

Diverting the Sword of Damocles: Why Did the Crown Choose to Settle Māori Historical Treaty Claims?

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In late 1994, the New Zealand government announced an ambitious plan to settle Māori historical grievances relating to breaches of the principles of Te Tiriti o Waitangi and the Treaty of Waitangi, signed between Māori and the British Crown in 1840. Why did the Crown choose to settle Māori historical treaty claims in the early 1990s, and what did it hope to achieve by settling Māori grievances? This article explores Crown motivations for settling Māori historical treaty claims, focusing on the period from August 1992 to November 1994 identified as crucial to the development of the Crown's treaty claims settlement policy, but which has received scant attention. It concludes that while the Crown publicly offered a series of moral, legal, social and political principles to explain its motivations and objectives in settling treaty claims, the Crown's primary motivation was to divert Māori away from their legal rights, to contain the Crown's fiscal liabilities, to maintain the acceptability of treaty claims settlements to the non-Māori public, and to "wind back" Māori rights and Crown obligations embedded in legislation.

Introduction

In the early 1990s the New Zealand government, led by a right-wing National Party who had historically shown little interest or regard for the rights of Māori, embarked on an unlikely and ambitious plan to negotiate the settlement of Māori historical grievances relating to breaches of the principles of Te Tiriti o Waitangi and the Treaty of Waitangi, signed between Māori and the British Crown in 1840.¹ Why did the Crown choose to settle Māori historical treaty claims in the early 1990s, and what did it hope to achieve by settling Māori grievances? The following article seeks to answer these questions. It does not attempt an overview of the entire treaty claims hearing and settlement process, nor does it offer an account of the settlements themselves, or the development of Crown policy over time. Rather, this article contributes to the existing literature by focusing in on the period from August 1992 to November 1994, identified

¹ Successive governments and historians have described these two documents as Māori and English language "texts", "versions" or "translations" of "the Treaty of Waitangi". However, several prominent experts including Anne Salmond, Margaret Mutu and Ani Mikaere have argued that Te Tiriti o Waitangi and the Treaty of Waitangi are best regarded as "two very different documents, with divergent textual histories and political implications", that "it is a mistake to bracket them together", and that conflating the two "has led to a confused and confusing historiography of the Treaty, which should not be perpetuated". Ann Salmond, Brief of Evidence Wai 1040 delivered to the Waitangi Tribunal, np, 2010. See Margaret Mutu, "Constitutional Intentions: The Treaty of Waitangi Texts", in M. Mulholland and V. Tāwhai, eds, *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Wellington, 2010), pp.13-40; Ani Mikaere, *Colonising Myths – Māori Realities: He Rukuruku Whakaaro* (Wellington, 2011), pp.123-146.

as crucial to the development of the Crown's treaty claims settlement policy, but which has received scant attention. This article begins with an account of the pathway to treaty claims settlements and an overview of the existing literature. Next, Cabinet papers and memoranda, published policy documents, written accounts from Crown Ministers, oral interviews with iwi (tribal) leaders and settlement legislation will be drawn upon to explore Crown motivations for settling Māori historical treaty claims in the early 1990s, and how these motivations were subsequently implemented into legislation. This article ends by grounding settlements in their historical and contemporary contexts, calling into question the validity of describing settlements as "full and final".

The Pathway to Treaty Claims Settlements

By 1968, the politics of the "long sixties" had reached the land of the long white cloud. A proliferation of Māori activist groups began to emerge from the urban centres of New Zealand, inspired by the various rights movements and social issues of the day.² Their efforts culminated in the 1975 Māori Land March, the largest pan-tribal protest action the country had witnessed, and a watershed moment that has come to symbolize the birth of the "Māori renaissance".

Their views found some sympathy amongst members of the third Labour government.³ On 10 October 1975, as the frustrated footfalls of the land march edged ever-closer to the capital, Labour played its trump card to manage Māori dissent. Just three days before protest leader Whina Cooper and supporters strode purposefully through the gates of Parliament to protest over a century of land alienation at the hands of settlers, the Labour government passed the Treaty of Waitangi Act 1975, establishing the Waitangi Tribunal as a permanent commission of inquiry to hear and make recommendations on Māori claims that contemporary Crown actions and omissions amounted to breaches of what it called "the principles of the Treaty of Waitangi".⁴

Little was expected of the tribunal and its achievements were limited in its first five years of operation: it published just two reports and excelled only in the accumulation of two-word epithets: window dressing, non-event, token gesture, toothless tiger.⁵ The appointment of Edward Taihakurei Durie as chair in the early 1980s saw some improvement, with an invigorated tribunal producing a series of authoritative reports that began to have some impact on government policy.⁶

² Tiopira McDowell, "'Riria te Riri, Mahia te Mahi': The Politics and Development of Modern Maori Activism, 1968-78", MA thesis, University of Auckland, 2007, pp.15-16.

³ Alan Ward, *An Unsettled History: Treaty Claims in New Zealand Today* (Wellington, 1999), pp.25-26; Tiopira McDowell, "Ka Hoki a Kupe? The Political Career of Matiu Rata, 1963-1979", *The New Zealand Journal of History*, Vol. 49, 1 (2015), p.113.

⁴ In its enabling legislation the Waitangi Tribunal acknowledged that "the Treaty in the English language differs from the text of the Treaty in the Maori language", and chose to reconcile the conflicting and irreconcilable provisions of these two documents by focusing on "the principles of the treaty", the principles shared between the two documents.

⁵ Nicola R. Wheen and Jacinta Ruru, "The Environmental Reports", in Janine Hayward and Wheen, eds, *The Waitangi Tribunal Te Roopu Whakamana i te Tiriti o Waitangi* (Wellington, 2004), p.98; Ranginui Walker, *Ka Whawhai Tonu Matou – Struggle Without End*, 2nd ed. (Auckland, 2004), p.245; James Belich, *Paradise Reforged: A History of the New Zealanders from 1880 to the Year 2000* (Auckland, 2001), p.479.

⁶ Claudia Orange, *The Treaty of Waitangi* (Wellington, 1987), p.250.

Yet, in spite of these gradual advances, it took a decade of increasingly more direct action, occupations, flashes of civil unrest, pressure from conservative leaders and a change in government before the tribunal was empowered to hear the historical claims that were at the root of Māori concerns.⁷ The Treaty of Waitangi Amendment Act 1985, introduced by the fourth Labour government, extended the tribunal's powers to hear retrospective claims dating back to 1840, increased its membership from three to seven and increased its funding.⁸ Even with the tribunals' new-found powers, a proliferation of tribunal reports, a flood of new claims, and a raft of landmark cases in New Zealand's courts, settlements were still not forthcoming: hope and history remained mismatched.

It was a government misstep that marked the next milestone. *New Zealand Māori Council v Attorney-General* 1987, popularly known as the "Lands case" emerged from the free market reforms introduced by the fourth Labour government. In 1986 the government introduced legislation transferring Crown lands to state-owned enterprises. Provision was made for Māori interests in section 9, which ensured that nothing in the Act would permit the Crown to act in a manner inconsistent with the principles of the Treaty of Waitangi. The Māori Council objected to the legislation: Crown lands were the subject of treaty claims and their transfer to private enterprises jeopardized the potential settlement of current and future claims. The amount of land involved was considerable, making up over 14 per cent of the total land mass of New Zealand.⁹ The Māori Council filed for judicial review and the Court of Appeal found in their favour in June 1987.

The court directed the Crown to prepare safeguards to ensure the transfer of lands was consistent with treaty principles, and the Crown reached an out-of-court agreement with the Māori Council that amendments to legislation were required to protect existing or future claims before the Waitangi Tribunal. These amendments were introduced as the Treaty of Waitangi (State Enterprise) Act 1988 and the Crown Forest Assets Act 1989.

The resulting amendments placed memorials on the titles of all state owned enterprise lands, noting the land was subject to resumption on the recommendation of the Waitangi Tribunal and could be resumed by the Crown and returned to Māori. If a claim was submitted to the tribunal in relation to state enterprise lands or Crown forests and assets and the claim was well founded, the tribunal could recommend their return to Māori ownership. If after a ninety-day period the claim had not been settled between claimants and the Crown, the tribunal's interim recommendations would take effect as final recommendations and would be binding on the Crown.

These amendments were revolutionary in effect, granting the tribunal binding powers to order the return of Crown lands and assets to Māori ownership. For the first time, Māori had legal rights under the principles of the treaty that could be recommended by the tribunal and upheld by the courts, removing Māori rights from the exclusive domain of politics and the discretion of politicians. Moreover, a potential pathway for the settlement of treaty grievances had been established.

In the wake of the Lands case, Labour announced plans to enter into direct negotiations with Māori to settle treaty claims, releasing *Principles for Crown Action*

⁷ Walker, *Ka Whawhai Tonu Matou*, p.253.

⁸ Paul Hamer, "A Quarter-century of the Waitangi Tribunal: Responding to the challenge", in Hayward and Wheen, eds, *The Waitangi Tribunal*, pp.5-6.

⁹ Mason Durie, *Te Mana, Te Kāwanatanga: The Politics of Māori Self-Determination* (Melbourne, 1998), p.182.

on the Treaty of Waitangi in 1989. The principles were problematic in their assertion of exclusive Crown control over settlement policy.¹⁰ What they did offer was a commitment to provide redress to resolve Māori grievances.¹¹ A Crown Task Force on Treaty of Waitangi Issues was established, consisting of a Cabinet committee, a core group of officials, and the Treaty of Waitangi Policy Unit (ToWPU), tasked with coordinating treaty policy and the direct negotiation of claims.¹² In July and August of 1989, members of the Crown Task Force made their first furtive steps towards settlements, travelling to Waikato to begin scoping negotiations with Waikato-Tainui, an *iwi* (tribe) long considered to have endured grave treaty breaches.¹³ With Labour's loss at the polls the following year, it was expected that settlements would follow the same fate: treaty claims were a Labour initiative, and National MPs had threatened to downgrade the status of the tribunal and remove all references to treaty principles in legislation if elected.¹⁴

It was with great surprise then that National's electoral victory in 1990 proved the unexpected herald of the treaty claims settlement era. In May 1991 Prime Minister Jim Bolger invited Member of Parliament Douglas Graham to become the inaugural Minister in Charge of Treaty of Waitangi Negotiations.¹⁵ Over the following fifteen months, Graham and the ToWPU developed a series of policy proposals outlining an ambitious plan to settle Māori historical treaty claims.¹⁶ Between August 1992 and November 1994 these proposals were refined after lengthy consultation with Cabinet Ministers and extensive analysis by government officials from a range of ministries¹⁷: paradoxically, Māori as treaty partner were not consulted. Thus, a policy intended to repudiate the partnership envisioned in the treaties and mend treaty breaches was itself a treaty breach, unilaterally imposed by one treaty partner on the other. In late 1994 the proposed policy was approved by Cabinet and published as *Crown Proposals for the Settlement of Treaty of Waitangi Claims*, forming the foundation of contemporary treaty claims settlements.¹⁸ The ToWPU was relaunched as the Office of Treaty Settlements in the Ministry of Justice, charged with negotiating and implementing the settlement of historical treaty claims, coordinating government departments involved in the process, providing policy and advice to the Minister for Treaty of Waitangi Negotiations and

¹⁰ Ranginui Walker, "The Treaty of Waitangi in the Postcolonial Era", in Michael Belgrave, Merata Kawharu, and David Williams, eds., *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Auckland, 2005), p.69.

¹¹ The Treaty of Waitangi Policy Unit, *The Direct Negotiation of Māori Claims. An Information Booklet* (Wellington, 1990), p.2.

¹² *Ibid.*, p.1; Ward, *An Unsettled History*, p.40.

¹³ Martin Fisher, "Balancing rangatiratanga and kawanatanga: Waikato-Tainui and Ngāi Tahu's Treaty settlement negotiations with the Crown", PhD thesis, Victoria University of Wellington, 2015, p.22.

¹⁴ Hamer, "A Quarter-century of the Waitangi Tribunal", p.7.

¹⁵ Douglas Graham, *Trick or Treaty?* (Wellington, 1997), p.42.

¹⁶ See Office of the Minister in Charge of Treaty of Waitangi Negotiations, *Policy Papers for Crown Proposals for the Settlement of Treaty of Waitangi Claims* (Wellington, 1995). All references to Cabinet papers and memoranda referred to in this article have been taken from this collection.

¹⁷ See Office of the Minister in Charge of Treaty of Waitangi Negotiations, *Policy Papers for Crown Proposals for the Settlement of Treaty of Waitangi Claims*.

¹⁸ Office of Treaty Settlements, *Crown Proposals for the Settlement of Treaty of Waitangi Claims – Detailed Proposals* (Wellington, 1994); *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown. Ka Tika ā Muri, Ka Tika ā Mua* (Wellington, 1999), p.19.

Cabinet on settlement issues, and managing Crown lands earmarked for potential inclusion in settlements.

A range of explanations as to why National chose to negotiate the settlement of Māori historical claims are offered in the existing literature. Jane Kelsey, Ani Mikaere and Annette Sykes contextualise treaty claims settlements within a broader neo-liberal agenda in which Māori claims have been translated into money and resources and transferred to tribal corporations to be managed by a corporate tribal elite, exacerbating class divides and effectively creating a buffer between the Crown and the marginalised majority of Māori.¹⁹ In contrast, Te Maire Tau offers that Māori ambitions for *mana motuhake*, independent power and authority, are not at odds with liberal theory: “its relevance to the future of Māori depends on our capacity to indigenize the theory”.²⁰

Wayne Rumbles views settlements as a form of post-colonial fiction that constructs settlements as “sites of reconciliation” that remove colonial guilt from the shoulders of *Pākehā* (European New Zealanders) by exposing and then purging the past, creating a postcolonial identity for New Zealand free of treaty grievances.²¹

Richard Boast and Ranginui Walker have defined settlements as exercises in political pragmatism: Boast described the Māori fisheries settlements as “classic examples of the historically dominant New Zealand political-constitutional system of ‘statutory pragmatism’”, wherein deals are negotiated behind closed doors based on political imperatives rather than principles and embodied in legislation, giving them the force of the law.²² Walker regarded National’s decision to negotiate settlements as a pragmatic response to the heightened legal and legislative status of treaty principles: “better to avoid litigation in cases where claims were well founded and enter into direct negotiations with claimants”.²³

Fiscal imperatives certainly played a role: the fourth National Government is best remembered for its parsimonious policies. The government faced a financial crisis on election and executed a series of drastic measures to right the economy in its first term.²⁴ Martin Fisher has emphasised the key role Treasury played in determining the parameters of settlements and placing limits on what could be offered to *iwi*.²⁵ Settlement liabilities were not the government’s biggest concern but they were part of the equation. More importantly for Māori, the dire state of the economy and belt-tightening exercises across the board were an unfortunate context within which to launch settlements.

In more recent publications, Fisher has described a range of factors including the establishment of the tribunal, judicial recognition of the status of the treaty, pressure from Māori, and a faction within the Labour Party as having “effectively served to

¹⁹ Jane Kelsey, “Māori, Te Tiriti, and Globalisation: The Invisible Hand of the Colonial State”, in Belgrave, Kawharu, and Williams, eds., *Waitangi Revisited*, pp.81-82; Annette Sykes, Bruce Jesson Memorial Lecture (Auckland, 2010), p.2; Ani Mikaere, “Settlement of Treaty Claims: Full and Final, or Fatally Flawed?”, *New Zealand Universities Law Review*, Vol. 17, 2 (1997), pp.452-3.

²⁰ Te Maire Tau, “Neo-Liberal Settlements: From Adam Smith to Treaty Settlements”, *New Zealand Journal of History*, Vol. 49, 1 (2015), p.133.

²¹ Wayne Rumbles, *Treaty of Waitangi Settlement Process: New Relationship or New Mask?* Paper presented at the Compr(om)ising Post/Colonialism Conference, Wollongong, 10-13 February 1999, p.6, <<http://lianz.waikato.ac.nz/PAPERS/wayne/wayne1.pdf>>.

²² Richard Boast, “Maori Fisheries 1986-1998: A Reflection”, *Victoria University of Wellington Law Review*, Vol. 30, 1 (1999), <<http://www.nzlii.org/nz/journals/VUWLawRw/1999/30.html>>.

²³ Walker, “The Treaty of Waitangi in the Postcolonial Era”, p.69.

²⁴ <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11842345>.

²⁵ Fisher, “Balancing rangatiratanga and kawanatanga”, pp.3, 111-2.

change the government's mind and pushed it to negotiate"²⁶ and to achieve political and economic stability by ensuring that treaty claims settlements were full and final.²⁷ Carwyn Jones has argued that the legal application of treaty principles by the courts contributed considerably to the establishment and refinement of the settlement policy, but that those legal findings mirrored policy and legislation, creating something of a self-perpetuating feedback loop.²⁸

While all these explanations have merit, none satisfactorily explains how it was that a National government could make the unlikely decision to action what were ostensibly Labour initiatives. National's about face on treaty claims settlements raises a series of perplexing questions. Firstly, successive governments had been aware of Māori treaty grievances, negative race relations and social and economic disparities for nearly 150 years. The Waitangi Tribunal had been in existence for nearly two decades and had been delivering critical reports for close to a decade. Māori activism was relatively subdued between 1986 and 1994, and had not yet reached the mid-decade crescendo witnessed in previous and subsequent decades. Social disparities were a biting reality of Labour's reforms and National's cuts to government spending, yet Māori had faced economic hardships for over a century. National faced an ever-developing treaty jurisprudence and a phalanx of *iwi*-initiated court actions that required urgent policy solutions, yet Labour had long proved the champion of Māori policy. In short, the government did face pressing issues in relation to Māori and treaty grievances, but they were longstanding issues, and, with the exception of mounting legal challenges, they were less pressing in the early 1990s than they had been in previous decades. Why, after a century and a half of Māori dissatisfaction, and nearly two decades after the establishment of the Waitangi Tribunal to hear and make recommendations on Māori claims, was the Crown suddenly shaken from its complacency and prompted into action?

Secondly, and perhaps even more perplexingly, why would a right-wing National government, which historically had enjoyed little support from Māori voters, which had only ever seen three Māori candidates elected to Parliament, and which had shown little interest in Māori policy except to curtail it, suddenly decide in 1991 to launch a policy that would, and indeed did, greatly antagonize its core constituency?

This article turns to Cabinet papers and memoranda, published policy documents, written accounts from Crown Ministers, oral interviews with *iwi* leaders and settlement legislation to offer an explanation as to why the Crown choose to settle Māori historical treaty claims in the early 1990s, and what it hoped to achieve by settling Māori grievances.

Crown Principles

Crown Proposals for the Settlement of Treaty of Waitangi Claims offer a series of broad moral, legal, social and political principles to explain the Crown's motivations and objectives in settling treaty claims:

- To achieve positive, harmonious and peaceful race relations
- To acknowledge and resolve historical injustices
- To restore the honour of the Crown

²⁶ *Ibid.*, p.22.

²⁷ *Ibid.*, p. 3.

²⁸ Carwyn Jones, *New Tradition New Treaty. Reconciling New Zealand and Māori Law* (Vancouver, 2016), pp.14-16.

- To remove the sense of grievance felt by Māori
- To improve the social and economic status of Māori
- To assure claimants and the New Zealand public that the settlements would be fair, full and final.²⁹

The Cabinet papers upon which the principles were based reiterate these themes, offering more nuanced explanations as to the Crown's motivations.³⁰ As primary author of the Crown policy, Graham has expanded on these themes in his own account.³¹ There is considerable consistency across public, private and personal spheres in these three sources, suggesting a degree of sincerity on the part of Cabinet, the Minister and Crown officials. A more detailed examination of the sources that takes its starting point from the motivations outlined in private Cabinet papers and memoranda rather than the principles outlined in public policy documents is required to fully explain Crown motivations and objectives in settling treaty claims.

Crown Motivations

While a range of factors influenced the Crown's decision to settle Māori treaty claims, it was the Lands case that ultimately prompted it to act. As the inaugural Minister in Charge of Treaty of Waitangi Negotiations, Graham was horrified by the political implications of the Lands case and its accompanying legislation that granted the Waitangi Tribunal binding powers to recommend the return of lands and resources to Māori ownership. He believed that sovereignty should lie with Parliament, and any attempts to grant the courts powers to challenge the will of Parliament, as seen in the Lands case, should be "resisted strongly".³² For Graham, treaty claims were political issues that should be dealt with by the Crown without interference:

Only the government can comprehend the total picture and only the government can decide how much can be afforded by the country. The courts cannot do this. Nor can Māori. Nor can an independent arbitrator.³³

Graham was concerned about the financial implications of the tribunal's powers, which effectively meant that discretion over the quantum of settlement packages no longer lay with the government, posing a huge financial liability.³⁴ Graham's emotive labelling of these powers is telling:

[...] these claimants had a sword of Damocles which they happily held over the government. If the government procrastinated they would apply to the Tribunal for mandatory orders for the return of assets pursuant to the State Owned Enterprises and the Crown Forest Assets Act. The risk to the

²⁹ See Office of Treaty Settlements, *Crown Proposals for the Settlement of Treaty of Waitangi Claims – Detailed Proposals*; *Crown Proposals for the Settlement of Treaty of Waitangi Claims – Summary*; *Crown Proposals for the Settlement of Treaty of Waitangi Claims – Consultation with Māori*.

³⁰ See Cabinet Strategy Committee (CSC) Memorandum, Ten Year Programme of Settling Māori Treaty Claims, No Identifier, No date (Hand written: 12 August 1992), pp.1-3; Office of the Minister in Charge of Treaty of Waitangi Negotiations, *Policy Papers for Crown Proposals for the Settlement of Treaty of Waitangi Claims*, Cover letter, p.1; CSC Memorandum, Principles for Settlement of Māori Claims, No Identifier, 16 September 1992, pp 1-2; Treaty of Waitangi (TOW) (93) 4 / CSC (93) 91, Overarching policy on the settlement of Treaty claims affecting natural resources – lake and river beds and waters, p.3.

³¹ Graham, *Trick or Treaty?*

³² *Ibid.*, pp.17-20.

³³ *Ibid.*, p.41.

³⁴ *Ibid.*, p.40.

Crown was that the Tribunal might make orders far in excess of that in the contemplation of the government.³⁵

The Crown policy proposals embraced similarly emotive language: the tribunal was described as holding “extraordinary powers”,³⁶ and its resumptive powers were dubbed “clawback provisions”.³⁷

The Crown expressed grave concerns over what it called the “parallel process”. Claimant recourse to the tribunal represented a parallel process for recovering lands and assets that claimants could pursue if they were not satisfied with any redress offered by the Crown: such orders would be binding on the Crown.³⁸ If the tribunal used these powers it could return lands and compensation far in excess of any quantum figures contemplated by the Crown, and the Crown would lose control over what Māori could recover, the costs of providing compensation, and any Crown-imposed relativities between settlements.³⁹ Further to this, the existence of two parallel processes meant that “double dipping” was possible. If individuals, *whānau* (extended families), or *hapū* (sub-tribes) disagreed with settlements negotiated between *iwi* and the Crown they could use the parallel process to recover their lands and compensation via the tribunal. The Crown’s concerns stemmed from the Treaty of Waitangi Act 1975, which allowed “any Māori” to lodge a claim, meaning that “a settlement with a recognised *iwi* will not necessarily stop further claims for a particular Crown asset from individuals, *whānau*, or *hapū*”⁴⁰:

If this issue [of claimant representation] is not resolved satisfactorily then the use of the parallel Tribunal process is likely to rise, thus increasing the fiscal risk to the Crown. This is because if particular claimants (who dissent from the settlement and have standing as “any Māori”) are dissatisfied with the Crown-claimant process they are likely to pursue the alternative route through the Tribunal.⁴¹

The Crown devised a solution to manage the “unknown contingent liability” presented by the tribunal’s powers.⁴² The solution was called “the fund”: \$100 million dollars would be set aside a year for ten years, creating a fund of \$1 billion dollars.⁴³ The Crown would side-step the individual claims made to the tribunal and instead enter into direct negotiations with *iwi* and large natural groupings of *iwi* to settle all historical treaty claims over a ten- to twenty-five-year period,⁴⁴ with the costs of settlements being met by the fund. By developing a clear pathway to settlement via direct negotiations, the Crown was offering Māori a choice: they could either choose the certainty and perceived speed of direct negotiation for a potentially smaller settlement

³⁵ *Ibid.*, pp.50-1.

³⁶ CSC Memorandum, Principles for Settlement of Māori Claims, No Identifier, 16 September 1992, p.6.

³⁷ CSC (93) 89, 30 June 1993, Treaty of Waitangi: Settlement of Claims: Overview Paper, p.2.

³⁸ CSC (93) 90, 30 June 1993, Treaty of Waitangi Claim Settlement Fund: Size, Shape, Timescale and the Reciprocation from Māori, 30 June 1993, p.2.

³⁹ *Ibid.*, p.15.

⁴⁰ CSC (93) 123, 21 July 1993, Treaty of Waitangi Settlement Fund: Further Issues, p.6.

⁴¹ *Ibid.*

⁴² CSC Memorandum, Ten Year Programme of Settling Māori Treaty Claims, No Identifier, No date (Hand written: 12 August 1992), p.6.

⁴³ *Ibid.*, p.5.

⁴⁴ CSC Memorandum, Principles for Settlement of Māori Claims, No Identifier, 16 September 1992, p.7.

with the Crown, or they could risk the uncertainties and associated costs and delays of a potentially larger asset recovery via the courts and the tribunal.⁴⁵

The purpose of direct negotiations then was to entice Māori away from the courts and the tribunal by offering them the certainty and convenience of a settlement via direct negotiation. The purpose of “the fund”, or the “fiscal envelope” as it is popularly known, was to allow the government “to contain its liability and hence its fiscal risk for Treaty settlements to a defined amount”.⁴⁶ Both the legal risks and the fiscal liabilities were inseparably tied to political priorities: settlements were to be entirely political decisions, they were to remain at the discretion of politicians, and they had to be palatable to the non-Māori public.

Many aspects of the Crown treaty claims settlement policy were developed to achieve these three aims of diverting Māori away from the tribunal, containing the financial risks posed by the tribunal and maintaining public acceptability. This article continues by briefly outlining four controversial aspects of the Crown policy as examples of how the policy was developed to achieve its aims of diversion, containment and acceptability.

Controversial Aspects of the Crown Treaty Claims Settlement Policy

The Crown’s proposed fiscal cap of one billion dollars to settle all historical treaty claims has been widely condemned by Māori as inadequate and inappropriate.⁴⁷ The Cabinet papers, policy documents and published accounts are coy on how the figure of \$1 billion dollars was reached, however in a recent interview Bolger has claimed responsibility for suggesting the figure as a starting point for discussions with claimants.⁴⁸

The claimant groups of Waikato-Tainui and Ngāi Tahu, officials, Cabinet and consultants engaged in arduous debates between 1989 and 1992 to establish on what basis Māori claims should be settled and how they should be quantified in monetary terms. Various approaches were floated, including an arrears approach of making back payments on annual grants made to Māori Trust Boards,⁴⁹ a losses approach based on the value of their land losses in modern terms,⁵⁰ a rights-based approach grounded in claimant property rights and social and cultural rights,⁵¹ a needs-based approach addressing the current and future socio-economic needs of claimants, and a restoration approach, restoring claimants to the position they may have been in if treaty breaches had not occurred.⁵² These exercises in attempting to quantify settlements were ultimately rejected by the Crown: In Graham’s words, settlements “were political issues that had to have a political solution”⁵³ and would be governed by “the art of the political possible”.⁵⁴ By June 1992 the Minister, Cabinet and Treasury had rejected the

⁴⁵ CSC (93) 90, 30 June 1993, Treaty of Waitangi Claim Settlement Fund: Size, Shape, Timescale and the Reciprocation from Māori, pp.11-14.

⁴⁶ CSC Memorandum, Principles for Settlement of Māori Claims, No Identifier, 16 September 1992, p.4.

⁴⁷ Wira Gardiner, *Return to Sender: What Really Happened at the Fiscal Envelope Hui* (Auckland, 1996), pp.71, 88, 98-102, 116, 119, 125, 129, 157, 158, 160, 162, 168, 169, 172, 197, 198.

⁴⁸ <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11842345>.

⁴⁹ Fisher, “Balancing rangatiratanga and kawanatanga”, pp.58-9.

⁵⁰ *Ibid.*, pp.100-1.

⁵¹ *Ibid.*, pp.101-2.

⁵² *Ibid.*, p.104.

⁵³ Graham, *Trick or Treaty?*, p.59.

⁵⁴ Fisher, “Balancing rangatiratanga and kawanatanga”, p.112.

various proposals put forward by claimants and took control, developing their own settlement policy based on political imperatives. The crude, cursory figure offered to claimants indicates that it was entirely rudimentary, a political exercise that had little to do with any quantification of claimant losses, rights or needs.⁵⁵

Further explanations as to why the “fiscal envelope” was developed appear in the Cabinet minutes. The “fiscal envelope” was offered as an incentive that would entice Māori into negotiations with the Crown⁵⁶ without placing an undue strain on the countries’ resources or the public’s patience:

If it is too low, claimants may not settle their claims. If it is too high, the nation will forgo the benefits of lower taxation and/or lower debt levels, and the settlement process may lose the support of the wider public.⁵⁷

Avoiding intervention by the courts or the tribunal was also high on the Crown’s priority list:

If the Crown has a reasonable offer on the table for a particular claimant who then seeks a determination from the Tribunal, the Tribunal itself is likely to be cautious about making binding recommendations which enlarge the quantum. The Tribunal may simply signal to the Crown their view on elements of the package.⁵⁸

On the other hand, the Crown feared that the concept of a fiscal cap risked tribunal intervention. Worse still, it could “provide an unwarranted opportunity for judicial review”⁵⁹ and “encourage courts to develop common law remedies”.⁶⁰

Settlements had to be acceptable to the non-Māori public: the Crown was at pains to avoid a public backlash,⁶¹ and several elements of the policy were developed and influenced by the need to ensure a degree of acceptability. The fiscal cap was introduced and a full compensation or a losses or damages approach to settlements were rejected, as to do otherwise “would place too great a burden on the present and future generations of taxpayers” and “would not be practicable or generally acceptable to the New Zealand public”.⁶² The full and final nature of settlements was deemed essential to securing public support. In Graham’s estimation: “Public support for the settlement process was forthcoming provided any settlement was final. There was to be no second bite at the cherry in the future”.⁶³

The Crown also considered that the public had a stake in the conservation estate and that their views and rights had to be accorded priority.⁶⁴ Thus from the outset Cabinet papers assert the conservation estate would not be made available for settlements except

⁵⁵ *Ibid.*, pp.103-4, 111, 129.

⁵⁶ CSC (93) 90, 30 June 1993, Treaty of Waitangi Claim Settlement Fund: Size, Shape, Timescale and the Reciprocation from Māori, p.10.

⁵⁷ CAB (94) 1016, 7 November 1994, Settlement Envelope Quantum, p.1.

⁵⁸ CSC (93) 90, 30 June 1993, Treaty of Waitangi Claim Settlement Fund: Size, Shape, Timescale and the Reciprocation from Māori, p.15.

⁵⁹ CAB (94) M 23/20, 01 June 1994, Treaty of Waitangi Settlement Envelope: Detailed Definition and Implementation, p.4.

⁶⁰ CSC (94) 43, 27 April 1994, Treaty of Waitangi Settlement Fund, p.3.

⁶¹ CSC Memorandum, Principles for Settlement of Māori Claims, No Identifier, 16 September 1992, p.2.

⁶² Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown. Ka Tika ā Muri, Ka Tika ā Mua*, Wellington, 2015, p.83.

⁶³ Graham, *Trick or Treaty?*, p.58.

⁶⁴ CSC (94) 16 General Approach to Treaty Claims Affecting Conservation Land, pp.1-3.

in some limited circumstances, and public access and recreation rights would be guaranteed and not reduced in any way except to protect natural and historic values.⁶⁵

The Crown policy preference to negotiate settlements with *iwi* or large natural groupings of *hapū* or *iwi* has also proven highly controversial.⁶⁶ The Cabinet papers state that the policy was developed to shut down claimant access to the parallel process. As discussed, the Treaty of Waitangi Act 1975 allowed “any Māori” to lodge a claim, and the Crown feared that claimants who took issue with settlements could pursue their claims through the tribunal. The Crown solution was to propose that settlements should only be negotiated with *iwi* rather than *hapū* or individual claimants.⁶⁷

Further to this, *iwi* groups would be required to develop a deed of mandate, defined and appraised by the Crown, indicating they had the support of the majority of individuals, *whānau* and *hapū* before they could enter negotiations with the Crown, to prevent dissenting groups from taking their claims to the courts or the tribunal.⁶⁸ The Crown floated the idea of amending the Treaty of Waitangi Act 1975 so that “only claims mandated by *iwi* or *hapū* may be heard by the Waitangi Tribunal” but this was not actioned.⁶⁹

We see in these examples that the overall Crown policy and many of its individual provisions were developed to divert Māori away from the tribunal, to shut down the parallel process of recourse to the tribunal, to contain the Crown’s fiscal liabilities, and to ensure settlements remained limited, and therefore acceptable to the non-Māori public.

Winding Back

What did the Crown want in return for settling treaty claims? In return for settling Māori claims the Crown required what it called a “winding back” of Māori rights and Crown obligations, specifically the waiving of all claimant rights, the repeal of all statutory Māori rights and Crown obligations, the removal of memorials on the titles of state-owned enterprise lands and the removal of jurisdiction of the courts and the tribunal to hear Māori historical treaty claims under five pieces of legislation: the State-Owned Enterprises Act 1986, the Treaty of Waitangi (State Enterprises) Act 1988, the Crown Forest Assets Act 1989, the Education Act 1989 and the Railways Corporation Restructuring Act 1990.⁷⁰

This has been achieved on a claim-by-claim basis via settlement legislation. The seven initial settlements of Waitomo, Ngāti Rangiteaorere, Hauai, Ngāti Whakaue, Waimakuku, Rotomā and Te Maunga were negotiated between 1990 and 1996 before the treaty claims settlement policy had been fully developed. As such, winding back clauses do not feature strongly in these agreements. Winding back clauses first appear in the benchmark settlements of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, the Waikato Raupatu Claims Settlement Act 1995 and the Ngāi Tahu Claims Settlement Act 1998. Following the passing of the Ngāi Tahu settlement, winding back

⁶⁵ *Ibid.*

⁶⁶ Tiopira McDowell, “‘Screaming from the Shadows’: Māori Views on the Treaty Claims Settlement Process”, *Te Pouhere Kōrero - Māori History Māori People*, 8, 1 (2016), pp.26-47.

⁶⁷ CSC (93) 90, 30 June 1993, Treaty of Waitangi Claim Settlement Fund: Size, Shape, Timescale and the Reciprocity from Māori, p.18.

⁶⁸ CSC (94) 15, 9 March 1994, Treaty of Waitangi Settlement Fund: Claimant Representation, p.5.

⁶⁹ *Ibid.*

⁷⁰ See Office of the Minister in Charge of Treaty of Waitangi Negotiations, *Policy Papers for Crown Proposals for the Settlement of Treaty of Waitangi Claims*.

clauses settle into a format that is repeated, with minor variation in wording, up to the present day.⁷¹

Settlement legislation includes four sections that achieve the Crown's goal of winding back. Under a "Meaning of claimants" section a precise definition of the claimant group whose claims are being settled is provided, ensuring that the opportunity for claimants to pursue the parallel process is removed. Next, a "Meaning of historical claims" section provides a precise definition of the historical claims that are being settled, extinguishing all past, present and future claims, ensuring settlements are full and final and removing access to the parallel process. A "Settlement of historical claims final" section confirms that the settlement is final, that the Crown is released and discharged from all obligations and liabilities, and that the jurisdiction of any court, tribunal or judicial body to inquire or make findings or recommendations in respect of the claims is removed. Finally, settlement legislation includes a clause stating that the five pieces of offending legislation no longer apply to the claimant group or the lands in their Right of First Refusal (RFR) area and a clause cancels or removes the memorials on the titles of any properties in the claimant's RFR area. When returning Crown forest land, an area of high risk, the Crown gives notice under the Crown Forest Assets Act 1989 as if the Waitangi Tribunal has made a recommendation under the Treaty of Waitangi Act 1975 for the return of the land, and that recommendation has become final. Thus the Crown legitimizes its own process by appearing to utilize, and thus neutralize, the binding powers of the Waitangi Tribunal.⁷²

The Crown did not wish to achieve this winding back of Māori rights and Crown obligations via legislative stealth. Rather, it required "mutual and visible acknowledgement" by claimants and the Crown and "political acknowledgment by Māori leaders"⁷³ in the form of legislation, solemn public ceremonies and transparency in published policy documents. This policy requirement explains some of the ceremonial aspects of treaty claims settlements: the signing of deeds of settlement in Parliament by *iwi*, the signing of settlement legislation on *iwi marae* (ceremonial courtyards), the public recital of Crown treaty breaches and a formal apology delivered by Crown Ministers to *iwi* on *marae*.

To further achieve its aims of winding back Māori rights, the Crown proposed introducing a cut-off date for the lodging of new claims with the Tribunal or for direct negotiation with the Crown "so that the settlement relativities are not distorted by the introduction of major new claims".⁷⁴ A deadline of 30 June 1996 was suggested, and was to be achieved by an amendment of the Treaty of Waitangi Act.⁷⁵ The Crown introduced a cut-off date for submission of historical claims to the Waitangi Tribunal

⁷¹ This section was completed through a detailed analysis of all settlement legislation signed between Māori and the Crown between 1990 and May 2016, the findings of which are presented here. The legislation is available at <<http://www.ots.govt.nz/>> and at <<http://www.legislation.govt.nz/>>.

⁷² For examples of this, see Te Uri o Hau Claims Settlement Act 2002; Ngāti Tūwharetoa (Bay of Plenty) Claims Settlement Act 2005; Ngāti Apa (North Island) Claims Settlement Act 2010; Ngāti Manuhiri Claims Settlement Act 2012; Ngāti Whātua o Kaipara Claims Settlement Act 2013; Raukawa Claims Settlement Act 2014; Ngāti Toa Rangatira Claims Settlement Act 2014; Te Kawerau ā Maki Claims Settlement Act 2015. Accessed at <<http://www.legislation.govt.nz/>>.

⁷³ CSC Memorandum, Principles for Settlement of Māori Claims, No Identifier, 16 September 1992, p.2.

⁷⁴ *Ibid.*, p.5.

⁷⁵ CSC (93) 90, 30 June 1993, Treaty of Waitangi Claim Settlement Fund: Size, Shape, Timescale and the Reciprocation from Māori, p.12.

via the Treaty of Waitangi Amendment Act 2006, with a cut-off date of 2 September 2008.⁷⁶

Alternatively, the Crown considered retaining the jurisdiction of the tribunal over settled claims as a safeguard if claimants turned to international bodies, as “the existence of an independent review body would give additional credence to the Crown’s approach to settling claims”.⁷⁷ This approach was discussed and subsequently dropped. The Crown also discussed the pros and cons of removing the jurisdiction of the courts, fearing such a move “may be seen as ‘overkill’ to eliminate the relatively minor risks involved”.⁷⁸ Ultimately it chose to remove the jurisdiction of the courts.

Once all historical claims had been settled, the Crown envisioned a “final winding back” of the claims apparatus, where by either the statutory provisions in the offending legislation, or the full legislation, would be repealed.⁷⁹ It recommended delaying this repeal of legislation until settlements had been completed. In the meantime, statutory obligations and memorials would be removed on a claim by claim basis.⁸⁰ Delaying the repeal of legislation was a diplomatic move:

The winding back would occur at the end of a successful settlement process. At this time, the arguments for retaining an independent review mechanism would be much weaker, and the arguments for achieving a sense of completion correspondingly stronger.⁸¹

This has also been done out of fear: the Crown assumed that winding back was “likely to be the area of greatest pressure for the Government”.⁸² The idea of repealing the offending legislation completely was discussed, but it was feared that this would give Māori an upper hand on the government in negotiations and would require a renegotiation of the settlement fund.⁸³

It is important to note here that settlements negotiated between *iwi* and the Crown from the mid-1990s through to the present day have introduced a new range of Māori rights and Crown obligations embedded in legislation, which focus on the ongoing relationship between *iwi* and the Crown. Settlement legislation ostensibly extinguishes the right to revisit settlements, however, the fifty-year time limits embedded in settlement legislation, coupled with historical precedents, recent initiatives and Māori dissatisfaction, all indicate that settlements will be neither full, nor final.

Informal Practices

Alongside these formal processes, the Crown have developed informal practices to divert Māori away from the tribunal. If claimants have tried to exercise their rights through the tribunal the Crown has simply threatened to abolish the powers of the tribunal, a practice highlighted by several experts on Māori law and policy.⁸⁴ Professor

⁷⁶ <<http://www.justice.govt.nz/Tribunals/waitangi-Tribunal/news/cutoff-for-submission-of-historical-claims>>.

⁷⁷ CSC (94) 130, 29 September 1994, Treaty of Waitangi Settlement Policies: Ensuring Finality, p.3.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, p.5.

⁸⁰ CSC Memorandum, Principles for Settlement of Māori Claims, No Identifier, 16 September 1992, p.10.

⁸¹ CSC (94) 130, 29 September 1994, Treaty of Waitangi Settlement Policies: Ensuring Finality, p.4.

⁸² CSC (93) 90, 30/06/93, Treaty of Waitangi Claim Settlement Fund: Size, Shape, Timescale and the Reciprocation from Māori, p.12.

⁸³ CSC (93) 123, 21 July 1993, Treaty of Waitangi Settlement Fund: Further Issues, p.6.

⁸⁴ David Williams, “Unique Treaty-Based Relationships Remain Elusive”, in Belgrave, Kawharu, and Williams, eds., *Waitangi Revisited*, p.367; Hamer, “A Quarter-century of the Waitangi Tribunal”, p.7.

Margaret Mutu states that Crown threats have extended beyond abolishing the powers of the tribunal to abolishing the tribunal altogether. Mutu has twice witnessed such threats as chairperson of her *iwi* Ngāti Kahu. In 1997 the tribunal published the *Muriwhenua Land Report*, recommending that if a settlement with *iwi* of the Far North could not be reached by negotiations it would make binding recommendations.⁸⁵ Mutu was told by Graham “that if I succeeded in getting binding recommendations from the Waitangi Tribunal he would abolish the Tribunal”.⁸⁶ These same threats were repeated to Mutu by Margaret Wilson after she was appointed Minister in Charge of Treaty of Waitangi Negotiations in 2002.⁸⁷

Ngāi Tahu have not commented on this issue publically, however there is some indication they experienced a similar scenario. Ngāi Tahu negotiator Sir Tipene O’ Regan has indicated that his *iwi* took a case involving the separation of powers to the High Court, and that the proceedings were discontinued with the passage of the Ngāi Tahu settlement.⁸⁸ This proceeding appears in the Ngāi Tahu Deed of Settlement as *Henare Rakiihia Tau and Te Rūnanga o Ngai Tahu Limited v Edward Taihakurei Durie, the Waitangi Tribunal and the Attorney-General*.⁸⁹ If the title of the proceeding is anything to go by, Ngāi Tahu appear to have alleged that Durie as chairperson of the Waitangi Tribunal acted in collusion with the Attorney-General Graham to disadvantage Ngāi Tahu in the hearing of their claims to the tribunal in some manner. Fisher argues that Durie refused to hear the case, citing a lack of funding and time, and the considerable amounts of resources already invested in the hearing of the Ngāi Tahu claims by the tribunal.⁹⁰ In contrast, Alexandra Highman has argued that an interim settlement of \$10 million dollars may have been used to buy Ngāi Tahu’s silence on the matter:

The case of *Tau v Durie* [...] might have exposed collusion between Durie and a Crown Minister to the disadvantage of Ngāi Tahu. This could have highlighted the Crown’s apparent lack of separation of powers between the judiciary and legislature, so the Crown was keen to have the case suspended, at a price, and negotiate.⁹¹

The other blunt but effective tool wielded by the Crown is popularly known as the “Whakatōhea shuffle”: if an *iwi* do not accept a settlement offer they will be sent to the back of the queue and forced to wait while every other *iwi* settle their claims and the settlement fund diminishes before the Crown will deal with them again, a fate suffered by Whakatōhea, who voted against accepting a treaty claims settlement from Graham in 1996 and have yet to re-enter into negotiations twenty-one years later.

Concessions and Context

To what extent have the Crown achieved their objectives of diversion, containment and winding back? To date, the Crown have maintained their objective of diverting claimants away from the tribunal and the exercise of its binding orders. The tribunal has used its powers just once, ordering the resumption of properties in relation to

⁸⁵ Waitangi Tribunal, *Muriwhenua Land Report* (Wai 45), Wellington, 1997.

⁸⁶ Personal communication, Professor Margaret Mutu, 15 May 2016.

⁸⁷ *Ibid.*

⁸⁸ Sir Tipene O’ Regan, Oral Interview, 26 April 2016.

⁸⁹ Accessed at <<https://www.beehive.govt.nz/feature/ngai-tahu-settlement-6>>.

⁹⁰ Fisher, “Balancing rangatiratanga and kawanatanga”, pp.150-1.

⁹¹ Alexandra Emma-Jane Highman, “Te Iwi o Ngai Tahu: An Examination of Ngai Tahu’s Approach to, and Internal Expression of, Tino Rangatiratanga”, MA thesis, University of Canterbury, 1997, p.85.

claims made by Ngāti Tūrangitukua in July 1998. The Crown chose to re-enter negotiations with the *hapū* and a settlement was reached in 1999.⁹² The Crown and the tribunal have, however, faced several serious legal challenges. In *Haronga v Waitangi Tribunal* (2011) the tribunal was challenged for not granting an urgent hearing into a claim, and the Supreme Court took the unorthodox step of granting an urgency inquiry rather than returning the issue to the tribunal for reconsideration.⁹³ Ngāti Kahu have rejected Crown settlement offers as inadequate and pursued their claims through the courts and the tribunal. The *iwi* applied to the tribunal for binding recommendations in 2012 but the application was declined. They took their case to the High Court who found in their favour and ordered the tribunal to re-hear the application. In December 2016 the Court of Appeal also ordered the tribunal to rehear their application and a similar application from Mangatū Incorporation of the East Coast. The tribunal have yet to rehear the application.

The Crown have conceded ground in relation to containing their fiscal liabilities. The fiscal cap was officially abandoned in 1996 as a consequence of post-election coalition talks between the National Party and the New Zealand First Party, however, relativity clauses built into the Waikato and Ngāi Tahu settlements whereby both *iwi* would receive top-ups to their settlements should the fiscal cap be exceeded have maintained a degree of relativity between settlements and constraints upon what has been spent.⁹⁴ The fiscal cap of \$1 billion dollars was eventually exceeded in November 2012.⁹⁵ According to one estimate, by 2022 the total cost of treaty claims settlements could potentially amount to \$2.5 billion.⁹⁶

Māori claims have also been addressed outside the Crown settlement process. In June 2017 the Parihaka Papakāinga Trust accepted a reconciliation package including a formal Crown apology and a development fund of \$9 million dollars negotiated outside the settlement negotiation process.⁹⁷

Similarly, Wakatū Incorporation took a claim to the High Court in 2014, arguing that an 1845 Crown land grant to the New Zealand Company which promised to set aside one tenth of the land as reserves for Māori created a private trust between the Crown and Māori from the region, and that in failing to set aside the reserves the Crown had breached its obligations. In February 2017 the Supreme Court ruled that the Crown had failed in its fiduciary duties, and the High Court is to determine a suitable remedy.⁹⁸

These small but significant shifts indicate that, in spite of Crown rhetoric, these settlements will be anything but “full and final”. The “fiscal envelope” settlements were not the first settlements reached between *iwi* and the Crown: The South Island Landless Natives Act 1906 and the Otaki-Porirua and Papawai-Kai Kokirikiri Trust Acts of 1943 are instances of limited settlements of Māori claims.⁹⁹ The first Labour government reached further settlements with Ngāi Tahu and Taranaki *iwi* in 1944 and Waikato-Maniapoto in 1946, setting up trust boards that were allocated annual grants of \$10,000

⁹² Ngāti Tūrangitukua Claims Settlement Act 1999, Preamble, p.10.

⁹³ Jones, *New Tradition New Treaty*, pp.19-20.

⁹⁴ Graham, *Trick or Treaty?*, p.86.

⁹⁵ The author was employed as a historian and analyst at the Office of Treaty Settlements in late 2012 when an announcement was made that the “fiscal envelope” had been officially exceeded.

⁹⁶ John Hutton, *Governance and Treaty Settlements – Ka Eke Poutama*, 13 August 2016.

⁹⁷ <<http://www.stuff.co.nz/national/89948846/details-of-9m-reconciliation-package-for-parihaka-revealed>>; <<http://www.radionz.co.nz/news/national/331556/govt-to-apologise-for-parihaka-atrocities>>.

⁹⁸ <<http://www.wakatu.org/news-stories/2017/2/28/success-in-the-supreme-court>>.

⁹⁹ <<https://www.parliament.nz/resource/0000164755>>.

as full and final settlements of their claims and the third Labour government updated Ngāi Tahu's settlement in 1973.¹⁰⁰ The fact that treaty grievances have continued to emerge and have continued to be settled by the Crown and the courts for over a century suggests that settlements will continue on in the "post-settlement" era, regardless of Crown rhetoric.

While settlements may be binding on those who were party to them, legislation cannot bind future parliaments from revisiting Māori claims. Indeed, the current settlements and the manner in which they were unilaterally imposed on Māori and negotiated provide a convenient outline of what the next round of claims will entail, namely, what was excluded from the "fiscal envelope" settlements. Today's settlements were not precluded by those of yesteryear, nor will they forestall those to come, they may however pose tougher hurdles to overcome. The settlement legislation of the 1940s included rudimentary clauses indicating they were "final settlements" and "full settlement and discharge of claims".¹⁰¹ The very detailed, precise and extensive extinguishments contained in "fiscal envelope" settlements may prove more formable barriers to future claims, as may the relativity clauses, which will require that reopening one settlement will necessitate revisiting all settlements to maintain relativities. Relativities ensure that future attempts to revisit treaty grievances will raise wider questions necessitating discussions that extend beyond the realm of justice, ensuring that treaty claims remain entrenched in the realm of the political, and what future generations consider to be politically possible. Yet these barriers already appear to be eroding under the pressure of claimants, the courts and Crown initiatives.

Conclusion

In the early 1990s, a right-wing National-led government embarked on an unlikely and ambitious plan to negotiate the settlement of Māori historical treaty grievances. Why did the Crown choose to settle Māori historical treaty claims in the early 1990s, and what did it hope to achieve by settling Māori grievances? This research indicates that the Crown's intended outcomes for settling treaty claims had little to do with the high-minded principles of resolution, justice, fairness, the restoration of honour or social and economic development outlined in published policy documents and espoused to the public and Māori claimants. These were expected and welcomed outcomes but they were ultimately incidental to the process. Rather, treaty claims settlements were actioned to unpick the legal rights Māori gained through the Lands case, by diverting Māori away from the tribunal, containing the financial risks posed by the tribunal, maintaining public acceptability and winding back Māori rights and Crown obligations to a time when settlements were at the discretion of politicians, not the judicial system. Despite Crown rhetoric, a century of Crown settlements and recent initiatives suggest that treaty claims settlements will be anything but full and final.

Time will tell whether future generations have the stomach to revisit settlements: history whispers that Māori grievances will continue to haunt current and future generations until the provisions of Te Tiriti o Waitangi are met and the ongoing breaches of those provisions are settled to the satisfaction of the aggrieved party.

¹⁰⁰ Tiopira McDowell, "Te Ana o te Raiona: Māori Political Movements and the Māori Seats in Parliament, 1867-2008", PhD thesis, University of Auckland, 2013, p.224.

¹⁰¹ Taranaki Māori Claims Settlement Act 1944, Waikato-Maniapoto Māori Claims Settlement Act 1946.

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