

A Treaty Lawyer Reflects on the State of the Treaty Relationship

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Waitangi Day 2008

I am one of those most scorned of individuals, a Treaty lawyer, indeed one of those characterised by the Prime Minister as a "*hater and wrecker*".

It is my personal experience, my time at the coalface if you like - 16 years of prosecuting claims in the Waitangi Tribunal, working to get claimants into negotiations, participating in the negotiations and generally playing the political game attempting to get clients through to settlement - that draws me today to focus on what I believe is the most pressing problem with the Treaty relationship. The reason I am addressing that problem, the resolution of historical Treaty claims, is because resolution of these historical issues must be achieved fairly and in a timely manner to provide a firm foundation for our country into the future.

Treaty relationship generally

Overall many aspects of the Treaty relationship are in good heart. Perhaps there is no longer the fear of the Treaty and Maori aspirations that there once was, borne out by the degree of public support for Maori over the foreshore and seabed issue and the recent police raids in the Urewera. Instead, many aspects of Maori culture have, over time, become mainstream. We all take pride in the different types of All Black haka, while the once controversial singing of the national anthem in Maori now appears to be well accepted. There is outstanding Maori leadership at both a national and regional level working tirelessly to strengthen Maori communities to enable them to maintain their identity, overcome problems and participate fully in our collective community.

Below the surface the picture is more complicated. The quality of relationships between the Maori and government remains haphazard. For every advance, there also appears to be a setback. The new New Zealand education curriculum narrowly avoided almost total excision of references to the Treaty and biculturalism only after a change in leadership at the Ministry of Education. The Department of Corrections rolled out a form of ethnic profiling for Maori and negative cultural markers for the sentencing of Maori offenders, without establishing the validity of the mechanisms, or consulting with Maori. It is only now after five years of

challenge including a claim to the Waitangi Tribunal that the last of these mechanisms appear to be being withdrawn.

On the other hand the Crown continues to enter into international obligations, particularly in the area of trade liberalisation, without working with its Treaty Partner to ascertain how such international obligations may affect the Treaty relationship. Likewise, as a direct result of the official witch hunt that followed Dr Brash's ill considered Orewa speech, the Ministry of Health has ordered the removal of references to the Treaty from new health policy, action plans or contracts - an action that raises questions about whether genuine partnerships in the health sector can be achieved. There are many other examples, some of which are already under challenge, and some which are yet to be discovered. The state of the interface between Maori and government departments is a real issue and is currently being considered in depth by the Waitangi Tribunal as it prepares its report into the Wai 262 claim in respect of indigenous flora and fauna which finally completed hearings in 2007(after 8 years). The Tribunal's report will hopefully provide significant guidance as to how to avoid the type of pitfalls I have outlined in order to build real Treaty partnerships into the future.

Settlement of Historical Claims

It is against this background that I want to talk about the settlement of historical claims. There can be no doubt that the process for resolving historical injustices is facing a major crisis.

To start at the beginning, there used to be a certain logic to the Treaty claims and settlement process. Claims were heard, reported on by the Tribunal and then the successful claimant attempted to negotiate a fair settlement with the Crown.

This sequence is still the expectation of many claimants, and indeed is how the general public (to the extent that they may think about such things) still believes the process works.

While there are issues with the claims process that must be resolved, the Waitangi Tribunal's so-called "*new approach*" to hearing claims is working reasonably well and has led to a major speeding up of the hearing of claims. Indeed, it will not be long before the Tribunal will complete the hearing of historical claims. There is however no point in speeding up the hearing process if nothing then happens.

In my experience there have been two key missed opportunities in the history of resolving historical Treaty grievances. The first was the "*fiscal envelope*". In the early 1990s there

was a considerable reservoir of goodwill for settlement as a result of the initial enthusiasm with the Waitangi Tribunal process. In my view there was a chance to move quickly and make rapid progress in the settlement of historical claims but that opportunity was not taken up because the government of the day chose to spend time developing its fiscal envelope proposal. The resulting ill will that was generated meant that momentum that had been building towards early settlement was lost.

The second missed opportunity is the story of the first eight years of the present government. At the time Labour came to power, notwithstanding the fiscal envelope, significant, and indeed unprecedented, progress had nonetheless been achieved, although the approach to settlements had become somewhat formulaic and restrictive. There was a clear need for more flexibility particularly so as to achieve fairness between large and small settlements, and settlements with Crown forests and without.

Unfortunately, the last eight years has seen a succession of Ministers in charge of Treaty of Waitangi negotiations for whom, no matter what their talents, Treaty settlements have not been the priority. We now have Dr Cullen as the Minister, who like the other ministers who have held this portfolio, is burdened by a wide range of tasks including being the Deputy Prime Minister, Leader of the House and the Finance Minister in an election year. Such a workload alone casts doubt as to whether his appointment demonstrates any real priority is being given by the government to historical Treaty settlement issues, while Dr Cullen's ability to stand as the Crown's primary representative for resolving Treaty grievances is in any event compromised by his having been the primary architect of the deliberate Treaty breach which resulted from the passing of the Foreshore and Seabed Act 2004. I have watched with interest government comments since Dr Cullen became the Minister. To date these appear to be trumpeting progress - five Agreements in Principle in the last six months. When however one looks at the agreements that have been signed, far from evidencing significant progress, it illustrates just how slow the process really is.

The most recent Agreement in Principle, for Ngati Kahu ki Whangaroa is a case in point. Their claim, Wai 116, was filed in 11 July 1986. Because the claim was so clear cut, it became one of the only claims to have been sent to Tribunal mediation between the Crown and the claimants in the late 1980s. After the mediation failed to make progress, the claim was included with the Muriwhenua claims for hearing before the Waitangi Tribunal, and was found to be well founded by the Tribunal in 1997. Accordingly, the Agreement in Principle is for a claim which had been largely accepted by the Crown some 20 years ago.

The other recent Agreements in Principle illustrate similar points. Te Rarawa was one of the iwi who participated in the Muriwhenua claims, yet it has taken nearly 14 years after the end of Tribunal hearings and 11 years after the Waitangi Tribunal found that the claims were well founded, just to reach the point of an Agreement in Principle and Te Rarawa are only the second of the five Muriwhenua iwi to get to this point. The Agreement in Principle in respect of the Waikato River is not a new settlement but relates to items left out of the main Waikato settlement which dates back to 1995. The Agreement in Principle for the Taranaki whanui (Wellington) comes nearly five years after the release of the Wellington District report by the Waitangi Tribunal, while the Ngati Apa (North Island) agreement in principle almost rapid by comparison, is the result of some 2 1/2 years of negotiations, although this does not take into account the length of time that the claimant group would have been working on the claims.

If these time periods are striking, what needs to be understood is that the Agreements in Principle are only comparatively early steps along the settlement pathway. They are what they suggest; merely broad headings setting out the basic parameters agreed upon, but which are not binding on either party. The detail of the settlement is still to be negotiated, and will ultimately be contained in the Deed of Settlement. Put simply, an Agreement in Principle may be a milestone, but following its release is subject to challenge by overlapping claimants, as has been the case with the Ngati Whatua o Orakei and Te Arawa Agreements in Principle, while the detailed negotiations to take the bare outline contained in a 20 to 30 page AIP to a 500 page Deed of Settlement, can literally take years.

Even when a Deed of Settlement has been agreed and ratified by the claimant community, this does not automatically mean that assets are transferred and the claims settled. Over two years has now elapsed since the Te Roroa Deed of Settlement was signed yet the settlement assets remain in the hands of the Crown, because the settlement legislation to give effect to the Deed cannot pass through Parliament.

The reality is there have not been that many historical settlements. Only if you look at the proportion of land area, taking into account the Ngai Tahu settlement which encompasses most of the South Island, does the picture to date look impressive. Most of the complex and difficult claims are still to come. The current processes are struggling to deal with the number of claimants wanting to settle and unless new measures are adopted quickly there is no prospect of settlement of historical claims by the government's current target of 2020.

What is the problem?

What is the cause of this lack of progress? Why do Treaty settlements take so long? The big problem in my view, and the fundamental challenge to everyone in the sector, is that there is a fundamental disjunction between the claim and settlement process. The hearing process in the Waitangi Tribunal is contestable, with an independent decision-maker and is something in which all claimants can participate. In settlements on the other hand, the Crown retains all decision-making and only a few claimants have any contact with the Crown during the negotiation process.

The reality is that the settlement process is totally uncertain. The overall settlement process remains a non transparent political process in which the criteria applied by the Office of Treaty Settlements (“OTS”) are unclear and inconsistent, from the mandate and pre-negotiations phase, through the negotiations process and the redress available and the negotiations. This means that not only is there, for example, no certainty that any successful claimants in the Waitangi Tribunal will ever get into negotiations, even when groups get into negotiations they face major problems in achieving anything approaching a fair settlement. There is not time in this speech to even touch on all systemic problems with the Treaty settlement process - they are manifold, but to summarise some of the key issues requiring urgent consideration:

- **Mandate and Pre-negotiations** – There are no clear rules as to how a claimant group gets into negotiations
 - Large natural groupings not defined – Some large groups are actually very small
 - Lack of participation in Treaty claims means OTS have lack of knowledge of claims and claimant dynamics - this in turn affect the speed of negotiations once a mandate has been recognised
 - Lack of certainty as to who OTS intends to negotiate with
 - Criteria applied by OTS are unclear and inconsistent as to what constitutes a large natural grouping, or valid mandate
- **Negotiations – Process**
 - Negotiations? Are they really negotiations where there is such a disparity of power between Crown and claimants? Claimants have no real rights in the process and often no real alternatives. Claimants have often criticised the process as imposing settlements. In many cases rather than negotiations, it is a process of reducing claimant expectations
 - Specific Issues:

- Time - Negotiations take forever. As they unfold claimants must deal with a constant turnover of Crown officials and the need to re-educate new Crown negotiating teams about the issues
 - Resourcing - There is obviously a huge discrepancy of resourcing between the claimants and the Crown. Many claimants do not even have a basic infrastructure. The discrepancy is made worse depending on whether the claimants are able to receive funding from Crown Forestry Rental Trust or not, and the fact that the various funding agencies (including CFRT and the Legal Services Agency) have their own relationships with the Crown independent of the claimants.
 - Transparency - The Crown has a number of bottom lines which often are not disclosed at the beginning of negotiations. The Crown will insist on items such as making an apology and they should be included in front, at the beginning of the negotiation process.
- **Negotiations – Redress** – Although claimants realise by now that settlements are not the panacea for all issues enduring settlements require consistency between settlements - as claimant buy-in will not happen if settlements are seen as being unfair vis-a-vis comparable settlements. Instead there is an increasing inconsistency between settlements. Key issues:
 - **Quantum**
 - No transparency as to calculation - no detailed calculations are ever provided and hard to see any pattern
 - Criteria Unfair
 - Total land loss/Types of land lost - there is no particular reason why quantum should be based just on acreage of land lost, as a group could lose less land but suffer greater socio-economic effects as a result of that alienation. Likewise paying higher rates for raupatu claims ignores the similar socio-economic effects for other types of land loss
 - Benchmarking on earlier settlements - takes little account that in the earlier settlements the claimants have had the settlement monies for over 10 years
 - Effect of Fiscal Envelope - although the fiscal envelope officially no longer exists, the ratchet clause contained in the Waikato and Ngai Tahu settlements mean that 34% of every dollar spent on Treaty settlements above \$1 billion plus interest will go to the Waikato and Ngai Tahu claimants. As a result Crown is looking for creative ways

- to increase the financial value of the settlement without triggering the ratchet clause which in turn is leading to greater unfairness between settlements - for example the proposed settlement with Ngati Whatua o Orakei has a quantum of \$8 million but includes the transfer of \$80 million worth of Crown lands funded by the Crown not paying rental on the land it currently owns
- No account taken of accumulated rentals from returned Crown forest land - not part of the settlement quantum. Prejudices claimants without Crown forests
 - Claimants treated unfairly compared to other parts of the community - for example the \$100 million paid to West Coast communities for the loss of logging opportunities
- **Return of lands**
 - For many claimants most important part of settlement - it is the only chance for the return of relevant Crown lands
 - Commercial redress properties returned at market value – does not take into account price paid by Crown or circumstances by which the Crown acquired land
 - No mechanism in negotiations process for the return of memorialised land (State-Owned Enterprise and Education land) alienated to third parties – ignores *Lands* case
 - No consistency in return of cultural redress lands – Ranges from 39 to 2115 ha returned as cultural redress
 - **Other Forms of Redress**
 - Current statutory instruments (Overlays/Protocols/Statutory acknowledgments and Deeds of Recognition) provide little of substantive benefit to claimants as underlying legal relationships remain unchanged
 - Wide disparity between types of relationship redress provided – Later documents generally have more effect
 - Need to develop redress that more truly reflects a substantive partnership between claimants and relevant Crown agencies
 - **Resolution of Underlying Issues**
 - Settlements do not address underlying issues
 - Little point in resolving specific claims if legislative regime remains inconsistent with the Treaty or if new breaches being created

- Little attempt made to redress Treaty inconsistencies in statutes e.g RMA (Tribunal Report 1992) or Foreshore and Seabed Act (Tribunal Report 2004)
- **Governance**
 - Lack of genuine options
 - Settlement dependent on Crown approval of governance entity
 - Any proposal that is new or different requires considerable work
 - Crown should be clear on entities that does not support e.g Charitable Trusts
 - Accountability requirements should be in proportion to settlement
- **Legislative Process**
 - Significant final hurdle for settlement process
 - Adds further time to already protracted process
 - Delay and uncertainty caused by settlement legislation is unconscionable

In short settlements are not fair, but rather what the Crown can get away with. The inconsistencies emerging from recent settlements do not provide a foundation for the future, and the position is getting worse. This has to be a major concern for all those who would like to see historical claims resolved within their lifetimes.

Why should we care?

What is the problem? After all, even if there are delays the settlements are full and final. Of course, so too were the settlements in the 1920s and 1930s. If there is a clear unfairness between settlements as is rapidly becoming the case, it does not take much prescience to tell that such unfairness will be pointed out by future generations, particularly if settlements negotiated have not made a difference to the claimant groups and/or have lost relevance.

What is to be done?

The worst response at this time would be to try and make up for the lack of prioritisation over the last 8 years and attempt to come up with some rapid ad hoc settlements in order to get quick runs on the board. There are some indications are that this indeed what is being proposed, that there will be a return to direct deals between the Minister and chosen rangatira, bypassing those groups that have been trying to work through the Crown's uncertain requirements for entering into negotiations. Such an approach would be a significant retrograde step for at least two reasons – it would not only remove the last traces of certainty from the settlement process, but also further destabilise existing settlements, particularly those negotiated under the present rules.

Instead it is still not too late to work through the issues systematically in order to build a principled consensus on the issue. The starting points are:

- To recognise that there are no easy solutions
- To provide much greater transparency and remove inconsistencies
 - Develop clear criteria known and understood in all aspects of settlements from mandate through to determining quantum and providing redress
 - Establish minimum settlement quantum for smaller claimants
- To aim for faster settlements while retaining integrity of process
- To provide greater education about the issues – to the public, claimants and politicians

In the new processes and mechanisms that will need to be developed there is a clear need for independent scrutiny of settlements. Put simply it is too important to be left up to the government of the day to be the sole arbiter. At the very least the Waitangi Tribunal needs to take a more active role in monitoring the Crown settlement performance, giving guidance to the Crown and where necessary should not be afraid to use its resumptive powers in order to provide claimants with a genuine alternative to direct negotiations.

Most importantly however to get the government to act with greater transparency and integrity, it will be necessary to have a far greater involvement of the public in the process. Without doubt we need a far greater awareness of the issues.

At the moment public understanding of the Treaty settlement process is almost non-existent. They know it is taking a long time, but not the reasons for the delays. The media bears a heavy responsibility for failing to adequately report the issues. For example Television New Zealand reported in December 2005 that the Te Roroa claim had been settled with the return of various wahi tapu. Those in charge of news and current affairs at the time should have realised that the signing the Deed of Settlement is not the same thing as the transfer of the land.

We need to find a mechanism for true public debate on these issues, as the fair settlement of claims is inextricably linked with who we are as New Zealanders and the type of society we wish to build.

To achieve this, much greater media scrutiny and interest is required. I have no doubt that if there is true informed discussion there will be greater willingness to find new ways of bridging gaps.

Concluding comments

Unless we are careful those of us who have invested an enormous time in working through historical grievances, whether the claimants, the Waitangi Tribunal, Crown officials, politicians, historians, or even lowly Treaty lawyers are likely to become just another historical footnote to another round of failed attempts at coming to terms with our history of colonisation which continues to provide an ongoing historical blight on our society.

I got into this area of the law because I believed in the process and believed and continue to believe that there is a need for everybody that can contribute to the process should contribute. It has been my passion for the last 16 years but I have become increasingly tired and frustrated as I watch the inconsistencies and unfairnesses within the system continue to mount up. I believe that we continue to have a unique opportunity to put things right to provide a solid platform for the future. However we are rapidly getting to a point where despite all the good intentions this will become just one further round of failed settlements. All of us will be responsible if we mess up this opportunity.

As I have told many people, my one goal in the law is to be able to stand here at Waitangi on 6 February 2040 and celebrate with those who participated in this process on the basis that we have made a difference to our country. I hope my articulation of the issues this morning may bring that vision just a little bit closer.