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

*Malcolm Birdling**

The Government's current Treaty of Waitangi settlement policy is founded on a strategy of direct settlement with "large natural groupings": iwi and amalgamations of hapu. In this comment, Malcolm Birdling argues that the large natural groupings policy seriously undermines the interests of smaller claimant groups – and may even amount to a breach of the Treaty.

I INTRODUCTION

In his last speech as a Member of Parliament, Sir Douglas Graham, the driving force behind Treaty of Waitangi settlement policy during the 1990s, had a short, bitter exchange with then opposition MP Tariana Turia:¹

Rt Hon. Sir DOUGLAS GRAHAM: If that member thinks we are going to deal with hapu settlements, she can forget it. There are thousands of them, and if she thinks the Crown is dividing people now, which we are certainly not trying to do –

Tariana Turia: It's a treaty right.

Rt Hon. Sir DOUGLAS GRAHAM: The member keeps talking about treaty rights. If the member does not want any settlements, and I know she does not, then, say we want to deal hapu by hapu, in a thousand years' time she will still be working it out and will still be arguing about the hapu rohe boundary. It is bad enough dealing at the iwi level, but that is another issue.

* This is an edited version of a paper presented in partial fulfilment of the LLB (Hons) degree, Victoria University of Wellington, 2003.

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

This exchange reveals much about the way in which Treaty settlements have proceeded in New Zealand over the past few decades. It illustrates the problems involved in formulating a settlement policy, the sense of urgency that underpins it, and, in the final sentence, the frustration felt by many with the current settlement process. It also brings into question the degree to which any settlement process is, or should be, consistent with the Treaty itself. Since the 1980s there has been an increased recognition and acceptance of the need to provide redress for historical Treaty of Waitangi grievances. The question of how best to manage the provision of that redress has vexed successive governments, with the solution now seen as lying in direct settlement.

Direct settlement is a process whereby historical Treaty grievances are settled between the Crown and Maori claimants in the political arena, rather than through the courts or the Waitangi Tribunal.² It is now the primary mode of settlement,³ and certainly the method most favoured by the current Government.⁴ Over the past decade, direct settlement has evolved from an ad-hoc, ill-planned (albeit well-intentioned) scheme into a considerably more formal process.⁵

Under the current model of direct settlement, the Crown has unilaterally decided to seek settlements solely with "large natural groupings" (iwi or amalgamations of hapu groups), despite academic consensus that Maori society has traditionally been organised along smaller, hapu lines rather than in the larger groupings with which the Crown seeks to negotiate.

This paper argues that the exclusion of smaller groups from the settlement process creates two significant and distinct problems. The first is that in electing to negotiate and settle claims with large natural groupings alone, the Crown runs the risk of neglecting key interests, particularly those of smaller hapu. This has happened in a number of cases in

2 Mason Durie *Te Mana, te Kawanatanga: The Politics of Maori Self-Determination* (Oxford University Press, Auckland, 1998) 188. In many cases direct settlement is preceded by Waitangi Tribunal hearings; the hearings then form the evidential basis for settlement negotiations.

3 Except for the possibility which has existed since 1988 for the Waitangi Tribunal to make binding recommendations in some circumstances under the Treaty of Waitangi Act 1975, ss 8A-8HJ. To date only one binding recommendation has been made, in the Waitangi Tribunal *Turangi Township Remedies Report: Wai 84* (GP Publications, Wellington, 1998). However the Government, prompted by the legislation, acted before this came into force: see Janine Hayward "Three's a Crowd? The Treaty of Waitangi, the Waitangi Tribunal and Third Parties" (2002) 20 NZULR 240.

4 The budget of the Office of Treaty Settlements, the government agency responsible for direct settlements, now dwarfs that of the Waitangi Tribunal: Alan Ward *An Unsettled History: Treaty Claims in New Zealand Today* (Bridget Williams Books, Wellington, 1999) 41.

5 See Ward *An Unsettled History*, above n 4, 25-40; "National Overview" (May 1997) Maori LR 4; Douglas Graham *Trick or Treaty* (Institute of Policy Studies, Wellington, 1995).

which smaller groups, excluded from the direct settlement process, have subsequently sought relief through the courts and the Waitangi Tribunal. While the courts and the Tribunal may be expected to examine the fairness of the process, they are reluctant (and usually powerless) to intervene given its inherently political nature. There is a risk that the settlements may not stand up in the long term—a problem that will be accentuated as the pace of settlements increases. The second problem with the large natural groupings policy is that it may itself be a breach of the Treaty.

As Doug Graham alluded to in his exchange with Tariana Turia, the direct settlement policy is intended to create the possibility of final Treaty settlements within a finite period. The public demand for (and thus the political importance of) such an outcome is huge. But while this may be so, this paper argues that it is difficult to justify the current policy given its wide-reaching effects, and the fact that it was unilaterally imposed upon, rather than negotiated with, Maori.

This paper begins by outlining the development and structure of the current direct settlement process, before examining the "large natural grouping" component in detail. Part IV identifies the practical effects of the large natural groupings policy when combined with other aspects of the settlement process. The role of the courts is considered in Part V, with some suggestions for reform. Parts VI and VII address the questions of whether settlements will last given the problems caused by the large natural groupings policy, and whether the policy itself amounts to a breach of the Treaty.

II THE DIRECT SETTLEMENT PROCESS

The formalisation of the Treaty settlement process started in 1992, when Cabinet decided to establish a new, comprehensive policy for Treaty claims relating to historical land grievances.⁶ One element of the policy was a limit on total government expenditure for Treaty settlements of \$1 billion over a 10-year period; this aspect generated widespread outrage among Maori, which tended to overshadow the detail of the policy.⁷ But that is not to say that issues of process were ignored in the public consultation process that followed.⁸

6 David Williams "Honouring the Treaty of Waitangi—Are the Parties Measuring Up?" (2002) 9 Murdoch University Electronic Journal of Law 3, para 13; Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua: Healing the Past, Building a Future* (Wellington, 2002) 21. While a "Treaty of Waitangi Policy Unit" had been established by the Fourth Labour Government in the late 1980s, it served mainly to coordinate policy development.

7 See Ward *An Unsettled History*, above n 4, 52; Williams, above n 6, para 13.

8 Of 2077 submissions received on the Crown's proposals, at least 869 rejected the proposals outright as a result of their unilateral development: Te Puni Kokiri *Report of Submissions: Crown Proposals for Treaty of Waitangi Claims* (Wellington, 1995) 5.

Many submitters made specific suggestions about representation,⁹ and Mason Durie has suggested that there was significant concern within Maoridom about the impact of the policies on smaller, less well-resourced groups.¹⁰

The Government's current Treaty settlement protocols can be found in *Ka Tika a Muri, Ka Tika a Mua: Healing the Past, Building a Future*, produced by the Office of Treaty Settlements.¹¹ While the concept of a fiscal cap appears to have disappeared from the settlement process (in name, if not in substance),¹² the 1994 proposals remain, largely unaltered.

A "Large Natural Groupings"

Healing the Past outlines certain "key settlement policies" to guide the settlement process. These provide, among other things, that the Crown seeks "comprehensive settlement of all claims of a claimant group", to ensure that all historical grievances are addressed.¹³ This may seem a noble aim, but it is undermined by the next policy, which

9 J H Roberts *Alternative Vision – He Moemoea Ano: From Fiscal Envelope to Constitutional Change: The Significance of the Hirangi Hui* in Craig Coxhead "Where are the Negotiations in the Direct Negotiations of Treaty Settlements?" (2002) 10 Waikato LR 13, 24; see also M H Durie "Proceedings of a Hui held at Hirangi Marae, Turangi" in Geoff McLay (ed) *Treaty Settlements: The Unfinished Business* (Institute of Policy Studies, Wellington, 1995).

10 Durie *Te Mana, te Kawanatanga: The Politics of Maori Self-Determination*, above n 2, 188.

11 The Office of Treaty Settlements is a unit within the Ministry of Justice reporting directly to the Minister in charge of Treaty of Waitangi Negotiations. It was established in January 1995 to manage historical Treaty settlements: Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua: Healing the Past, Building a Future*, above n 6, 23.

12 See Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua: Healing the Past, Building a Future*, above n 6, 30 and Hon Margaret Wilson's statement that the Labour-led Government has "now moved entirely away from the fiscal envelope concept in planning": Hon Margaret Wilson "Principles to Guide Settlement of Treaty Claims" (3 August 2000) Press Release. However, while the rhetoric of a "fiscal cap" has disappeared, one of the Crown's negotiating principles remains "fairness between claims", meaning that similar claims should receive a similar level of redress. Given that key early settlements were negotiated within the framework of a fiscal cap, it is difficult to see how this policy can mean anything other than that the fiscal cap model is still adhered to: see Coxhead, above n 9, 26-27 and Tom Bennion "New Principles to Guide the Settlement of Historical Treaty Claims" (July 2000) Maori LR, which notes that "the harsh relativity clauses of the Tainui and Ngāi Tahu settlements make it difficult for any government to stray too far from the \$1 billion figure for all major settlements".

13 Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua: Healing the Past, Building a Future*, above n 6, 32.

baldly states that "[t]he Crown strongly prefers to negotiate claims with large natural groupings rather than individual whanau and hapu".¹⁴

The Crown has decided to define the Maori Treaty partner (for the purposes of historical settlements) in terms of large natural groupings. This is of considerable importance for the manner in which the settlement process is conducted; and yet determining the identity of the Maori Treaty partner, and particularly the level of Maori society at which to pursue Treaty negotiations, is far from straightforward. The area is so complicated and the number of considerations and possibilities so vast that any decision is bound to be controversial.¹⁵

B Development

It was recognised from a very early stage in the development of the direct settlement process that deciding who to negotiate and settle with could be problematic. Cabinet papers noted the possibility that wider groups (for example, iwi) may not represent the interests of subgroups (such as hapu).¹⁶ Negotiation solely with iwi was deemed "particularly controversial", and further discussion and consultation were recommended.¹⁷

The issue was raised again in July 1994, in the report to Cabinet of an ad hoc officials committee.¹⁸ The report emphasised the importance of getting representation issues right, noting that "[e]xcluding the right people or including the wrong people can both result in

14 Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua: Healing the Past, Building a Future*, above n 6, 32.

15 See Kirsty Gover and Natalie Baird "Identifying the Maori Treaty Partner" (2002) 32 U Toronto LJ 39, 40; Tom Bennion "Who Represents Maori Groups?" (Nov 1994) Maori LR 1; Paul Meredith "Seeing the 'Maori Subject': Some Discussion Points" (Draft, Te Matahauariki Institute, University of Waikato).

Maori society is organised in many ways, but iwi, hapu, and whanau are the main traditional categories. Iwi are the largest grouping, followed by hapu, whereas whanau groups consist mainly of the extended family. Both iwi and hapu are primarily organised along the lines of whakapapa, or direct descent from a common ancestor. For more detailed analysis see Angela Ballara Iwi: *The Dynamics of Maori Tribal Organisation from c1769 to c1945* (Victoria University Press, Wellington, 1998) 17 and generally; I Pool *Te Iwi Maori: A New Zealand Population: Past, Present and Projected* (Auckland University Press, Auckland, 1991).

16 A Cabinet paper dated 28 June 1993 notes that "[w]ith every claim there is an inherent risk for the Crown that it may not be dealing with the appropriate representatives of the claimants": Officials Strategy Committee "Treaty of Waitangi Settlement Fund: Size, Shape, Timescale and the Reciprocation from Maori" (28 June 1993) CSC (93) 90 para 64.

17 Officials Strategy Committee, above n 16, para 67.

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

new grievances",¹⁹ and that "[a] particular concern is that minority interests are protected against an oppressive majority".²⁰ In considering the specific question of which group to deal with, the report noted that "[a]ggregating grievances into a wider group, e.g. hapu grievances being subsumed at the iwi level emphasises the overall nature of grievance felt by Maori but could lead to settlements that are not seen to extinguish highly specific grievances".²¹

Cabinet considered this report in October 1994 before releasing the settlement proposals for public consultation at the "fiscal envelope" hui. An inter-departmental working group then examined proposals for negotiation processes and recommended among other things that "the Government explicitly place a priority on negotiating and settling claims brought by iwi or confederations of iwi".²² This proposal was subsequently approved by Cabinet,²³ and reflected in the Crown's settlement guide.²⁴

The preference for dealing solely with iwi has subsequently become a preference for dealing solely with large natural groupings. The change occurred, according to current Office of Treaty Settlements Director Andrew Hampton, in recognition of "the diversity of Maori political organisation".²⁵ But despite this shift in policy, smaller groups which do not qualify as large natural groupings are still unable to negotiate directly with the Crown. In Hampton's words, restricting the process to large groups is necessary "to accommodate the reality that a settlement with each registered claimant is unsustainable".²⁶

19 Ad Hoc Officials Committee, above n 18, 2.

20 Ad Hoc Officials Committee, above n 18, 2. The sentence continues "[and] the majority against an unreasonable minority"; this resonates with the terms of Te Ture Whenua Maori Act 1993, s17(2)(d), which strikes a similar balance in terms of interests in land.

21 The report did not express any ultimate view as to the level at which claims should be pursued, but did note that the issue should be addressed. Cabinet also noted the issue at the October 1994 meeting that considered the report: Ad Hoc Officials Committee, above n 18, 3.

22 Ministry of Justice "Treaty Settlement Policies: Reports from Working Groups" (5 July 1996) CSC (96) 127 paras 14, 45.

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

24 See Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua: Healing the Past, Building a Future*, above n 6, 24.

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

26 Hampton, above n 25.

C *The Crown's Justification for the Large Natural Groupings Policy*

The Crown's justification for the policy (as set out in *Healing the Past*) is that it "makes the process of settlement easier to manage and work through, and helps deal with overlapping interests" as well as reducing costs for both the Crown and claimants.²⁷ The Office of Treaty Settlements explored these reasons in more detail in a recent report to the Maori Affairs Select Committee:²⁸

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

The rationale for the large natural groupings policy is clearly expedience: that is, making the goal of final settlements easier to achieve from the Crown's perspective.²⁹ There is no evidence that the question of which group Maori identified as most suitable, or most representative of past or present notions of Maori social organisation, was ever considered when formulating the policy. Indeed, the entire direct settlement process was constructed with minimal consultation with Maori.³⁰

III AN UNPRINCIPLED APPROACH

The Crown's goal is to obtain, by way of negotiation, full and final settlements of historical Treaty grievances. Crucial to achieving this goal is ensuring that the Crown negotiates with the proper representatives of the other Treaty partner, and that it does not

27 Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua: Healing the Past, Building a Future*, above n 6, 44.

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

This line of reasoning has also been adopted by the current Minister in charge of Treaty of Waitangi Negotiations, Hon Margaret Wilson. See Written Question from Rt Hon Winston Peters to Hon Margaret Wilson (24 October 2002) 54 NZPD Q Supp 2655, question no 11982, where Ms Wilson stated: "Negotiations with smaller groups, or negotiations covering only some of the claims of the group (non-comprehensive settlements) will mean more negotiations are required than otherwise, and this will tend to delay completion of the settlement process."

29 Andrew Hampton has described the policy more charitably as an "attempt to balance ... matters of tikanga and whakapapa with practicality and efficiency". See Waitangi Tribunal *Te Arawa Mandate Report: Wai 1150* (Legislation Direct, Wellington, 2004) 4.2.2.

30 Except for the opportunity to comment generally on the issue of claimant representation in the context of the "fiscal envelope hui" described above, which as noted elicited a variety of responses detailed in Te Puni Kokiri, above n 8, 92-93.

end up creating new grievances in the process. In this respect, the current settlement process is problematic.

Kirsty Gover and Natalie Baird have argued that the effect of approaching definition issues in the way currently favoured by the Government is to fail to recognise a Treaty status for "non-traditional Maori collectives".³¹ But when one examines the current framework for the negotiation and settlement of historical Treaty grievances it becomes apparent that it is not only non-traditional collectives that are shut out of the process. While the expression "large natural grouping" is not defined, the factors which the Crown takes into account before entering into negotiations with a group are such that it is virtually impossible for any groups other than iwi, large hapu, or sizable confederations of hapu to satisfy the criteria.³² "Large hapu or confederations of hapu" may qualify because, according to the Office of Treaty Settlements and Te Puni Kokiri, they function "in similar ways to iwi".³³

This approach is inconsistent with current historical and anthropological thinking, which is that it was hapu and not iwi which were (and arguably still are) the primary vehicles of Maori political organisation.³⁴ The Waitangi Tribunal itself has acknowledged this on several occasions,³⁵ and there is an extensive body of peer-critiqued anthropological research dating back to the mid-1970s in support.³⁶ Yet government Treaty settlement policies perpetuate the traditional, flawed assumption that iwi are the

31 Gover and Baird, above n 15, 39–40.

32 These factors include relevant Waitangi Tribunal findings; whether the group has a distinctive area of interest, whakapapa, tipuna, iwi, hapu, and marae; and (crucially) the relative size of the group in terms of its population and rohe: Hampton, above n 25.

33 Hampton, above n 25; Response from Leith Comer, Chief Executive, Te Puni Kokiri to a request from the author under the Official Information Act 1982 (12 August 2003).

34 See Ballara, above n 15; Steven C Bourossa and Ann Louise Strong "Restitution of Land to New Zealand Maori: The Role of Social Structure" (2002) 75 *Pacific Affairs* 162; Steven Webster "Maori Retribalisation and Treaty Rights to New Zealand Fisheries" (2002) 14 *The Contemporary Pacific* 341; Richard Hill and Vincent O'Malley *The Maori Quest for Rangatiratanga / Autonomy 1840-2000* (Treaty of Waitangi Research Unit, Wellington, 2000) 1–2; see also the texts of the Treaty of Waitangi itself, where the word "tribes" in the English text was translated as "hapu" in the Maori version.

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

36 Stephen Webster "Maori Hapuu and their History" (1997) 8 *Australian Journal of Anthropology* 307.

paramount bodies, commanding obedience from hapu, who in turn command obedience from whanau.³⁷ As Alan Ward has put it:³⁸

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

Thus, in choosing to negotiate almost solely with iwi, the Government is choosing a model inconsistent with *tikanga*. This is the "one major flaw" of the modern Treaty settlement process:³⁹ successive governments' propensity for "largely unilateral definitional exercises, effectively removing the debate about Maori identity from Maoridom".⁴⁰

IV PRACTICAL EFFECTS

The lack of a principled basis for the large natural grouping policy would perhaps not be an issue if the policy were working in practice. But its adverse effects are becoming ever more apparent as the number of settlements increases. Smaller groups such as hapu are forced to amalgamate under the banner of an iwi or a special body constructed for the purpose of settlements, rather than being able to enter into direct negotiations with the Crown. The effect of this is that the concerns and aspirations of the smaller groups are eclipsed by those of the larger. As the Waitangi Tribunal noted in 1999, the "often bitter" historical struggles among hapu tend to resurface when claims are heard and settlements

37 This is a concept which emerged and then flourished during the colonial context due to officials' desire to find a "comprehensible and comprehensive hierarchical body politic with which to negotiate land purchases": Ballara, above n 15, 59, 70, 81; see also Lindsay Cox *Kotahitanga: The Search for Maori Political Unity* (Oxford University Press, Auckland, 1993) 141; Wayne Rumbles "Treaty of Waitangi Settlement Process: New Relationship or New Mask" in Greg Ratcliffe (ed) *Compr(om)ising Postcolonialism(s): Challenging Narratives and Practices* (Dangaroo Press, Sydney, 2002).

38 Alan Ward "Historical Claims under the Treaty of Waitangi" (1993) 28 *Journal of Pacific History* 181.

39 Williams, above n 6, para 2. See generally Leo Watson "The Negotiation of Treaty of Waitangi Claims: An Issue Ignored" (1996) 8 *Otago LR* 613, 615–617 and Dr Joan Metge "Submission to the Maori Affairs Select Committee on the Runanga Iwi Bill" (MA/90/85, 14 February 1990) which criticises the Government's attempts to rigidly define "the essential characteristics of iwi" by law. See also the Interim Report of the Maori Affairs Committee on the Runanga Iwi Bill [1990] AJHR I.10A. Criticism has come not only from the academic world: see the comments of Maori involved in the settlement process reproduced in Ministry of Justice *Hui Report: Seeking Solutions* (Wellington, 2003) 39–42, 47.

40 Gover and Baird, above n 15, 40.

negotiated.⁴¹ The scope for injustice is increased by two further factors: the policy of seeking comprehensive settlements, and the steps taken to ensure finality of settlements.

A "Comprehensive Settlements"

Once a group's negotiating mandate is accepted, the Crown will proceed to negotiate a settlement with that group which covers all of the hapu and whanau present in the area forming the subject of the claim. Settlements will address "all claims of the group whether the claims have arisen or been considered, researched, registered, notified or made on or before the settlement is reached".⁴²

Under the large natural grouping policy, the Crown will look for a large natural group with which it can conduct negotiations for the comprehensive settlement of all claims in the area in question. There is a possibility that the larger group may claim to represent smaller groups which fall within the area but do not accept the mandate of the larger group. Smaller groups may find their claims subsumed into those of the larger group, even though they have not themselves consented to this.

B "Finality"

The main aim of the Treaty settlement process is to obtain full and final settlement of historical grievances. To this end, the redress provided by the Crown is offered "in total satisfaction of the grievance for all time".⁴³ Settlement legislation includes a provision that the settlement is final, backed up by provisions preventing the reopening of the settlement by the courts or the Waitangi Tribunal.⁴⁴ These provisions constitute "powerful structural barriers to prevent Maori from pursuing their Treaty claims in the future".⁴⁵

41 Comments reproduced in Tom Bennion "Whanganui River Claims of Atihaunui and Tamahaki" (March 1999) Maori LR 4.

42 Letter from Tony Sole, Manager, Claims Development, Office of Treaty Settlements to Rawinia Konui (18 August 2003), which describes the policy in relation to the Ngati Tuwharetoa negotiation process.

43 Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua: Healing the Past, Building a Future*, above n 6, 32; the quote is from Barney Riley "Mocked before the Ink is Dry on the Statute? Final Settlements of Treaty of Waitangi Claims" (LLB(Hons) Research Paper, Otago University, 1994) 16.

44 Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua: Healing the Past, Building a Future*, above n 6, 77. See for example the Ngai Tahu Claims Settlement Act 1998, s 461(3), which states:

Despite any other enactment or rule of law, no court or tribunal has jurisdiction to inquire or further inquire into, or to make any finding or recommendation in respect of,—

(a) Any or all of the Ngai Tahu claims; or

(b) The validity of the deed of settlement; or

The combined effect of the comprehensive settlement and finality policies is that once a claimant group has negotiated a settlement, the legislation that gives effect to that settlement precludes any future pursuit of claims by smaller groups not involved in the settlement process but bound by its outcome.

C *The Crown's Answer*

The Office of Treaty Settlements maintains that it has processes in place to ensure that the settlement policy does not compromise the interests of hapu or whanau. These processes, it is argued, ensure "a transparent and inclusive mandating process, offering specific redress to [smaller] groups and providing an opportunity for all claimants to participate in the acceptance of a settlement offer through a ratification process".⁴⁶ *Healing the Past* notes that in some cases, specific smaller claims from whanau and hapu "can be addressed within the comprehensive settlement".⁴⁷ An example of this, according to Andrew Hampton, is the return of the Turuturu Mokai Reserve to Ngati Tupaia Hapu in the Ngati Ruanui settlement.⁴⁸ However, none of this adequately answers the point that smaller groups are forced to work within an imposed settlement structure which does not necessarily suit them.⁴⁹

D *The Policy in Practice*

The effectiveness of the large natural grouping policy and the success of the Crown's attempts to mitigate the problems with the policy can be gauged by examining its practical effects.

(c) The adequacy of the benefits provided to Te Runanga o Ngai Tahu and others under this Act or the deed of settlement; or

(d) This Act.

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

46 Hampton, above n 25.

47 Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua: Healing the Past, Building a Future*, above n 6, 66.

48 Hampton, above n 25.

49 The return of the Turuturu Mokai Reserve was negotiated within the large natural grouping framework, and title to the reserve vested not in the hapu, but in Te Runanga o Ngaati Ruanui Trust, the entity representing the iwi as a whole: Ngati Ruanui Claims Settlement Act 2003, s 34. This process did not stop a number of whanau and hapu from rejecting the settlement, and even going so far as to travel to Wellington to object at the first reading of the settlement legislation, as was noted at the time by Metiria Turei (3 October 2002) 603 NZPD 885–887.

1 Court challenges and acquiescence

In a number of cases, smaller groups, concerned that their interests will be submerged in those of the larger negotiating group without their consent or involvement, have challenged settlements in the courts. Such challenges occurred during the Te Atiawa,⁵⁰ Ngai Tahu,⁵¹ and Ngati Ruanui⁵² settlements.

While court challenges are the most visible examples of discontent, in every claims district there is a very real risk that hapu will simply acquiesce in the policy, out of fear that they will be excluded from the settlement process if they do not.⁵³ The Office of Treaty Settlements takes an uncompromising line against groups which choose not to participate in the settlement process.⁵⁴

2 "Fast-tracking" settlements

The Government's current proposals for "fast-tracking" settlements in some of the largest claim districts are likely to aggravate the problems of court challenges and acquiescence.⁵⁵ In fast-tracking the Central North Island settlement, the Office of Treaty

50 *Kai Tohu Tohu o Puketapu Hapu Inc v Attorney-General and Te Atiawa Iwi Authority* (5 February 1999) HC WN CP344/97 2–4 Doogue J.

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

52 Waitangi Tribunal *Pakakohi and Tangahoe Settlement Claims Report: Wai 758* (Legislation Direct, Wellington, 2000); *Watene and Ors v Minister in Charge of Treaty of Waitangi Settlements* (11 May 2001) HC WN CP120/01 Goddard J.

53 For an illustration of this sentiment, see "Submission from the Mokai Patea Waitangi Claims Committee Concerning the Inquiry Boundary" (2 November 2002) Wai 903 Doc #2.57. See also the comments of a witness for Ngati Makino in the Te Arawa Mandate Urgent Inquiry that his people "felt like the Crown was essentially forcing them 'into bed with those whom [they] wished to remain at arms length': Waitangi Tribunal *Te Arawa Mandate Report*, above n 29, 3.5.

54 When some hapu expressed concern about their role in the Ngati Tuwharetoa settlement process, the Office of Treaty Settlements responded with a letter on 18 August 2003 which stated: "if a minority of hapu choose to stand outside of ... negotiations that would not be sufficient cause for the Crown not to begin negotiations ... I should emphasise that—consistent with the policy of comprehensive settlement with large natural groups—the Crown would not contemplate having separate negotiations with individual hapu"; see also the comments of the Waitangi Tribunal regarding the Crown's actions in attempting to convince Waitaha to join in the Te Arawa settlement: "If the Crown has not been 'coercive' in pursuing Waitaha ... it has certainly been relentless": Waitangi Tribunal *Te Arawa Mandate Report*, above n 29, 5.6.3.

55 Eugene Bingham, Phil Taylor, and Catherine Masters "Government Gambles on High Risk Treaty Plan" (19 July 2003) *New Zealand Herald* Auckland 1; Letter from Ross Phillipson, Central North

Settlements has advised interim representatives of claimant groups that while "it is important that the interests of individual hapu and whanau are represented around the table", it is "conscious that whanau and hapu issues should not distract from progressing settlements at the wider level".⁵⁶

3 *Research funding*

Smaller groups are further handicapped by a lack of access to research funding. As Alan Ward has pointed out, claims tend to become "hydra-headed": research at iwi level prompts further claims at the hapu and, occasionally, whanau levels as smaller groups begin to identify and assert their own interests.⁵⁷

In order to streamline the Central North Island claim, research is to be conducted at least initially along general lines, with "overview research covering all the generic issues".⁵⁸ The aim is to provide "a sufficient evidential base either for hearings and a Tribunal report on the claim issues affecting *all or most* of the claimants in a district, or for the negotiation of a settlement of these issues".⁵⁹ A similar process has been proposed for the Rotorua inquiry district. Research in that case is to be based on "big picture" issues, rather than specific claims such as detailed hapu/whanau grievances about particular resources.⁶⁰

The problem with this approach is that if research is carried out into the big picture issues alone, the particular claims of hapu and whanau will go unexamined. And this problem is compounded when the focus on achieving a comprehensive settlement results in legislation extinguishing the rights of smaller groups to pursue a claim at a later date.

Island Project Leader, Office of Treaty Settlements to Interim Representatives of Claimant Groups (16 June 2003) Wai 950 Doc #2.1133(b), Wai 951 Doc #2.1039(a), Wai 952 Doc #2.1022(a); "Memorandum and Directions of Judge C M Wainwright re: Judicial Conference for Whanganui District Inquiry" Wai 903 Doc #2.88, 2.

56 Phillipson letter, above n 55.

57 Ward *An Unsettled History*, above n 4, 176.

58 See Waitangi Tribunal Research Co-ordinating Committee "Central North Island Inquiry: Stage One Casebook—proposal for an integrated research programme" (June 2003) Wai 950 Doc #2.1130, Wai 951 Doc #2.1035, Wai 952 Doc #2.1019, 1.

59 Waitangi Tribunal Research Co-ordinating Committee "Central North Island Inquiry: Stage One Casebook Proposal" above n 58, 1 (emphasis added).

60 See Dr Barry Rigby, Eileen Barrett-Whitehead, Bruce Stirling, and Dr Grant Phillipson "Rotorua Inquiry District: Stage One Casebook Discussion Paper" (May 2003) Wai 950 Doc #2.1129, 2.

Smaller claimant groups are alarmed at this prospect,⁶¹ particularly given that it is almost impossible for them to gain funding for independently commissioned research.⁶² Without independent research, and with generic research unable to focus on specific claims, smaller groups are put at a distinct disadvantage when it comes to obtaining a fair settlement. They will often not be able to prove the extent of their grievance—and in some cases may not even know that the grievance exists.⁶³

V THE ROLE OF THE COURTS

Given that Treaty settlements purport to abrogate for all time the rights of groups to bring claims for historical grievances, one might have expected jealous oversight of the process by the courts. This has not in fact occurred.

A Court Challenges

For the most part, court challenges to settlements have not been successful. Judges have held that the direct settlement process is "not by its nature amenable to supervision by the Courts".⁶⁴ A further obstacle lies in the fact that the process has no statutory basis.⁶⁵ Negotiations are "entertained by the Crown as part of a political and not part of a legal process",⁶⁶ and court intervention "would be an outright interference in what is nothing more or less than an ongoing political process as opposed to a distinct matter of law".⁶⁷ It has been further held that if negotiations lead to a settlement, that settlement is itself non-

61 See "Memorandum of Counsel for Ngati Tamakari Regarding Memoranda dated 25 March 2003" (16 April 2003); "Joint Memorandum of Counsel for Ngai te Rangi and Ngai Tukairangi following Judicial Conference at Rotorua on 26 March 2003" Wai 950 Doc #2.1101(a).

62 One of the main sources of such funding, the Crown Forestry Rental Trust, recently stated that it would make funding available for claimant research subject to criteria which would rule out virtually all hapu and whanau groups: Gary Judd QC "Counsel for Crown Forestry Rental Trust memorandum to Tribunal for 27 March 2003 conference" Wai 950 (Wai 791) 2.

63 Ward *An Unsettled History*, above n 4, 176; see also Peter Shand "Fixing Settlement: An Analysis of Government Policy for Settling Tiriti Grievances" (1998) 8 AULR 739, 760.

64 *Pouwhare and Or v Attorney-General and Te Runanga o Ngati Awa* HC WN CP78/02 para 42. This approach is disturbingly reminiscent of Prendergast CJ's observation in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72 that the extinguishment of native title was an "act of state" and therefore beyond the reach of the courts.

65 One possible exception is where the body conducting the negotiations with the Crown is a statutory trust with limited purposes: see *Waitaha Taiwhenua o Waitaki Trust and Ors v Te Runanga o Ngai Tahu and Attorney-General*, above n 51.

66 *Kai Tohu Tohu o Puketapu Hapu Inc v Attorney-General and Te Atiawa Iwi Authority*, above n 50, 15.

67 *Greensill and Ors v Tainui Maori Trust Board* (17 May 1995) HC HAM M117/95 12–13 Hammond J.

justiciable until it passes into legislation.⁶⁸ At that stage, however, elementary constitutional principle dictates that the settlement is "inviolable and totally beyond the reach of the Court's supervision".⁶⁹

B Waitangi Tribunal

The Waitangi Tribunal's approach has been essentially the same as that taken by the courts:⁷⁰

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

While the Tribunal has confirmed that that it does have jurisdiction to consider whether any particular decision on settlements is a breach of the Treaty, it has also noted that such claims often have an "air of artificiality", given the Tribunal's focus on Crown actions.⁷¹ While "technically aimed at the Crown, they mask what is essentially an internal dispute between closely related kin groups as to which organisation at which level speaks for them".⁷²

C Conclusions

As Carrie Wainwright has observed, "[i]t is very hard indeed to persuade any forum to call a halt to the process of effecting a settlement in order that the misgivings of the few can be addressed in the face of the apparent desire to proceed of the many, and of the Crown".⁷³ But there is a strong argument to be made that the courts should be more

68 *Pouwhare and Or v Attorney-General and Te Runanga o Ngati Awa*, above n 64, para 45.

69 *Pouwhare and Or v Attorney-General and Te Runanga o Ngati Awa*, above n 64, para 45. See also, in the Court of Appeal, *Milroy and Ors v Attorney-General and Te Runanga o Ngati Awa* (11 June 2003) CA 197/02 para 18 Gault P.

70 Waitangi Tribunal *Pakakohi and Tangahoe Settlement Claims Report* above n 52, 57.

71 Waitangi Tribunal *Pakakohi and Tangahoe Settlement Claims Report*, above n 52, 55–56.

72 Waitangi Tribunal *Pakakohi and Tangahoe Settlement Claims Report*, above n 52, 55. The inappropriateness of the Waitangi Tribunal as a forum for such grievances was noted over 10 years ago by Chief Judge Durie (as he then was) at the New Zealand Law Conference: Edward Durie "Politics and Treaty Law" (Lecture to New Zealand Law Conference, Wellington, 2–5 March 1993).

73 Carrie Wainwright "Maori Representation Issues and the Courts" in David Carter and Matthew Palmer (eds) *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (Victoria University Press, Wellington, 2002) 179, 191.

concerned with ensuring the fairness of the process. In 1993 then-Chief Judge Durie observed that:⁷⁴

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

Similarly, Sir Robin Cooke, writing at around the same time, observed that what progress had occurred in the Treaty area was the result of "an interaction of three forces":⁷⁵

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

There is a powerful message in these statements. The Treaty settlement process is not solely a political one: the courts have an integral part to play. If it is to achieve its aims, it must be conducted fairly—and if the political process fails to ensure fairness, then the courts must step in.⁷⁶

Tom Bennion points out that large natural groupings which achieve settlements will form legal structures to manage them—each with rules about membership, decision-making, and distribution of benefits.⁷⁷ Bennion predicts that in some areas, unresolved issues around hapu and other small groups will come bubbling back up after settlement, in the form of applications for judicial review of the actions of these legal structures and litigation concerning the interpretation of any rules.⁷⁸ It would make sense for the courts to resolve disputes *before* this occurs, rather than waiting around for post-settlement

74 Durie "Politics and Treaty Law", above n 72.

75 Rt Hon Sir Robin Cooke "The Challenge of Treaty of Waitangi Jurisprudence" (1994) 2 Waikato LR 1.

76 Note, however, the comments of Judge Wainwright who argues that litigation is not the best means by which to resolve these issues, as any attempt to fit these kinds of disputes into "legal boxes" (if this is indeed possible) will obscure the real issues, and sour relationships: Wainwright, above n 73, 191.

77 Interview with Tom Bennion (the author, Wellington, 12 September 2003).

78 Bennion interview, above n 77.

litigation. But even if courts have the will to intervene, they lack the jurisdiction to do so.⁷⁹ This is quite deliberate government policy. As Professor Durie observes, one of the key motives behind the direct settlement process was a desire that the Government, and not the courts, have the final say on Treaty issues.⁸⁰

Given the importance of judicial scrutiny when it comes to the basic fairness of the settlement process, there may be a need for legislative intervention to fill the jurisdictional gap. The Waitangi Tribunal has recently recommended that consideration be given to better legislative regulation of the procedural aspect of Treaty settlements, to stop the process being "subsumed by political rather than Treaty-compliant priorities".⁸¹

VI WILL THE SETTLEMENTS LAST?

The effect of the large natural grouping policy, coupled with the measures taken to ensure the finality of settlements and the courts' inability (and unwillingness) to become involved in the settlement process, is that unless smaller groups submit to the will of a larger grouping, they are shut out of the process altogether. This is severely detrimental to the smaller group's rights, as settlement legislation invariably precludes future reopening of historical claims by the courts and Waitangi Tribunal.

The flaws in the current policy raise two concerns: (1) Are the deficiencies likely to undermine the durability of the settlements? (2) Is the direct settlement process *itself* a breach of the Treaty? To answer the first question one only has to look to past attempts.

A Lessons from the Past

Attempts to settle historical grievances have been made periodically throughout New Zealand history, most notably during the 1930s and 1940s.⁸² As with the current process, finality was the aim. The Ngai Tahu Claim Settlement Act 1944 stated that it was an "Act to

79 Wainwright, above n 73, 191. One possible source of jurisdiction is the mediation provisions found in Te Ture Whenua Maori Act 1993, as noted by Chief Judge Joe Williams in "The Maori Land Court—A Separate Legal System?" (New Zealand Centre for Public Law occasional paper no 4, Wellington, 2001) 10–11. Note however the concerns as to the efficacy of such determinations: Wainwright, above n 73, 192–194, and the concerns of the Maori Land Court in *Re Ngati Paoa Whanau Trust* (1995) 96A Hauraki MB 155, noted in New Zealand Law Commission *Determining Representation Rights under Te Ture Whenua Maori Act 1993* (NZLC SP8, Wellington, 2001) 12.

80 Durie *Te Mana, te Kawanatanga: The Politics of Maori Self-Determination*, above n 2, 188.

81 Waitangi Tribunal *Te Arawa Mandate Report*, above n 29, 124.

82 See also the South Island Landless Natives Act 1906 which intended to finally settle any sense of grievance in the South Island, and the comments of Hon James Carrol (1906) 137 NZPD 318–320; Riley, above n 43, 29.

effect a Final Settlement of the Ngaitahu claim",⁸³ and more explicitly that it was "in settlement of all claims and demands which have heretofore been made" and "which might hereafter be made".⁸⁴ But when the Crown argued before the Waitangi Tribunal that the 1944 settlement estopped Ngai Tahu from suggesting they were entitled to further compensation, the Tribunal responded that equity and justice demanded otherwise.⁸⁵

The Ngai Tahu experience is not the only case in which a "final" settlement was later discarded and re-negotiated. Another is that of Taranaki, where the claimants had "agreed to accept the provisions [of the Taranaki Maori Claims Settlement Act 1944] in full settlement and discharge of the ... claim".⁸⁶ Similar wording can be found in the Waikato-Maniapoto Maori Claims Settlement Act 1946, which purported to settle claims relating to land confiscations in the Waikato.⁸⁷ The inadequacies of these settlements are revealed by the subsequent need for renegotiation: they were unfair, and thus incapable of being full and final.⁸⁸

B Will History Repeat Itself?

The lesson from this experience is clear. If settlements are not handled properly, the result, no matter what those actually negotiating the settlement commit to, will not stand up in the long term. The clear view within Government at present is that these problems will not re-emerge. As Craig Coxhead notes, the Government assumes that Maori participation in the process as it currently stands indicates acceptance of it.⁸⁹ But this is a

83 See Ngaitahu Claim Settlement Act 1944, long title.

84 Ngaitahu Claim Settlement Act 1944, s 2.

85 Waitangi Tribunal *Ngai Tahu Report: Wai 27* (Brooker and Friend, Wellington, 1991) 1027. The Report refers to the Maori Purposes Amendment Act 1973, which revisited the terms of the 1944 settlement.

86 Taranaki Maori Claims Settlement Act 1944, preamble, quoted in Riley, above n 43, 30.

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

88 A more recent example can be seen in the settlement of the historical grievances of Ngati Whatua at Orakei. While an initial settlement was made in 1978, this had to be revisited in 1991 for much the same reasons as the settlements of the 1940s. See Orakei Block (Vesting and Use) Act 1978; Orakei Act 1991; Justine Munro "The Treaty of Waitangi and the Sealord Deal" (1994) 24 VUWLR 389, 421-422.

89 Coxhead, above n 9, 30; see also Shand, above n 63, 751.

flawed assumption when claimant representatives have "no alternative but to enter into negotiations if they are wanting to settle their Treaty claims".⁹⁰

A parallel may be drawn between the present process and that of the 1940s. In both cases, the Crown has presented Maori with "the only deal in town",⁹¹ with an expectation that the result will be a definitive end to historical Treaty grievances. If the Government is serious about settling claims, it must be willing to learn from the lessons of the past and to find a well thought-out solution that is acceptable to its Treaty partner.

The possibility that the current settlements may be neither full nor final should shock nobody – least of all the Crown. It was known as early as 1993, when the direct settlement proposals were still in development, that negotiating solely with iwi would be "controversial for Maori" and that the issue of claimant representation would need to be resolved "if the objectives of finality and durability are to be achieved".⁹² More specifically, it was noted that that, if grievances were addressed in aggregate, there was a risk that "settlements [would not be seen] to extinguish highly specific grievances".⁹³ This topic has been considered in Parliament on numerous occasions.⁹⁴ The current Minister in charge of Treaty of Waitangi Negotiations herself said, shortly after taking office, that:⁹⁵

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

But the possibility remains that settlements reached under the current process may have been negotiated with the wrong parties, or may have neglected the interests of parties

90 Coxhead, above n 9, 30; see also "Submission from the Mokai Patea Waitangi Claims Committee Concerning the Inquiry Boundary", above n 53, para 11: "we also have no choice but to ... enter into this foreign process to protect our interests".

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

92 Officials Strategy Committee, above n 16, paras 74–76.

93 Ad Hoc Officials Committee, above n 18, 3.

94 See Sandra Lee (5 October 1999) 580 NZPD 19594 and Tariana Turia (17 September 1997) 563 NZPD 4401–4402, where the Ngai Tahu (Pounamu Vesting) Bill was said to be "the creation by this Government of further grievances that successive Governments will be expected to resolve".

95 Wilson, above n 12.

which should have been included—and may therefore be subject to re-opening and re-negotiation in the future.⁹⁶

VII A BREACH OF THE TREATY?

Might the direct settlement process in its current form itself be creating new Treaty grievances? The evidence suggests that it may well be.⁹⁷ This is a serious possibility: as the Waitangi Tribunal has observed, it is "out of keeping with the spirit of the Treaty ... that the resolution of one injustice should be seen to create another".⁹⁸

A Ignoring Hapu

As noted earlier, the central role of hapu in Maori social organisation at the time of the signing of the Treaty is now widely recognised, at least among the academic community. The Waitangi Tribunal has stated on a number of occasions that the traditional structure of social organisation is to be preserved under the Treaty.⁹⁹ Surely, then, there is an obligation on the Crown to protect traditional structures of social organisation during the settlement process. But the obligation goes further than this. The Tribunal has observed on several occasions that "tribal restoration" is a key component of the settlement process.¹⁰⁰ The Crown therefore has an obligation not only to preserve traditional structures, but to actively foster their redevelopment.

But the effect of the large natural grouping policy in many cases has been to force hapu to either amalgamate with a larger group or risk having settlements negotiated without their input. Whether this is compatible with the obligation to protect traditional social structures is highly questionable. As Tariana Turia has argued, the process "pits ... hapu

96 Whether settlements are unsound will, of course, require a closer examination of whether constituent hapu in each situation gave their willing, informed consent to larger-scale negotiations. Further, many iwi argue that hapu will benefit in the long run from the settlements as the fruits of iwi-level settlements "trickle down" to hapu.

97 This paper only considers two possible breaches, although there is considerable scope to argue that other Treaty principles are affected by the policy. See, for example, the breaches of the Treaty alleged in the Te Arawa Mandating Urgent Inquiry: Waitangi Tribunal *Te Arawa Mandate Report*, above n 29, 5.3.

98 Waitangi Tribunal *Waiheke Report: Wai 10* (Brooker and Friend, Wellington, 1987) 99; see also Waitangi Tribunal *Report on Muriwhenua Fishing Claim: Wai 22* (Waitangi Tribunal, Wellington 1988) xxi.

99 See Munro, above n 88, 393, referring to the Waitangi Tribunal *Mangonui Report: Wai 17* (Government Printer, Wellington, 1988) and Waitangi Tribunal *Waiheke Report*, above n 98.

100 See Waitangi Tribunal *Turangi Township Remedies Report*, above n 3, 2.6.3; Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim: Wai 7* (Brooker and Friend, Wellington, 1987), 14.2; Waitangi Tribunal *Waiheke Report*, above n 98, 41.

against their own whanaunga because the Crown prefers to deal with one legal iwi corporate structure instead of recognising the treaty rights of the hapu".¹⁰¹ This disruption occurs at a time when, to quote one group of claimants in the Whanganui district:¹⁰²

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

The large natural grouping policy would seem to conflict with the Crown's obligations under the Treaty: it undermines the process of rebuilding traditional social structures and instead fosters the growth of larger groups which are easier for the Crown to deal with.¹⁰³

B Vesting

The Crown may be further prejudicing the redevelopment and growth (and even existence) of hapu by choosing to distribute assets to larger settlement entities rather than to hapu. This is almost certainly contrary to the aim of "tribal restoration" as detailed by the Waitangi Tribunal.¹⁰⁴

An example is the Ngai Tahu settlement, where various assets and taonga were vested in Te Runanga o Ngai Tahu. At the Committee of the Whole House stage, amendments were proposed that would instead have vested the assets and taonga in hapu.¹⁰⁵ The aim

101 This comment was made during parliamentary consideration of the Maori Affairs Committee's report on the Ngai Tahu (Pounamu Vesting) Bill: Tariana Turia (17 September 1997) 563 NZPD 4401–4402.

102 "Submission from the Mokai Patea Waitangi Claims Committee Concerning the Inquiry Boundary", above n 53, para 5. See also Sandra Lee's comments in this regard during the first reading of the Ngati Turangitukua Claims Settlement Bill: (5 October 1999) 580 NZPD 19593–19595.

103 An analogy may be drawn between this and the short lived Runanga Iwi Act 1990, which was itself heavily criticised for breaching the Treaty in this way. See Watson, above n 39, 620–621; A L Mikaere "Maori Issues" [1990] NZ Recent Law Rev 122; Interim Report of the Maori Affairs Committee on the Runanga Iwi Bill, above n 39, 5; Roger Maaka "A Relationship, Not a Problem" in Ken S Coates and P G McHugh (eds) *Living Relationships, Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) 203.

104 See Waitangi Tribunal *Turangi Township Remedies Report*, above n 3, 2.6.3; Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim*, above n 100, 14.2; Waitangi Tribunal *Waiheke Report*, above n 98, 41.

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

of the amendments was to "turn back the clock and restore to those people the kaitiakitanga and the property right that was originally under the mana whenua of the tangata whenua of the hapu in these various different areas".¹⁰⁶ But the amendments were rejected, and the legislation as passed vested the assets in Te Runanga o Ngai Tahu.¹⁰⁷ Sandra Lee was strongly critical of this, and warned of the dire predicament in which it left hapu.¹⁰⁸ The prospect of a string of new Treaty grievances in this and other cases is significant.

C A Justified Limitation?

The possibility that the direct settlement policy in its current form is inconsistent with the Treaty of Waitangi is one thing; recent statements from the Waitangi Tribunal suggest however that we should consider the further question of whether this inconsistency can be justified.¹⁰⁹

The large natural grouping policy exists for obvious reasons. The political pressure for full and final settlement within a modest timeframe is readily apparent,¹¹⁰ and dealing with large groupings makes this a real possibility. Further, as the Waitangi Tribunal noted in 1998, "[t]he focus on past grievances is diverting the energies of many Maori away from pressing social and economic needs and is preventing Maori from taking control of their own futures".¹¹¹ And more recently:¹¹²

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

106 Sandra Lee (17 September 1998) 571 NZPD 12117–12118.

107 See Ngai Tahu Claims Settlement Act 1998.

108 Sandra Lee (17 September 1998) 571 NZPD 12124.

109 Waitangi Tribunal *The Petroleum Report: Wai 796* (Wellington, 2003) paras 5.9–5.12.

110 The Royal Commission on Social Policy in 1988 found that only 20 per cent of non-Maori believed that historical Treaty grievances which required redress existed: Royal Commission on Social Policy *The April Report* (Wellington, 1988) vol 1, 532. While one might have expected the rate of acceptance of the need for redress to have increased significantly as the settlement process proceeded, the evidence suggests otherwise. A 1999 study showed that almost 70 per cent of a random survey of 1000 New Zealand households stated that they did not believe historical injustices should be remedied: Kirsten S Carlson *Rhetoric versus Reality: Sovereignty and Tino Rangatiratanga in Aotearoa New Zealand* (MA Thesis, Victoria University of Wellington, 1999).

111 Waitangi Tribunal *Business Strategy 1998* (Wellington, 1998) 6.

112 Waitangi Tribunal *Pakakohi and Tangahoe Settlement Claims Report*, above n 52, 65.

Does the end result of full, final, and prompt Treaty settlements justify the means used to achieve it?

The Tribunal has taken the view that "[w]hile the Treaty guarantees were not absolute, they were fundamental", and that "[f]undamental guarantees cannot be overridden even by an informed government acting in good faith, except in exceptional circumstances".¹¹³ To determine whether such "exceptional circumstances" existed, the Tribunal in its *Petroleum Report* drew an analogy with the approach taken by the Court of Appeal in assessing justified limitations under the New Zealand Bill of Rights Act 1990. The key question is whether, of all the possible alternatives, the policy produces the least possible interference with the rights involved.¹¹⁴

What, then, are the alternatives to direct settlement with large natural groupings? A number of ideas have been floated. At the more conservative end of the spectrum, Alan Ward argues that smaller groups should have to pursue claims through an iwi structure, but that there is a "strong case for this mandating process to be overseen by an independent authority such as the District Court or the Electoral Commission".¹¹⁵ A similar result could be achieved by removing the jurisdictional barriers preventing judicial scrutiny of the settlement process, or, less drastically, by strengthening the powers of the Maori Land Court under section 30 of the Te Ture Whenua Maori Act 1993. This would ameliorate some of the problems caused by the courts' inability and unwillingness to get involved in the process by giving disaffected groups a forum in which to air their concerns. A more radical solution is proposed by Gover and Baird, who argue that a model of "democratic experimentalism" should be applied to the New Zealand situation.¹¹⁶ Maori, rather than the Crown, would be empowered to define the identity of the Maori "Treaty partner" based on criteria chosen by Maori—thus reflecting evolving cultural norms and *tikanga*.

But it would be short-sighted simply to pick one of these models and adopt it across the board. That would fail to recognise one of the key problems with the current system, which is that the Crown has unilaterally imposed a process upon Maori. Far better would be to negotiate with claimants as to which group is best suited to conducting settlement

113 Waitangi Tribunal *Petroleum Report*, above n 109, para 5.10.

114 See *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16 (CA); Waitangi Tribunal *Petroleum Report*, above n 109, para 5.12.

115 Ward *An Unsettled History*, above n 4, 177.

116 Gover and Baird, above n 15.

negotiations on their behalf, unconstrained by blanket rules such as the large natural grouping policy.¹¹⁷

The need for negotiation of this sort was recognised by officials at the start of the direct settlement process. Cabinet papers noted that the issue of who to deal with was "likely to be particularly controversial for Maori" and that it would require "discussion and consultation".¹¹⁸ At the time, Ian MacDuff argued that the settlements should not be seen as an end in themselves, and that the initial focus should be on determining how to carry out the negotiations rather than on the outcome¹¹⁹ – a conclusion recently echoed by Craig Coxhead.¹²⁰ But the discussion and consultation proposed at the outset has never occurred.

It is difficult to identify a better alternative to the large natural grouping policy without entering into the negotiations which, as MacDuff and Coxhead point out, should have occurred years ago. But the scope for new grievances under the current policy is great, and its effects far-reaching. In many cases settlements have removed the ability of smaller groups to seek redress for their grievances. Given that the very basic first step of negotiation with claimants as to the most appropriate way of conducting negotiations has never been taken, it cannot be asserted with confidence that the Crown's current policy produces the least possible interference with Treaty rights.

VIII CONCLUSION

The direct settlement policy has now crystallised into a process whereby the Crown seeks to negotiate comprehensive settlements covering all of the claims in a given area. Following settlement, legislation removes any avenue by which the settlement might be challenged or reconsidered in future. In the rush to achieve full and final settlements, spurred on by public demand for an expeditious settlement process, the Crown has opted for a policy of negotiating only with large natural groupings. The effect of this has been to shut out the smaller groups which traditionally dominated Maori society, unless they amalgamate into larger groups. The policy is not based on *tikanga*, nor on a desire from

117 A similar conclusion was reached by Leo Watson, above n 39, 623.

118 Officials Strategy Committee, above n 16, para 67.

119 Ian MacDuff "The Role of Negotiation: Negotiated Justice" in McLay, above n 9, 55.

120 Coxhead, above n 9, 32: "For a claims process to obtain some acceptance and approval from Maori, given past experience, it would seem certain that Maori will need to be involved in the future development of the claims process. As a major partner within the settlement process Maori need to be afforded the opportunity to participate in the development of the settlement processes".

Maori to be defined in large-group terms; it exists because it is easier for the Crown to do things this way.

The effects of this policy are becoming increasingly apparent. In recent years a number of hapu whose claims have been sidelined by the process have taken their disputes to the courts and Waitangi Tribunal, with little success. Small claimant groups are finding their access to redress abrogated by settlements negotiated without their consent or involvement. The frequency with which this occurs is likely to increase under the current Government's policy of fast-tracking settlements, especially in the behemoth Central North Island claim.

These problems raise two very important questions for the settlement process: whether the settlements will be durable in the long term, and whether the process itself is a breach of the Treaty. History tells us that if settlement programmes are not handled correctly, they will have to be revisited by future governments. The flaws with the current process are alienating many groups, creating a very real risk that supposedly full and final settlements will prove not to be and instead require re-opening and re-negotiation. There is a very real possibility too that the process is adversely affecting the redevelopment of traditional Maori social structures, and is therefore creating new Treaty grievances. While recent commentary from the Waitangi Tribunal suggests that such breaches may be justifiable if they are in pursuit of a desirable goal, such as final Treaty settlements, it is hard to justify the current policy with any confidence.

It is incumbent upon the Office of Treaty Settlements to closely scrutinise the large natural groupings policy, and any alternatives, in order to ensure that it is the best way of healing the past, and not simply a source of new grievances. The way to start this process is to do what should have been done almost a decade ago: commence discussion and consultation with claimants as to how settlement negotiations can best be carried out, free from the constraints of a non-negotiable bottom line.

