigenous Peoples—Government Support (20 April 2010) 662 NZPD 10229.

102 There was once a time when the Chief Justice of this country dismissed the Treaty of Waitangi as a “simple nullity”: *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72. The Treaty is now widely regarded as the founding document of the nation: *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA).

Bishop of Wellington position no longer enjoys widespread popularity:¹⁰³

. . . it has largely been replaced by a range of views that are, in reality, no less oppressive, despite being conveyed in the soothing language of partnership, mutual respect, or aboriginal rights. While Prendergast's overt racism has for the most part been spurned in favour of greater cultural sensitivity, any concessions that are made to Māori aspirations of tino rangatiratanga . . . are nevertheless envisaged as occurring within the framework of Crown sovereignty. As such they represent the false generosity of the oppressor . . .

This critique resounds strongly here. Treaty settlements may well be seen as concessions made within an oppressive Crown framework while conveyed in the soothing language of healing the past, of recognising rights and providing redress. They will certainly be seen by some as a further example of the false generosity of the Crown. Despite the Government's current view of the Declaration, there remains an enthusiasm amongst Māori to further explore and promote greater understanding of the implications of New Zealand's endorsement of the Declaration for New Zealand law and policy on Māori rights and interests, and it is increasingly cited in legal submissions to the courts and parliamentary select committees, and to the Waitangi Tribunal.

D. Conclusion

Māori claims to lands and waters in Aotearoa New Zealand are mainly historical and date back to breaches of the 1840 Treaty of Waitangi. Crown breaches of the Treaty guarantees have resulted in the loss of ancestral lands by way of early Crown purchases, the impacts of the "New Zealand Wars" and the major land confiscations that followed, early Native Land Court transactions and public works takings. The degradation of waterbodies and the extinguishment of indigenous rights and interests in water have also been the subject of Treaty claims. Māori continue in their struggle for reconciliation and justice, and have come a long way. But there is a way to go. While the negotiated settlements that are aimed at settling grievances that arise from the Crown's Treaty breaches are creative, offer economic opportunities and go some way to recognising special relationships between Māori and their lands and waters, they are tainted with inequity and constrain the ability of Māori as indigenous peoples to be free and self-determining. They are therefore inconsistent with the United Nations Declaration on the Rights of Indigenous Peoples, now endorsed by the New Zealand Government. The Declaration is a valuable tool that ought to be called upon to assist both the Crown and Māori in future Treaty settlement negotiations and in the complex debate around indigenous rights and interests in water.

103 Ani Mikaere above note 2, at 330. See also Jane Kelsey *A Question of Honour: Labour and the Treaty 1984–1989* (Allen & Unwin, Auckland, 1990) at 217.