

D261 DAVIS, C. The Crown's development of its proposals...

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**THE CROWN'S DEVELOPMENT OF ITS PROPOSALS FOR THE SETTLEMENT OF TREATY OF WAITANGI CLAIMS AND NEGOTIATING WITH IWI**

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ADVANCED NEGOTIATION (LAWS 541)

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**WORD LENGTH**

The text of this paper (excluding footnotes, figures and bibliography) comprises approximately 12,000 words.

## ABSTRACT

The main objective of this paper is to highlight some significant deficiencies of the Crown's approach to negotiating with iwi (Māori tribes) in New Zealand with respect to settling Treaty of Waitangi grievances which iwi claim against the Crown. To demonstrate it firstly looks at the culture that the Government has developed in relation to negotiating with iwi. Secondly it raises some important issues regarding the structural fairness of the Crown's approach to resolving these grievances, and notes how the Government's culture of negotiating influences its approach. Thirdly it argues that in failing to consult meaningfully with iwi about its Proposals for settlement of claims, the Crown has breached a fiduciary duty it has under the Treaty of Waitangi toward iwi. Finally, the writer argues for a more problem-solving approach to negotiating with iwi about the resolution of Treaty claims and suggests some elements that may be conducive to such an approach.

## WORD LENGTH

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 12,500 words.

## INTRODUCTION

On Thursday 8 December 1994, the Minister in Charge of Treaty of Waitangi Negotiations, the Hon D A M Graham, announced the Government's proposals for future negotiations of Treaty of Waitangi claims (the Proposals). This announcement was made after close to three years of in-house development of the Proposals by Government officials with no consultation with the wider Māori community.

Between February and April 1995 a round of consultations on the Proposals were undertaken with Māori, interest groups and the public generally, and the Crown stated that all submissions would be "carefully considered by Government and the policy proposals may be modified as a result."<sup>1</sup>

In December 1995 the Crown released its "Report of Submissions" made on the Proposals. In the Foreword, Mr Graham states that the "process of policy development will go on over the next few months" and that he looks forward to "being able to report progress, as it is made".<sup>2</sup> However, to date little positive feedback if any has been released about such 'progress'. In fact, there have been indications that the Crown is not willing to reconsider aspects of its Proposals at all.

The writer considers that the Government's approach to date shows tell tale signs that it still appears to be locked into a classical or traditional school of thought relating to negotiation in which negotiations which "rest finally on some element of power and coercion".<sup>3</sup> This traditional approach stems from what the Government considers is its inherent business, that is, to rule the nation in the best interests of its constituents.

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<sup>1</sup> Office of Treaty Settlements *Crown Proposals for the Settlement of Treaty of Waitangi Claims - Summary* (Department of Justice, Wellington, 1995) 7.

<sup>2</sup> Office of Treaty Settlements *Report of Submissions: Crown Proposals for the Treaty of Waitangi Claims* (Department of Justice, Wellington, 1995) 42.

<sup>3</sup> J W Burton *Resolving Deep-Rooted Conflict - A Handbook* (University Press of America, 1987) 5.

On first inspection, the Crown's process of producing its Proposals for consultation may seem reasonable enough. After all, one party eventually had to 'get the ball rolling' and begin dialogue on the issues of addressing Treaty claims.

However, in the Government's preparatory stage of the negotiations process, two things concern this writer which leads her to question the fairness of the Crown's approach.

Firstly, there are a number of structural issues relating to the Crown's development of its Proposals that need to be addressed. These concern the imbalance of power between the parties, the affect of norms on this balance of power and the way that the Crown has used assumptions to limit the boundaries of settlement.

The second concern for the writer regarding the fairness of the Crown's approach to preparing for negotiations with iwi is that the Crown excluded Māori from meaningful consultation regarding major policy initiatives that affect Māori, at key stages in the process. In this way, the Crown failed to meet its fiduciary obligation under the Treaty of Waitangi to act in good faith toward its treaty Partner.

Both these concerns are directly linked to the way that the Government's culture of ruling has affected the approach it has taken to preparing for negotiations with iwi. To address these deficiencies, it is proposed that the Crown needs to adopt a new culture of negotiation which embraces a more problem-solving ethic.

Chapter One will begin by discussing on a broad front the 'culture' of governing in New Zealand and the relevance it holds in relation to negotiations with iwi. It is argued that the unilateral way the Government has gone about developing the Settlement Proposals is largely a by-product of the Westminster culture of governing, according to which the Government functions. Within this governing culture the Government has created a 'sub-culture' of negotiating with iwi. However, this sub-culture, or approach, is incompatible with notions of fairness, and interpretations of the Treaty of Waitangi which promote a meaningful partnership between the Crown and iwi.

Chapter Two discusses the structural fairness of the Government's approach in preparing for negotiations with iwi. Firstly, it is submitted that there exists, for a variety of reasons, a demonstrable power imbalance between iwi and the Crown. The writer examines the impact that societal and individual norms have on negotiating power and in particular what relevance the power of norms holds for iwi. Also addressed is the use of assumptions by the Crown and the effect that they have on confining the boundaries of settlement. To illustrate this point, particular aspects of the Settlement Proposals which have been highlighted as unacceptable by Māori will be considered.

Chapter Three looks at the fairness of the Crown's approach to negotiating with iwi in the context of its Treaty obligations. This Chapter begins by stating that the Crown has a fiduciary obligation under the Treaty to act in good faith toward its Treaty Partner. Fundamental to this obligation is a duty to consult meaningfully with iwi on issues of major importance. An examination of the Crown's approach will show that the Crown has breached this duty.

Chapter Four proposes that, to address the deficiencies of the Crown's approach to preparing for negotiations with iwi, an alternative to the traditional, power-bargaining framework of negotiation is required. Such an alternative might be the establishment of a problem-solving framework which has, as its core goal, the removal of the sense of historical grievances for iwi. The Crown and iwi, in preparation for the respective negotiations, should work together to arrive at a mutually-acceptable definition of the problem facing them and the issues to be resolved, and agree on principles or guidelines upon which they can review any outcome of negotiations to determine whether grievances have in fact been resolved.

The deficiencies in the Crown's approach to negotiating with iwi and the preparation of its Proposals for settlement of Treaty claims draws this writer to question the fairness and legitimacy of the process for negotiation and therefore leaves any outcomes of negotiations between the Treaty Partners vulnerable to the same criticism.



## CHAPTER ONE

### 'THE GOVERNMENT'S CULTURE OF NEGOTIATING'

#### 1.1 The Concept of 'Culture'

Samovar, Porter, & Jain (1981) define culture as:<sup>4</sup>

the culmination of 'knowledge, experiences, beliefs, values, attitudes, meanings,... concepts of the universe, and material objects and possessions acquired by a large group of people in the course of generations through individual and group striving'.

'Culture' has an important part to play in the process of negotiations generally. This is because one's culture will determine how one relates to the other party, and how one measures the acceptability and fairness of the process and the outcome of negotiations.

Individuals who have had experience in the field develop their own unique culture of negotiating. This may be influenced by such factors as their upbringing, their education, and their own personal beliefs. Companies can have a culture of negotiating, perhaps influenced by the nature of its business and the personalities of the members holding executive powers.

In the same way, indigenous populations and Governments can also develop cultures of negotiating. In these interactions, however, one party's culture of negotiating often differs in many respects to that of the other party. Sometimes the parties are able to develop a mutually acceptable process of negotiating with elements drawn from both cultures. However it is not unusual for the weaker of the two (more often than not, the indigenous party) to be forced to yield to the other (i.e. the governing body) and operate within a process constructed in line with their culture of negotiations.

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<sup>4</sup> L E Drake 'Negotiation styles in Intercultural Communication' (1995) 6 Int'l Jnl of Conflict Management 72, 73.

Weisinger writes that "parties to cross-cultural conflict tend to see things from their own cultural perspectives".<sup>5</sup> This implies that the further apart the cultures of the two parties are, the more obstacles there will be to overcome before the parties can agree on a process of negotiation let alone reach a mutually agreeable settlement.

Subsequent to the release of the Proposals, it became apparent that both iwi and the Crown have diametrically opposed views on the process of negotiations. It is argued that this difference in culture has been one of the primary factors which has impacted on Māori's perception of the Crown's Proposals and their process for producing them. Some of Māori's major criticisms are that the Proposals were produced unilaterally behind closed doors, that despite assurances to the contrary the Proposals were not comprehensive (as they did not deal with for example Treaty issues and the distribution of any proceeds of settlement), and that the Proposals in the main only served the purpose of providing "reassurances to the general public and interested parties at the expense of potential claimants".<sup>6</sup>

These criticisms, the writer suggests, hit at the heart of the Government's attitude toward or culture of negotiating with iwi, this attitude having been shaped by how the Government has become accustomed to governing in New Zealand.

## 1.2 The Government's Culture of Ruling

In brief, the Government structure comprises the three branches of the Parliament (Members of the House of Representatives), the Executive (Ministers which make up the operational and policy-making branch, and who are themselves Members of Parliament) and

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<sup>5</sup> J Y Weisinger & P F Salipante "Toward a Method of Exposing Hidden Assumptions in Multicultural Conflict" (1995) 6 Int'l Jnl of Conflict Management 147, 161.

<sup>6</sup> M H Durie "Proceedings of a Hui held at Hirangi Marae, Turangi" (1995) 25 VUWLR 109, 112.

the Judiciary.<sup>7</sup> This structure also has a Head of State (or sovereign). In real terms, the Sovereign reigns, but the Government *rules*.

Sovereignty has its foundation firstly in what the 'English' version of Article I of the Treaty of Waitangi under which iwi sovereignty was ceded to the Crown:<sup>8</sup>

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

A more commonly enunciated view, however, is that sovereignty stems from the people, i.e. the underlying basis of the power of the Executive, or the Government of the day, is the support that it maintains in Parliament, the Members of Parliament in turn being themselves democratically elected by the constituencies of the Nation. In other words, the power that the Government wields originates ultimately at a grassroots level, from the individual members of society. In return, the Government has a responsibility to those members to exercise that power in a lawful manner, and in the best interests of the people as a Nation. If the Executive does not have this support, it loses its authority to rule, and an election must be held to determine which political party has the support to form the next Government. Its authority to rule therefore extends not only from Article I of the Treaty, but in more practical, observable terms, from the voters. As a result, the views of 'the people' tend to have significant influence on Government policy.

One may observe that the governing body's authority under the current structure can be traced to a source which gives it a clear legitimacy to govern or rule. Ministers have used

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<sup>7</sup> For a brief but helpful summary of the structure of Government in New Zealand, see "Working Under Proportional Representation - An Introduction for the Public Servant" (State Services Commission, Wellington, 1996).

<sup>8</sup> See above n1.

this line of reasoning to argue that a division of Parliamentary sovereignty is therefore not an option, because no other body can simultaneously claim a slice of this legitimizing source from which it gets its authority. Another way of looking at it would be to say that if a section of the community wanted a slice of sovereign power under the current governance structures they would have to establish a separate state. And this also is not contemplated at this point in time by Ministers.

### 1.3 The Treaty of Waitangi

By acknowledging the Treaty of Waitangi as *a founding document* of New Zealand, the Crown also acknowledges the Article II rights of Māori which it is obliged to safeguard under the Treaty.<sup>9</sup>

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.

With regard to the settlement of Treaty claims and processes for negotiation with iwi, the Government recognizes that its powers to rule under Article I in the best interests of the Nation must be tempered by the Article II rights of Māori. It is also aware that there is an unavoidable tension that exists between observing both Articles simultaneously, but that it needs to strike a balance; from time to time, the Government will have to make decisions will be perceived either by Māori as compromising their Article II rights, or by the general populous as extremely favouring Māori.

Historically, however, a pattern has emerged in the Government's consideration of both Treaty Articles such that the 'balance' that successive Governments have reached has been more in favour of the best interests of the Nation as a whole, with the result that the Article

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<sup>9</sup> See above n1.

II rights of Māori are often compromised. This is because in the Government's view, policy that favours the best interests of the nation is more likely to be supported by a greater number of New Zealanders, and as the basis of day-to-day Government of the Nation rests in the ongoing consent of the people, the Government obviously wishes to maintain that support.

#### **1.4 The Government's Culture of Negotiating with Iwi**

In sum, the Government's predominant culture developed thus far in the history of the evolution of our country's governance structure is that of 'ruler of the Nation'. And it rules effectively as sole sovereign power in the formation of policies, creation, amendment and repealing of legislation, and so forth, mindful of its responsibilities to the members of society (especially when during election time).

Based on the above premise that the Government's prevailing culture is that of 'ruling' effectively as the sole sovereign, the writer argues that this culture is the primary influencing factor on how Government interacts with iwi in the context of preparing for negotiations. The Government has transplanted aspects of its culture of 'ruling' to its culture of negotiating with iwi. This reflects a traditional approach to negotiations, the outcome of which rests "finally on some element of power and coercion".<sup>10</sup>

It is suggested that in this manner the Crown has developed a culture of preparing for negotiations, and ultimately a culture of negotiating, with iwi which is inappropriate and, indeed, challenged by iwi as illegitimate and indefensible. The basis of this challenge rests in the fiduciary nature of the Crown's obligations and the nature of the relationship between hapū and the Crown as Partners under the Treaty of Waitangi.

Our country is entering into a new era. For the first time, our Government has made a commitment to an unprecedented and unique process of resolving *all* Treaty grievances involving negotiating settlements with iwi. For this, the Government should be given due

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<sup>10</sup> Burton, above at n3.

credit. There was a time when the mere idea of the Government negotiating with a third party would have been seriously resisted by stalwarts of the governing elite. For, as the discussion above shows, our Government is in the business of ruling, and negotiating is a concept quite at odds with the notion of Parliamentary sovereignty.

At the same time, the Government is aware of its precarious position in terms of its reliance on the support of the voters to maintain its position of power. The Crown is "hampered by the pressure of dominant class interests" and Ministers "with an eye to their electoral future, are aware of this".<sup>11</sup> One might go so far as to say that it is a habitual reaction of Governments to "formulate policy judgments with an eye to winning public support for them"<sup>12</sup> - a survival instinct.

As a result, the culture of ruling has had a huge impact on the way that the Government has gone about preparing for negotiations with iwi. Rather than enter into meaningful consultation with Māori about possible options for a process of settling Treaty claims the Government took a course of action altogether consistent with its culture of ruling. Firstly, it geared the development of its Proposals in such a way that they were agreeable to the majority of the population and in that sense less of a political risk. Secondly, the Government developed these Proposals in isolation from the wider Māori community which enabled it to release them to the voting public with the clear message that they in fact represented the Crown's *preferred* view on the boundaries of settling Treaty claims. This had the effect of establishing the agenda or setting the benchmark for subsequent discussions on settlement of Treaty claims. This placed iwi in a disadvantageous position because in disagreeing with many of the substantive Proposals they not only had to take on the Government bureaucracy - a formidable force in itself - but also of the 'wider public'.

In addition, in using this approach the Crown had also acted outside its fiduciary obligations under the Treaty of Waitangi to act in good faith toward its Treaty Partner in that it omitted to consult meaningfully on a major issue affecting Māori.

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<sup>11</sup> R Walker "Pushing the Envelope" Metro Magazine, September 1994.

<sup>12</sup> H H Saunders "We Need a Larger Theory of Negotiation: The Importance of Pre-negotiating Phases" (1985) 1 Negotiation Jnl 249, 256.

These issues all combine to add weight to the call for a review of the process by which the Crown has prepared for negotiations with iwi and any outcomes emerging from that process of negotiation. Therefore, although on one level the Government might be commended for making a commitment to resolving all Treaty claims, the potential of this policy for equitably resolving such claims has been largely whittled away by the way that the Government has set the scene for negotiations.

In the following two Chapters, the writer will concentrate on the issues raised in this section of the paper. Chapter Two looks at the structural fairness of the Crown's negotiations process, particularly the issues of power imbalance between the parties, the affect of norms and the use of assumptions by the Crown. Chapter Three argues a deficiency in the Crown's preparation for negotiations on the basis that it did not meet its Treaty obligation to meaningfully consult with iwi on issues of major significance for Māori.

The Crown. I begin below with an introduction to the concept of structural fairness.

## 2.2 Structural Fairness

On the relevance of fairness to negotiations, Albin (1993) writes that it:

influence(s) the "give-and-take" in the bargaining process, help(s) parties to form agreement, and help(s) to determine whether a particular outcome will be viewed as satisfactory, and thus be honoured in the long run. Notions of fairness may create a motivation to resolve a particular problem through negotiation in the first place.

In addition, ensuring fairness in all aspects of negotiations is not only beneficial in terms of achieving a maximum combined satisfaction for both of the negotiating parties, but it lends credibility to and maintains the integrity of the process.

Albin considers that there are three broad categories of fairness: structural, process,

<sup>17</sup> C Albin, "The Role of Fairness in Negotiation" (1993) 9 Negotiation 161-211.

## CHAPTER TWO

# 'STRUCTURAL FAIRNESS OF THE NEGOTIATIONS PROCESS'

### 2.1 Introduction

In this part of the paper I intend to establish that there is an inherent lack of structural fairness about the Crown's Treaty claims settlement process. The writer achieves this by examining issues of power imbalance, the impact of norms and the use of assumptions by the Crown. I begin below with an introduction to the concept of structural fairness.

### 2.2 Structural 'Fairness'

On the relevance of fairness to negotiations, Albin (1993) writes that it:<sup>13</sup>

influence[s] the "give-and-take" in the bargaining process, help[s] parties to forge agreement, and help[s] to determine whether a particular outcome will be viewed as satisfactory, and thus be honoured in the long run. Notions of fairness may create a motivation to resolve a particular problem through negotiation in the first place.

In addition, ensuring fairness in all aspects of negotiations is not only beneficial in terms of achieving a maximum combined satisfaction for both of the negotiating parties, but it lends credibility to and maintains the integrity of the process.

Albin considers that there are four broad categories of fairness: structural, process,

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<sup>13</sup> C Albin "The Role of Fairness in Negotiation" (1993) 9 Negotiation Jnl 223.



procedural and outcome. In brief, the concept of structural fairness relates to:<sup>14</sup>

...the overarching structure of the negotiation process which, in turn, reflects more or less the structure of the dispute and overall relations between parties.

*Process* fairness encompasses "the extent to which parties...relate to and treat each other "fairly", including any use of coercive tactics by one party against the other.<sup>15</sup> *Procedural* fairness<sup>16</sup> concerns the 'how' aspect of arriving at any agreement, that is any tools, structures, etc. *Outcome* fairness refers to "the extent to which parties actually consider [the ultimate] allocation [of benefits and burdens] fair after the fact."<sup>17</sup>

Information about *structural* issues concerning the proposed process of settlement of Treaty claims is of special interest to this author, not only because it provides valuable insight into the fairness of the Crown's negotiations process, but also because it reveals much about how the Crown interprets its fiduciary obligations under the Treaty of Waitangi and how it views its relationship with iwi as its Treaty Partner.

### 2.3 Imbalance of Negotiating Power

The negotiating power of the respective parties is an important consideration when examining the structural fairness of any process of negotiation. Thibaut and Kelly (1959) define power as:<sup>18</sup>

the ability of one person or group to affect another person's or group's outcomes such that the degree of power comes to be the potential range of outcomes that one can determine for the other.

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<sup>14</sup> Above at n13, 226.

<sup>15</sup> Above at n13, 228.

<sup>16</sup> Above at n13, 234.

<sup>17</sup> Above at n13, 237.

<sup>18</sup> P H Gulliver *Disputes and Negotiations: A Cross-cultural Perspective* (Academic Press, London, 1979) 188.

In other words, a balance of power between the parties would manifest itself as an equal ability between them to leverage their respective positions to their benefit, or to succeed in producing a concession from the other on some contentious issue. Munro captures the fundamentals of the imbalance in power between Māori and the Crown, when she writes:<sup>19</sup>

The Crown wields control over the negotiation process; it has skilled and experienced advisors and negotiators; and it can, for the most part, pick when and on what terms it wants to negotiate, and whether or not to settle. Māori are in a comparatively weak position. They have few human and financial resources; they cannot enter into negotiations without a measure of political largesse or as a result of judicial favour; and are often unable to walk away from a settlement, either because their needs are pressing, or for fear that, without settlement, the crown will act or omit to act so as to prejudice Māori interest.

These factors that impact on the negotiating power of the parties relate to all stages of the negotiations process, from the preliminary or preparatory stages of determining the boundaries of settlement through to the negotiations proper and the outcome of any negotiations.

The Crown's act of publishing its Proposals seems to particularly exemplify the power that it has over iwi. It had the human and financial resources to develop the Proposals and also to implement a communication strategy about them. In doing so, the Crown had the important 'first word' on the issue of resolving Treaty claims, setting the agenda for negotiations and the point of departure for what was to be all ensuing dialogue nation-wide on the issue of settlement. The effect was that many New Zealanders became predisposed towards the Crown's Proposals which increased the Crown's control over determining the boundaries of settlement and, hence, its negotiating power. Neutralizing this effect presented a formidable challenge for iwi.

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<sup>19</sup> J M Munro *The Treaty of Waitangi and the Sealord Deal* (Law Faculty, Victoria University of Wellington, 1993) 21.

Indications are that the Crown has chosen to ignore the realities facing iwi regarding access to resources. Consider, for example, the following quote from the Minister in Charge of Treaty of Waitangi Negotiations, Douglas Graham, on the Government Proposals:<sup>20</sup>

Well, when people say it won't work and it's terrible and all the rest of it, I have to ask them, what would you do and when I do that there's dead silence.

This statement is indicative of the general attitude which the Crown has displayed throughout the settlement Proposals episode. The Crown, having given Māori only a few months to consider the Proposals, expected iwi fully understand the details, undertake a full analysis, obtain feedback from their iwi members, develop their own comprehensive strategy and have it ready to present as an alternative - all of this with severely limited resources. In contrast, the Crown took close to three years and an undoubtedly considerable amount of money to develop the Proposals without the impediments of having to consult with a wide audience.

The Crown's attitude also seems to be that it is not overly concerned about the effect iwi will have on the Proposals and the final outcome of negotiations.<sup>21</sup>

I'm not asking...the Māori people to agree to anything....if [Māori claimants] don't wish to negotiate that's their choice.

This seems to be saying that even if iwi disagree with the Proposals for settlement of Treaty claims, the Crown will go ahead regardless and implement those Proposals as Government policy. The other disturbing thing that Mr Graham's comment reveals is that he seems to believe that all iwi claimants have other choices available to them besides negotiating with the Crown on the Crown's terms.

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<sup>20</sup> Radio New Zealand "Morning Report" 30 November 1994.

<sup>21</sup> Ibid.

However, it is the exception rather than the rule that iwi have other realistic 'choices' besides negotiating.<sup>22</sup> The very reason that iwi make claims to the Waitangi Tribunal is that they seek redress from the Crown for historical losses. The overwhelming majority of this loss results from the effects of colonization which also involved systematic dispossession of Māori from their land and resources. This depleted their economic base which has profoundly affected iwi's ability to provide adequately for their people. To this day, many iwi members are impoverished and reliant on the perpetrator of these past injustices, the Crown, for their sole source of income - a bitter irony to have to live with day to day. Other downstream effects of colonization are that in the areas of employment, health and education Māori feature disproportionately as compared with non-Māori.

Is preserving this state of affairs the 'choice' that the Minister is asking iwi to consider?

The absence of any alternatives, let alone satisfactory ones, for a negotiating party signals an absence of a key source of negotiating power.

Considering that iwi are, relatively speaking, less prepared than the Crown to negotiate in that they have fewer financial and human resources, and given the impacts of agenda setting on and the absence of realistic alternatives for iwi, it appears that many iwi lack a significant measure of negotiating power vis-à-vis the Crown.

## 2.4 The Impact of Norms

### 2.4.1 Introduction

'Norms' are certain "standards" established within society, or "customary behaviour".<sup>23</sup> In terms of structural fairness of the negotiations process, their impact is far-reaching in that together with rights and duties they constitute the building blocks of the boundaries of

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<sup>22</sup> J Kelsey "The Mystery Envelope: What is the Government up to? (Public Meeting on the Fiscal Envelope, Wellington, December 1994)" in L Pihama (ed) *The Fiscal Envelope - Economics, Politics and Colonisation* (Moko Productions, 1995) 22.

<sup>23</sup> R E Allen (ed) *The Concise Oxford Dictionary of Current English* (8 ed, Clarendon Press, Oxford, 1990).

settlement of Treaty claims including the process for negotiation. They also have a profound affect on the respective power of the negotiating parties which, as discussed above, is a primary issue when considering structural fairness.

#### 2.4.2 The Power of the Norms of the 'Majority'

Because norms are strewn throughout our everyday lives, their impact on our day-to-day dealings and interactions with other members of the community tend to be taken for granted. For example, Behrendt writes of how Aboriginals in Australia are affected by the powerful use of the norms of the dominant society.<sup>24</sup>

Where Aboriginal people conformed with the values of the dominant society they could receive the protection of the legal system. Where they lived outside of those values, maintaining the traditional cultural values and/or living traditional lifestyles, the legal system would provide no protection at all. The point to be taken from this is that there is clear evidence that the existing legal system is not able to adjust to recognizing the cultural values of other groups. In fact, it requires compliance with accepted norms before it offers protection.

In New Zealand also, the power of the norm is inescapable. In reference to the 'Haka Party Incident' at Auckland University in 1979, Hazlehurst comments on how norms can be communicated through the media, amplifying their potency.<sup>25</sup>

Middle class Pākēhā society had a powerful articulator of group ideology and interests - the media...the press, radio and television transmitted news and interpretations of the confrontation...by implication...[the protest by Māori against the use of the haka by university students] was seen as an attack of the working (or unemployed) lower classes upon the 'respectable', 'law abiding', 'hardworking' middle

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<sup>24</sup> L Behrendt *Aboriginal Dispute Resolution: A Step Towards Self-determination and Community Autonomy* (The Federal Press, Sydney, 1995) 5.

<sup>25</sup> K M Hazlehurst *Racial Conflict and Resolution in new Zealand - The Haka Party Incident and its Aftermath 1979-1980* (Peace Research Centre, Research School of Pacific Studies, The Australian National University, Canberra 1988) 53.

classes. Such a challenge to the status quo could easily be seen as a challenge to the nation's stability and well being.

The two preceding quotes give an indication of what in essence it is that gives norms the power to affect the actions of other members and sectors of society. They indicate that the existence of norms in themselves are not sufficient to make an impact. As a general rule, it is the dominant culture's set of norms that has maximum force. The 'dominant' set of norms may usually be identified as those which a majority of the population shares. In terms of sheer numbers, their force far outweighs those of any minority population (more rarely, a set of norms may also achieve dominance due to the power of one group to effectively communicate and/or enforce those norms regardless of whether it contains more members than any rival group).

In the New Zealand experience, there are admittedly difficulties in defining *exactly* who's norms constitute the dominant ones. It would be oversimplifying things to merely divide the population into two camps of Māori and non-Māori, arguing that the Māori minority has one set of norms and the non-Māori majority has another, and concluding therefore that the dominant set of norms must be those of the non-Māori majority. There exists within the non-Māori community different groups, not the least of which in terms of numbers include white (Pākēhā) New Zealanders. Breaking it down even further, there are also different groups within the Pākēhā community, such as upper, middle and lower classes, rural and urban, and the list goes on. Each in a general sense (allowing for a certain degree of interlinkage and crossover) has their own set of norms. However if the dominance of norms stems from numbers, chances are that they would exist in the non-Māori sector of New Zealand or (because other ethnic minority groups may share similarities of culture) more precisely the Pākēhā sector.

This has major implications for Māori. Being a minority in New Zealand their norms will have less force in general, and in particular where it most counts relative to the negotiation of Treaty settlements - on governmental policy makers and ultimately iwi's negotiating power. As mentioned above, Ministers wish to maintain the voters support, especially with the MMP elections close at hand. The Government would want to satisfy the majority of

voters' interests, and it is particularly mindful that many taxpayers have very passionate views concerning certain aspects of the Proposals. For example, to some taxpayers just the thought of their money and Government assets to the tune of hundreds of millions of dollars being allocated to the settlement of Treaty claims would create a "white backlash", especially "where vested interests were threatened".<sup>26</sup> It is therefore not inconceivable that the Government would strive to incorporate the norms of the majority population into the Proposals for settlement of Treaty claims.

Burton states that "authorities who attempt to impose the norms of the powerful are, in themselves, a source of conflict".<sup>27</sup> If this is true, it sends a clear message to the majority population and the Government that they themselves are a source of much of the conflict that currently exists between iwi and the Crown. This is a clear case of 'majority rules', and where this culture exists the voice of the minority is lost.

Once the power of norms in everyday human interactions is comprehended, one can begin to appreciate the tremendous potential for employing norms as tools to increase negotiating power. In the remainder of the discussion on norms below, I will highlight some of the specific ways in which norms may be employed explicitly by the Crown and iwi and also give other examples of how norms impact directly on the negotiating power of the parties and hence the ultimate fairness of the negotiations process.

#### 2.4.3 The Use of Norms Relating to Principles of Natural Justice

Parties "frequently endorse norms - and interpretations of them - which best favour their interests",<sup>28</sup> or even manipulate norms "by selective interpretation and biased application".<sup>29</sup> This use of norms may be observed in the context of negotiations between the Treaty Partners. For example, the following norms are a selection from the Crown principles for

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<sup>26</sup> Walker, above at n11.

<sup>27</sup> Burton, above at n3, 18.

<sup>28</sup> Albin, above at n13, 224.

<sup>29</sup> Gulliver, above at n18, 192.

settlement of Treaty claims:<sup>30</sup>

“In attempting to resolve outstanding claims the Crown should not create further injustices”;

“The Crown has a duty to act in the best interests of all New Zealanders”; and

“As settlements are to be durable, they must be fair, sustainable, and remove a sense of grievance”.

These norms have their foundations in equity, at least in a utilitarian sense. Their nature, therefore, allows the Crown to proceed with a measure of confidence that their Proposals are fair and reasonable. On this basis (all other things being equal), the Crown can convince other sections of the community that these Proposals are in fact fair, thereby boosting its support and ultimately negotiating power and reducing that of the other party.

The difficulty is, however, that the Crown's norms actually conflict with norms commonly enunciated by iwi in response to its Proposals which also reflect principles of natural justice, so they are fairly robust in terms of fairness. For instance:

“Each case must be determined on its merits.”<sup>31</sup>

“...both sides should be heard before a decision is given...”<sup>32</sup>

“Minerals and standing timber are constituent elements of the land ownership itself.”<sup>33</sup>

“[Land owners are] entitled to take advantage of advances in technology to exploit the resources on their lands.”<sup>34</sup>

It would appear to follow that as the Crown is able to employ norms to increase their negotiating power and leverage their respective interests, so iwi should also be in a position to employ norms and reduce the power of the Crown. This might lead one to conclude that

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<sup>30</sup> Above at n2, p7.

<sup>31</sup> Above at n2, p42.

<sup>32</sup> Above at n2, p21.

<sup>33</sup> Above at n2, p73.

<sup>34</sup> Above at n2, p74.



there appears to be a stand-off in which no one party is more 'correct' or 'right' than the other - each party has simply prioritised the applicable principles of natural justice so that one principle takes precedence over another competing principle resulting in a zero sum effect. However, there are further kinds of norms and uses of them that do appear to exacerbate iwi's lack of negotiating power.

#### 2.4.4 The Government's Use of 'Status Quo' Norms

In addition to using norms in reference to principles of natural justice, the Government has the luxury of having built up its public support base as an 'institution' which should be protected at all costs. There is often significant support to maintain the societal status quo (which may or may not include the general balance of power between Māori and non-Māori or distribution of burdens and benefits as perceived by some non-Māori). Observing the norms of society, Burton writes:<sup>35</sup>

Societies have always been in potential conflict because some sections drive toward change to fulfil their human needs, while other fear change and its threat to their interests. Change has traditionally been regarded as malign and anti-social. We have not developed a language for it, except a negative one - revolt, revolution, dissent, terrorism.

Therefore, any perceived threat to that institution or the status quo by one party is likely to result in a measure of resistance. Māori and their claims for redress (which often argues strongly for the return of key natural resources) may be perceived as a threat. As such, they constantly have to defend their interests, rights and positions. According to Gulliver, in this defensive position iwi are being told by major sectors of the community that they:<sup>36</sup>

"ought morally to accede to the [Government]...refusal to accede will be disadvantageous to the [iwi], for [it] invites the possibility of adverse interference from

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<sup>35</sup> Burton, above at n3, 19.

<sup>36</sup> Above at n2, 191.

the outside, now or later, should [it] refuse...In addition, there may be reference to the ongoing social life of the participants and to their future relationships, needs, and prospects in the wider society that have bearing on the current negotiations.

The key word in the above quote is 'ought'. It implies that in some sense the ideas communicated are actually norms. For instance, in very simple terms the following norm could be distilled from the quote above:

"one should not rock the boat".

Of course, there may be other more sophisticated interpretations of the norm contained in Gulliver's quote. More than likely, there are a number or family of them. Again, the norm communicated is being used in support of the Crown's Proposals, i.e.:

'The boat' is 'the establishment', the 'status quo', the structures of Government. The Government has formulated a set of Proposals, and what more, they are based on principles of fairness. If one attacks the Proposals, then one attacks the establishment, and that is undesirable.

The use of such norms by the majority, therefore, acts as a significant drain on the effectiveness of iwi to promote their views regarding the Proposals, and so diminishes their power to negotiate.

#### 2.4.5 The Use of Norms relating to Behaviour

Norms, says Gulliver, are also powerful tools in negotiations in that "the party who has conformed to them may have powerful support against his opponent who has contravened them."<sup>37</sup> An example of this kind of norm stems from the statement that the Government has made major achievements to date in terms of progressing the claims settlement issue

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<sup>37</sup> Gulliver, above at n18, 191.

with iwi, and even that iwi have been fortunate to be offered as much as they have been.<sup>38</sup>

Those who considered the envelope to be too generous suggested that Māori do not deserve compensation and that they have benefited from years of European 'civilisation'....since Māori have rejected the envelope, the generous offer to them should be withdrawn.

There seems to be a couple of norms underlying this statement. For example, there is an impression that there have been disproportionate contributions made to the New Zealand society by the European settlers and their descendants on the one hand and Māori and their descendants on the other; that colonisation by the former has resulted in innumerable benefits to Māori, but that Māori have not provided benefits to the same degree. This being the case, further benefits accruing to Māori would seem to worsen this state of affairs. The norm communicated therefore seems to be that, in a relationship where it is intended that both will contribute equally and share equally in any benefits of that relationship, any major breach of that arrangement would be grossly unfair. It seems that the receipt of proceeds from the settlement of Treaty claims is the last straw for a number of New Zealanders who think that Māori have already received more than their fair share from the relationship.

Moreover, it is implicit in the quote above is that 'one should not be greedy'. It is being implied that iwi are being greedy in arguing for more than what the Crown is actually prepared to give, and this behaviour is viewed in a negative light that results in a reduction of support and hence negotiating power for iwi.

Another underlying norm is that the Government's behaviour of making progress is 'good'; the Government may be seen to be committing itself to a rational and 'logical'<sup>39</sup> process of negotiating settlements with iwi in progressing the resolution of Treaty claims. Moreover, media reports indicate that although the majority of voters thought that the Government's approach to negotiating settlements with iwi may not be perfect, it still got 'brownie points'

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<sup>38</sup> Above at n2, q42.

<sup>39</sup> See "Procedure for Settling Treaty Claims" *Radio New Zealand "Mana News"* 23 June 1994.

from them for their efforts.<sup>40</sup> This illustrates that, even in the face of major criticism, the Government still manages to maintain huge support on balance.

The implication for iwi is that because the dominant societal norm is that progress is good, impediments to this 'progress' are seen in a negative light. As iwi oppose many of the Crown Proposals, they are perceived by many to be creating unnecessary delays to the progression of an issue that the Government has put a lot of effort into trying to resolve. In addition, this also implies that iwi are being unreasonable.<sup>41</sup>

A working assumption that often explains poor outcomes is the premise that if we are not making progress, and if I am being reasonable, then you are being unreasonable. Put another way, the assumption in many conflict situations is that if one side is responding rationally to its perceived choice, then the lack of progress is the fault of the other side.

The protest actions of some Māori against the Proposals have also resulted in a barrage of normative statements being applied by many New Zealanders with respect to the entitlement of iwi to redress for past losses. For example, these protest actions included the reclamation of authority by certain Māori groups over sites of significant importance by physical occupation of those sites. The lawfulness of these occupations and the actions of some of the participants were often called into question. This led to debate on whether those Māori ought to maintain their entitlement to redress.

Normative statements made in support of the iwi claimants can go some way toward addressing the imbalance of power in favour of the Crown which stems from the use of

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<sup>40</sup> In "Thumbs down on Māori deals" Sunday Star Times, 8 September 1996, it was reported that "Most voters don't think the Government's fiscal envelope proposal has been successful but give ministers credit for making progress in settling Māori claims".

<sup>41</sup> R Fisher "The Power of Looking at 'Their' Choice: The South African Case" (1986) 2 Negotiation Jnl 129, 129.

norms - for example:<sup>42</sup>

Clearly it would not be acceptable to wider New Zealand for a thief to steal a new car and say 150 years later that he will not return the car to its rightful owner since it has gained vintage status with special qualities to be appreciated by all.

However, iwi are particularly vulnerable in these times to the erosion of their negotiating power stemming from norms when media scaremongering combined with the general lack of an enlightened New Zealand public exacerbates the racial tensions in the community. Norms such as those expounded above ultimately lead to statements that Māori are "exploiting the role of the victim",<sup>43</sup> this even in the face of references by iwi to established norms that define their rights as tangata whenua - rights which have been, and continue to be, infringed.<sup>44</sup>

#### 2.4.6 Summary

It is unclear to this writer whether, generally, the relevance of norms and the potential they have to impact on the negotiating power of both the Crown and iwi is fully appreciated in New Zealand. The preceding discussion raises the issue as one that deserves not to be ignored in the context of Crown-iwi negotiations as norms have a definite potential to impact on the power imbalance between the Treaty Partners to the detriment of iwi.

### 2.5 **The Use of Assumptions - Crown Control Over the Limits and Boundaries of Settlement**

Assumptions may be defined as the act or instance of accepting something to be true, without proof, for the purpose of argument or action.<sup>45</sup> The use of assumptions also needs

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<sup>42</sup> Above at n2, 56.

<sup>43</sup> H Gadlin "Conflict Resolution, Cultural Differences, and the Culture of Racism" (1994) 10 *Negotiation Jnl* 33, 41.

<sup>44</sup> Gulliver, above at n18, 192.

<sup>45</sup> Allen, above at n23.

to be considered when determining issues of structural fairness, particularly the issue constraints of any negotiations. Like norms, the use of assumptions by the Crown when combined with its greater negotiating power and control over the negotiation process places artificial constraints on the boundaries of settlement, thereby affecting the fairness of any outcome.

The Government has used a variety of assumptions which fit comfortably with the norms that it has used as a basis for its Proposals. Some of these assumptions have been selected by the writer for discussion below. It is contended that these and others used by the Crown have their foundation in "traditional political theory" relating to "concepts of law and order, the common good, majority decision making, 'democracy' and the right to rule and to expect obedience".<sup>46</sup> This relates directly to the discussion in Chapter One about the Government's culture of ruling and how it has affected the way in which the Crown has chosen to deal with iwi in the process of negotiations. The Government's act of unilaterally making assumptions reflects its belief that it is entitled to do so as the sole ruler of the state.

This approach is criticized by the writer in that the assumptions were taken to be universally acceptable when in actual fact the Crown failed to test the robustness of these assumptions by obtaining feedback from iwi regarding their acceptability. This presents a further ground upon which the fairness of the Proposals may be questioned, and leaves the Proposals open to the criticism that they cater to the interests of the majority population. Durie observes that:<sup>47</sup>

Of the seven Settlement Principles, only one gives any indication of fairness to the claimants; the others appear to provide reassurances for non-claimants. While it is appropriate that the rights of others must be protected, the resolution of proven claims must be guided primarily by the principles of natural justice,<sup>48</sup> not political expediencies or popular support....[it] suggests other principles which for the most

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<sup>46</sup> Burton, above at n3, 18.

<sup>47</sup> Durie, above at n6, 112.

<sup>48</sup> The difficulty with conflicting principles of 'natural justice', however, is noted in the discussion of norms above, Chapter Two, 2.4.

part provide reassurances to the general public and interested parties at the expense of potential claimants.

In defence of the Crown, one might argue that as consultation with Māori was still pending, re-examination of and amendment to the Proposals was always a possibility. However, the tone in which the Proposals were framed and subsequent commentary indicates the Crown's intention that there were particular issues identified upon which it was unwilling to move on.<sup>49</sup>

In this part I will examine some of the key assumptions made by the Crown in the production of the Proposals. The common theme throughout the discussion is that the Crown's unilateral use of these assumptions affected the structure of the negotiations process in that it limited the boundaries of settlement. The structure having been affected so profoundly by the more powerful party has substantially reduced the fairness of the process of negotiation. As Saunders states "the act of definition of interests and objectives is a profoundly political act and not just an abstract academic exercise".<sup>50</sup>

## 2.6 'Full and Final' Settlements

One of the norms enunciated by the Crown in its Proposals (referred to above at page ) is that it has the duty to act in the best interests of all New Zealanders. The Crown believes that "the best interests of all New Zealanders" necessarily involves providing certainty, and a process by which New Zealand as a country can deal with Treaty grievances once and for all so that we may be able to move forward as a Nation. The first assumption that the Crown has made is that the best means of obtaining certainty is to impose that any settlements reached with iwi will be full and final. In fact, the Crown hopes to settle all major grievances by the year 2000.<sup>51</sup>

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<sup>49</sup> For more about the consultation process, see Chapter Three below.

<sup>50</sup> Saunders, above at n12, 255.

<sup>51</sup> The 1996/97 Ministry of Justice's Corporate Plan includes, as the 'Vision' statement of the Office of Treaty Settlements, "To settle all major historical Treaty of Waitangi breaches by the year 2000".

However, past attempts at guaranteeing 'full and final' settlements have not necessarily resulted in certainty. To illustrate, Mr David Lange cites the case of former attorney-general HGR Mason who, in 1948:<sup>52</sup>

told Parliament that the three great land claims of Waikato, New Plymouth, and Tauranga arising from the Māori wars had now been settled. The truth was that while they were settled with the affirmation of the parties involved and while they were protected by legislation, the settlements were so inequitable...they became absolutely untenable."...the Bastion Point dispute was another case where settlement had been reached between the government and Ngati Whatua...and, within 10 years, the Waitangi Tribunal had found the settlement faulty and further compensation and legislation was required.

This shows that even if the finality of settlements is provided for in legislation, these are not necessarily safe from review. From a historical point of view, therefore, it can no longer safely be assumed that settlements can actually be made to "last forever".<sup>53</sup> This probably reflects the nature of the problems created by colonisation which suggests that they cannot in a practical sense be equitably resolved by the mere swipe of a pen at one instant in time:<sup>54</sup>

It has to be accepted...that we are dealing with long-term problems which have arisen from colonisation, a messy and hazardous affair that has left Māoris as economic orphans rather than treaty partners.

The route to decolonisation is likely to be as inconvenient, if not hazardous, for the Crown as colonisation was for the Māori.

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<sup>52</sup> "Lange sees no end to Māori claims" *The Dominion*, Wellington, New Zealand, 26 February 1994.

<sup>53</sup> M Chen *Full and Final Settlements Between the Crown and Māori* (Seminar paper produced for Te Puni Kōkiri by Russell McVeagh McKenzie Bartleet & Co, Wellington, New Zealand, 11 May 1994) 7.

<sup>54</sup> S Jones "Waitangi and Māori political evolution" *New Zealand Herald*, Auckland, New Zealand, 29 July 1994.



On another level, the Waitangi Tribunal seems to be in no doubt that "full and final settlements for all time are inconsistent with the ongoing nature of the partnership established under the Treaty of Waitangi."<sup>55</sup>

These comments should indicate that the imposition of full and final settlements by the Crown is not entirely appropriate. This seems to justify a review of the Crown's assumption that such a limitation on the settlement of Treaty grievances is appropriate.

### 2.7 The 'Fiscal Cap' - Unilateral Definition by the Crown of 'affordability to the Community'

Having made the initial assumption relating to full and final settlements, the Crown uses this to justify a second assumption that a limit must be set on the amount the Government will allocate for the resolution of Treaty grievances. The Crown's argument is that, as the significant burden of funding the resolution of Treaty grievances will rest with one generation of taxpaying New Zealanders, that amount must be one that they can realistically be expected to pay out. In the words of the Minister in Charge of Treaty of Waitangi Negotiations, "The fund has to be big enough so we can get settlements that are durable and last, but not so big that it blows the country's budget apart."<sup>56</sup> In other words, the Crown is asking itself what the country can actually afford to pay. I find the assumptions which the Crown has made in developing this aspect of the Proposals to be problematic for at least two reasons.

Firstly, many Māori ask the question, "why should one generation of non-Māori pay the price to resolve the problems?"<sup>57</sup> In making its assumption about an appropriate timeframe for settlement, the Crown has refused to acknowledge the viability of the alternative of spreading the costs of settlement over time.<sup>58</sup> This alternative is appealing to Māori because

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<sup>55</sup> Chen, above at n53.

<sup>56</sup> "Māori grievances must be addressed, says Graham: Goodwill of all called for" *Northern Advocate*, Kaitaia, New Zealand, 28 May 1994.

<sup>57</sup> "Treaty envelope 'unlikely' to contain all the answers" *Evening Post*, Wellington, New Zealand, 22 November 1994.

<sup>58</sup> Jones, above at n54.

sometimes "the issue of who is going to pay stops people from thinking about some of the other real issues",<sup>59</sup> in this case how much can the current Government and one generation afford to allocate to Treaty settlements? Spreading the costs over time would ease the financial burden somewhat.

Some iwi are also not fully prepared to present their claims for redress. A fixed quantum means that, there being only a finite amount to divide between iwi, the value of each settlement must be *relative*. However, if not all claims are lodged with the Waitangi Tribunal for determination as to the merit of their case, how can we know what we are dealing with let alone determine the relative value of each claim?:<sup>60</sup>

We don't know what the injustices are, we don't know who the claimants are, and we can't quantify the costs. This seems to put a "full and final settlement" well out of reach. The injustices will not abate nor the pool of claimants shrink to fit the purse of the minister.

In addition, the Crown's time frame for settlement is in a sense very arbitrary - why the year 2000? Why not 2020? It seems that the time limit has been chosen more as "a major New year's resolution" than for any other reason.<sup>61</sup>

Secondly, based on settlement by the year 2000 of all major grievances, the Crown has made the unilateral assumption that \$1 billion is the maximum amount that the country can afford. The writer agrees that the principle of affordability is an important consideration here. And Māori have indicated that they too believe affordability is important - it is not the intention of Māori to place unreasonable demands<sup>62</sup> on the taxpaying public. Where the

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<sup>59</sup> F Cassidy "What Can the Federal and Provincial Governments Do?" in F Cassidy (ed) *Reaching Just settlements: Land Claims in British Columbia* (Oolichan Books and the Institute for Research on Public Policy, 1991) 60-66, 65.

<sup>60</sup> D Lange "An appearance of progress" *The Dominion*, Wellington, New Zealand, 31 January 1994.

<sup>61</sup> T Rangihueua "The Role of Māori Women in Treaty Negotiations and Settlements" (1995) 25 VUWLR 195, 195.

<sup>62</sup> Chen, above at n53, 3.

Crown and Māori do differ, however, is in their definitions of affordability, and the Crown has yet to reveal the method it used for calculating the \$1 billion quantum.<sup>63</sup>

...The Proposal is not explicit on how a sum of one billion has been calculated but it is justified as a political decision largely on the basis of affordability and acceptability to the wider community...neither the methodology used to calculate the amount, nor the basis for deciding viability has been disclosed....conservative estimates suggest that the sum of one billion dollars falls well short of a reasonable and fair settlement price.

## 2.8 Definition of Māori Interests Confined to 'Use' and 'Value'

The final assumption that I wish to discuss under this heading relates to the Crown's proposal concerning natural resources. The Crown Proposals for Settlement of Treaty Claims states that "special rules must apply [to natural resources] because in general terms the Crown controls natural resources in the interests of all New Zealanders".<sup>64</sup> It lists four types of interest in a natural: ownership interest, use interest, value interest and regulatory interest, and then goes on to state that Māori interests, according to its interpretation of Article II of the Treaty of Waitangi,<sup>65</sup> are confined only to 'use' and 'value'.

This Crown proposal contains many underlying assumptions, not the least of which is an assumption that the Crown need only refer to the English version of Article II of the Treaty of Waitangi to ascertain the rights of iwi with respect to natural resources. However, iwi continually assert that according to the Māori version of the Treaty they did not concede ownership of natural resources, and that Article II in fact conveys a level of interest which

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<sup>63</sup> Durie, above at n6, 113.

<sup>64</sup> Above at n1, 21.

<sup>65</sup> See n9 above.

goes well beyond use and value.<sup>66</sup>

A refusal to contemplate Māori ownership of natural resources, even though acknowledging use and value interests, is contrary to the Treaty of Waitangi. The Courts have...never explicitly ruled out Māori ownership.

The attitude of the Crown towards the interpretation of Article II reflects “a colonial view of ownership” rather than upholding the concept Partnership that the Treaty embodies.<sup>67</sup>

The Treaty of Waitangi was never intended to freeze Māori in a time warp. It was essentially about forward development, economic growth for Māori and Settlers and the opportunity to share new technologies. Yet...the Proposal...[ignores] the intentions of the Treaty and the expectation that Māori would share fully in the benefits of the new nation.

The fact that these definitions were assumed without cross reference to Māori interpretations of the Treaty and without extensive and meaningful consultation with iwi again shows a deficiency in the process by which the Crown developed its Proposals.

## 2.9 Summary

The Court of Appeal has stated that the Treaty relationship between the Crown and iwi is best described as something akin to ‘partnership’.<sup>68</sup> However, it is in real terms something much less. The issues raised above relating to the balance of power between the parties, the impact of norms and the use of assumptions by the Crown highlights some of the structural

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<sup>66</sup> Durie, above at n6, 112.

<sup>67</sup> Durie, above at n6, 113.

<sup>68</sup> Te Runanga o Whare Kauri re Kohu Incorporated v Attorney General & Others [1993] 2 NZLR 301.

deficiencies of the negotiations process. This combined with the discussion in Chapter One above about how the culture of ruling affects the Government's attitude toward and dealings with its Treaty Partner provides the foundations for the claim that the fairness of the Crown's negotiations process may be called into question.

### OBLIGATION TO CONSULT

This Chapter discusses the Treaty obligation of the Crown with respect to consultation with Māori and how the Crown's culture of negotiating is deficient in terms of meeting these obligations. In addition to incompatibility with the Crown's duty to act in good faith, the conventional concept of negotiation that the Crown has chosen to adopt also denies recognition of the unique nature of the ongoing partnership between Māori and the Crown.

#### 4.1 The Treaty of Waitangi - The Fiduciary Nature of the Relationship between Māori and the Crown

##### 4.1.1 Fiduciary Duty to Consult

In *Tūhonoa o Whare Kōwhiri ki Te Kaitiaki Take Kōwhiri o Te Kaitiaki Take Kōwhiri*, Cooke P stated his view that:

the Treaty created an enduring relationship of a fiduciary nature akin to partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards the other.

Cooke P's interpretation of the relationship between Māori and the Crown as Treaty Partners is further clarified when read in conjunction with his following comment made in

<sup>10</sup> See the discussion above on transparency, Chapter Two, 2.3.

<sup>11</sup> [1993] NZLR 161.

## CHAPTER THREE

# 'THE CROWN'S FAILURE TO MEET ITS TREATY OBLIGATION TO CONSULT'

This Chapter discusses the Treaty obligation of the Crown with respect to consultation with iwi and how the Crown's culture of negotiating is deficient in terms of meeting those obligations. In addition to incompatibility with the Crown's duty to act in good faith, the conventional concept of negotiation that the Crown has chosen to adopt also denies recognition of the unique nature of the ongoing partnership between iwi and the Crown.<sup>69</sup>

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<sup>69</sup> See the discussion above on assumptions, Chapter Two, 2.5.

<sup>70</sup> [1993] 2 NZLR 301.

New Zealand Māori Council v Attorney General:<sup>71</sup>

the good faith owed to each other by the parties must extend to consultation on truly major issues.

In terms of the production of the Proposals for the settlement of Treaty of Waitangi Claims with iwi, the courts have shown that the Crown owed Māori the duty to consult with them in a meaningful way on issues of major importance to Māori.

Even though the Government put its Proposals out for consultation, indications were that it was not intended that such consultation would be made in the spirit of the Treaty, that is, in good faith. Iwi could be forgiven for feeling that the consultation rounds were nothing more than a token exercise. On several occasions, the Government indicated that it was not prepared to shift its position on several of its Proposals. For example, in 1994 the Minister in Charge of Treaty of Waitangi Negotiations, Mr Douglas Graham, said that the Government would "shortly determine" the amount it is prepared to set aside in a "fiscal envelope".<sup>72</sup>

The Minister also appeared to be unphased with the overwhelming iwi opposition to many of the Proposals, and indeed displayed an air of confidence indicating that such opposition would have no effect on the final Crown settlement policy.<sup>73</sup>

The amount of the financial cap contained in the fiscal envelope is expected to be announced within a few weeks....However, Mr Graham says it is for the Government to fix the envelope and Maoridom will not be asked to agree to it.

In addition to the lack of good faith of the Crown consultation process was the issue of resourcing:<sup>74</sup>

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<sup>71</sup> [1989] 2 NZLR 142, 152.

<sup>72</sup> "Treaty limit proposal draws flak" *Evening Post*, Wellington, New Zealand, 31 January 1994.

<sup>73</sup> "Setting Treaty claim limits" *The Dominion*, Wellington, New Zealand, 15 July 1994.

<sup>74</sup> J Chadwick, *Radio New Zealand "Mana News"* 31 January 1995

But what [Māori] were really complaining about is that instead of sitting down and saying let's work out together how to get rid of all these claims, you get a unilateral approach and say well here's my proposal, now what's yours. What they're saying is if you're going to spend money to resolve something then why don't we do it together rather than you spend it on your one and then throw it at us and we have to go and look for money to work out ours.

This factor in turn led to the Government's approach to settling treaty grievances being labelled as "arrogant",<sup>75</sup> and the proposals themselves as a "fait accompli".<sup>76</sup> Criticism of the Government approach to the production of the fiscal envelope proposals echoed concerns voiced about the national hui undertaken to obtain ratification of iwi and hapū consent for purchase of the fishing quota owned by Sealord Fisheries Limited in 1992.<sup>77</sup>

In an attempt to address these comments, the Government alluded to the "great deal of intellectual firepower" that went into developing the proposals, citing, for example, the Crown's "direct negotiations with a number of claimants over the last few years".<sup>78</sup> However, these negotiations had been progressed with a view to settling grievances on an *iwi-by-iwi* basis; on the other hand, the Government's fiscal envelope proposals would apply *across iwi*, at a *pan-tribal* level. The application of policy at this level raises additional issues for Māori which may or may not have been sufficiently discussed or canvassed in these "direct negotiations" alluded to by the Government. The Crown also seemed confident that it had sufficiently incorporated the interests and concerns of Māori on this issue, referring to the consideration of quality advice received from Te Puni Kōkiri regarding the proposals.<sup>79</sup>

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<sup>75</sup>Taumata Kaumatua o Ngapuhi Nui Tonu spokesman Kingi Taurua, "Crown fiscal envelope proposal 'arrogant'" *Northern News*, Wellington, New Zealand, 15 December 1994.

<sup>76</sup>S Jones *Radio New Zealand "Mana News"*, 31 January 1995.

<sup>77</sup>For further information, see Munro, above at n19, particularly 37.

<sup>78</sup>Minister of Justice, D Graham *Radio New Zealand "Checkpoint"*, 30 January 1995.

<sup>79</sup>The Ministry of Māori Development. See Comment by D Graham, Minister of Justice, Above at n78. However, no matter how competent and sound the advice, it remains that (1) a Government department will never be perceived as independent, and (2) one can only speculate as to the extent Te Puni Kōkiri's advice was actually followed in the process.



3.1.2 Requirement for 'Meaningful Consultation' Paramount

This writer believes that it remains to be shown whether the Crown's approach to consultation with iwi on its Proposals for settlement of Treaty claims satisfied the requirements of fairness. The author is therefore reluctant to conclude that the Crown satisfied the requirement of 'meaningful' consultation. Meaningful consultation as a concept suggests to this writer that merely presenting policy proposals to iwi for their consideration and feedback is not sufficient.

This writer suggests that, preliminary step required to be undertaken is for the Crown and Māori to enter into exploratory discussions about an appropriate framework or principles which will guide the process of developing proposals for the settlement of Treaty claims. Such discussions would necessarily include a process of defining the conflict to be resolved between the parties, and there is an obvious conflict between the Crown and Māori regarding the ways in which Treaty grievances ought to be resolved. Defining the conflict is important because it determines the issues that will be addressed, and those that will be left off the agenda for discussion. This ultimately leads to unsatisfactory outcomes and the relitigation of settlements.<sup>80</sup>

an incorrect definition of the cause of a serious conflict leads to the adoption of procedures of management that are inconsistent with the realities of that conflict. The procedures are, therefore, likely to be unsuccessful....Indeed, it can reasonably be argued that all levels of conflict may be protracted, not necessarily or merely because of their inherent complexities, but because of the ways in which they have been initially defined, and because of the means employed to manage them.

In addition, meaningful consultation would increase the potential for canvassing all the options and the durable nature of settlements. At present, the Government could be criticized for sacrificing iwi acceptability of the boundaries and processes of negotiation

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<sup>80</sup> Burton, above at n3, 21.

(and thereby the long term benefits of increased durability of settlements) for "the appearance of progress"<sup>81</sup> in the short term. As Ury and Smoke write:<sup>82</sup>

An inadequate grasp of the long-term stakes in a crisis can sometimes lead decision-makers to raise the stakes deliberately in the short term, in ways that they later regret. ...All too often parties calculate potential short-term gains without adequately appreciating possible long-term losses.

In general terms, more appropriate Crown action may have been first to communicate its willingness to Māori to establish a mutually agreeable process of developing a framework and principles for settlement of treaty claims (including the process of negotiation). This would be an approach consistent with the international trends for inclusive processes of negotiation with indigenous peoples that appear to be evolving. Canada, for example, is proactive in the area of establishing mutually agreeable processes of negotiation with its indigenous population, or First Nations groups. As an example, its British Columbia Treaty Commission<sup>83</sup> was created to "guide and facilitate negotiations,...and where the parties agree, other related agreements."<sup>84</sup> As preliminary steps, the Commission:<sup>85</sup>

receives a statement of intent to negotiate from First Nations plus any requests for funding...[It] must allocate funds to enable First Nations to participate in negotiations. [It] is also charged with assessing the readiness of the parties to commence negotiation of a framework agreement...[and assesses whether each of the

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<sup>81</sup> Lange, above at n60.

<sup>82</sup> W Ury and R Smoke "Anatomy of Crisis" (1985) 1 *Negotiation Jnl* 93, 94-5.

<sup>83</sup> Established by September 1992 upon recommendation of the British Columbia Claims Task Force in 1991, and by resolution of the Assembly of First Nations Summit, the Federal Government of Canada and the Province of British Columbia - see C Wickliffe *Indigenous Claims and the process of Negotiation and Settlement in Countries with Jurisdictions and Populations Comparable to New Zealand's* (Parliamentary Commissioner for the Environment, 1994) 53.

<sup>84</sup> Wickliffe, above at n83, 53-4.

<sup>85</sup> *Ibid.* It should also be noted that the Commission is an independent body with considerable powers to facilitate the expeditious resolution of claims of indigenous groups in British Columbia. The establishment of such a Commission would also facilitate a greater balance of power in negotiations between Governments and indigenous groups.

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parties has] adopted a ratification procedure and that they have identified the substantive and procedural matters to be negotiated.

Considering the Crown's past experience with negotiations, and the significant body of writing and research available to the Crown on more effective models of negotiation, the conclusion is that the Crown has yet to provide the concept of 'adequate consultation with tangata whenua' the respect it deserves.

#### 4.1 Introduction

If nothing else, the Crown Proposals episode has shown that at present, the Crown and the Government are in conflict as to how Treaty claims settlements might be negotiated. Of the concept of 'conflict resolution', Burton (1987) writes that it<sup>20</sup>

refers to the facilitated analysis of the underlying sources of conflict situations by the parties in conflict. The term also encompasses the process whereby institutional and policy options are discovered that meet the needs of the parties, thus establishing the basis for a resolution of the conflict.

Chapters Two and Three above highlight some of the inadequacies of the Crown approach to negotiating with iwi, more particularly the preparatory stages for negotiation. The present makes some suggestions for enhancing the fairness of a process of negotiation between the Treaty Partners.

#### 4.2 Reducing Negotiating Power between the Parties

In Burton's view, there is a growing ideology which favours a more problem-solving approach rather than "the traditional approach of power bargaining, negotiation, and the settlement of disputes",<sup>21</sup> the latter being favoured by the more powerful of potential parties

<sup>20</sup> Burton, *supra* note 17, p. 37

<sup>21</sup> Burton, *supra* note 17, p. 37

## CHAPTER FOUR

### 'THE NEED FOR A MORE PROBLEM-SOLVING APPROACH TO NEGOTIATIONS'

#### 4.1 Introduction

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#### 4.2 Balancing Negotiating Power between the Parties

In Burton's view, there is a growing ideology which favours a more problem-solving approach rather than "the traditional approach of power bargaining, negotiation, and the settlement of disputes",<sup>87</sup> the latter being preferred by the more powerful of potential parties

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<sup>86</sup> Burton, above at n3, p7.

<sup>87</sup> Burton, above at n3, p11.

to negotiations due to their ability to coerce the weaker parties and influence the final outcome. However, " 'resolution' is not the result of a compromise or an enforced decision".<sup>88</sup> Therefore, to achieve a 'resolution' in the true sense of the word, the ability of one party to coerce the other and influence the final outcome must be reduced.

This requires that the inequality of power between the parties needs to somehow be addressed to establish an equitable starting point for negotiations and enhance durability of any 'settlements'. Burton suggests that the inclusion of a neutral third party in the negotiations process would help balance the power in the interaction between the parties.<sup>89</sup> The inclusion of a facilitator in the process of negotiations between iwi and the Crown, as with other indigenous peoples and Governments, may be appropriate given the significant imbalance of power between them, and considering that Governments have a tendency to be attracted to a more traditional, win-lose form of negotiation that typically results in unsatisfactory outcomes for the weaker party.

### 4.3 A Framework for Government Policy

One major criticism of the Crown's Proposals for settlement of Treaty grievances is that it was unclear as to what the underlying framework for the Proposals was. This part of the paper contends that there is an urgent need for any proposals regarding the resolution of Treaty claims to have their base in a coherent and mutually agreeable framework, more to the point a Treaty framework. This is because the growing trend in negotiations concerning natural resources is for indigenous groups to raise issues varying from sovereignty and constitutional arrangements, to the recognition of ownership of resources and the right to self governance.

However, although recognition of such issues as appropriate and legitimate for discussion in the context of negotiation processes has featured in countries such as Canada,<sup>90</sup> the same

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<sup>88</sup> Burton, above at n86.

<sup>89</sup> Burton, above at n86.

<sup>90</sup> C Whitcliffe *Radio New Zealand "Mana News"*, 8 December 1994.

cannot be said for New Zealand models.<sup>91</sup> This is clearly evidenced by the following comment made by the Minister of Justice, New Zealand, in regard to Māori reaction to the fiscal envelope proposals:<sup>92</sup>

There seems to have been a great deal of emphasis put on Māori sovereignty issues...Now those matters relate to the rights of indigenous people and are taking place in America with First Nation people and in Australia with the Aborigines...But they're not matters which are involved directly with the [Government's fiscal envelope] proposals...Those proposals relate to trying to settle outstanding [treaty] grievances...and whether there should be a separate Māori Parliament or not doesn't seem to me to be terribly relevant to that.

The above view is in stark contrast with other comments of the day. Professor Mason Durie, for example, Spokesperson for the Hui held 29 January 1995 in Turangi to discuss the fiscal envelope proposals, commented that the Government's fiscal envelope proposals "lacked any coherent framework", and further suggested that the Government's reactive and ad hoc approach to the settlement of treaty claims required urgent attention in the form of discussions involving both Māori and the Crown.<sup>93</sup> The views of another well-respected Māori commentator, Moana Jackson, suggests that, by failing to acknowledge constitutional and sovereignty issues raised by Māori as sufficiently relevant to what the Government had proposed for the settlement of treaty claims, the Crown has sent a strong message to Māori about the importance that it ascribe to the treaty as the founding document of Aotearoa.<sup>94</sup>

Commentators outside New Zealand also support the plight of indigenous people to obtain acceptance from their country's Governments that they need to accommodate more the

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<sup>91</sup> Wickliffe, above at n84, 10.

<sup>92</sup> Graham, above at n78.

<sup>93</sup> *Radio New Zealand 2ZB "Paul Brennan"*, 30 January 1995.

<sup>94</sup> *Radio New Zealand "Mana News"*, 31 January 1995.

indigenous peoples' frameworks:<sup>95</sup>

People and entities, such as governments and mining companies, dealing with Aboriginal people need to accept that if they wish to negotiate with an Aboriginal community the need to do so within the frameworks that Aboriginal people find acceptable. While this may appear a radical idea, it is no different than expecting Aboriginal people to operate only within the framework of the imposed legal system.

In addition, British Columbia has made much progress in the area of enhancing indigenous peoples' meaningful involvement in negotiations. In 1991, the British Columbia Claims Task Force made a number of recommendations to the Government of British Columbia on how to deal with native claims. These recommendations included:<sup>96</sup>

...that during negotiations each party should feel free to introduce new issues which it feels are significant to the new relationship.

Although this recommendation was made in relation to negotiations proper, it could just as well be applied to the preparatory stage of negotiations between iwi and the Crown as exploratory discussions evolve and new issues are raised, and in particular to discussions concerning a framework for the settlements policy. It is also emphasized that it is only the introduction of such issues that the BCTCF recommends here. A process for finally determining the components of any policy framework (and as far as possible a mutually-acceptable framework) is another separate matter.

This writer contends that issues of such obvious importance to one party concerning the establishment of a culturally acceptable framework ought not be dismissed by the other without further consideration as to the implications that action will hold for negotiating a mutually acceptable settlement, and the processes for achieving such settlements. Allowing one party to voice and express issues that they consider important to them, *as they see*

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<sup>95</sup> Behrendt, above at n24, 6.

<sup>96</sup> Wickliffe, above at n84, 51.

*them*, is empowering. Receiving acknowledgment of the existence of these issues from the other party can therefore only be conducive to their relationship.

In light of the fiduciary nature of the Crown's obligations under the Treaty as discussed above, the Crown needs to secure a significant measure of acceptance of the Crown policy for settlement of Treaty claims from iwi. It is argued that for any detailed policy to be acceptable to Māori, it is both fundamental and imperative that they be based on a Treaty framework. Acceptability of the underpinning framework would also enhance the durability of any settlement.

#### 4.4 Reviewable Settlements

The writer above discussed the assumption of the Crown that, to enhance acceptability of the Proposals by New Zealanders, the settlement of Treaty claims must be full and final.<sup>97</sup> The discussion showed that this assumption has yet to be tested, and in fact that there is strong argument favouring alternatives to full and final settlements which the Crown needs to explore further.

It is proposed that the Crown should do away with the 'full and final' descriptor, and change the focus not on *settling* claims, but healing grievances. The Waitangi Tribunal supports such an approach.<sup>98</sup>

Treaty settlements of this kind should not be expressed in finite terms but defined by reference to goals...and provision should be made for regular checks, and for adjustments if the goals are not being achieved.

The use of economic, cultural and social indicators of the particular iwi claimant may prove helpful in determining over time whether the outcome of any negotiations could be categorized as fair. This is offered as an alternative to the Crown's approach to give

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<sup>97</sup> See Chapter Two, 2.6.

<sup>98</sup> Chen, above at n53, 11.



legitimacy and therefore enhance durability of the outcomes of negotiations between Māori and the Crown.

As the Treaty relationship between the Crown and iwi is ongoing, this would also imply a review from time to time of the relationship, including its component parts such as the outcomes of any negotiations. The concept of 'reviewal' has major benefits for both iwi and the Crown in that they do not have to think of every possible factor that may impact on the fairness of an outcome. For example, the issue of distribution of assets to iwi has become of enormous concern to iwi and the Crown.<sup>99</sup>

Two years after the Sealord fisheries deal squabbles persist about how the proceeds won from the seas will be split up. Papers released yesterday by the Treaty of Waitangi Fisheries Commission underline the unsatisfactory situation that has been reached. The initiative was meant to benefit all Maoris, yet "allocation models" prepared by the commission do not provide benefits for those who do not know their tribal affiliations.

...Should the Government have foreseen these problems and itself produced guidelines for sharing the benefits of the deal?...In a classic case of discretion being the better part of valor it decided to leave Maoridom to sort things out.

It took some time before the parties came to appreciate the complexity of this particular problem. Who can foresee what other problems might also arise, and when? It may therefore be some time before we will know for certain whether outcomes to negotiations will be 'fair'.

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<sup>99</sup> "Lessons to be learned from Sealord wrangle" *The Daily Post*, New Zealand, August 11 1994.

## CONCLUSION

It has been said that Māoridom's rejection of the Government's proposals for settling treaty claims was a "foregone conclusion".<sup>100</sup> Māori's resounding negative reaction of to these Proposals led to great debate about the substance of the Proposals themselves and the legitimacy of the process by which they were developed. In summary, Māori were, and continue to be, faced with a non-negotiable, unilaterally-formulated package imposed upon them without any prior consultation, to which they are asked to 'react', with scarce financial and human resources, and in the knowledge that their iwi and hapū will only suffer further if restoration of their economic base is unnecessarily delayed.

The Government's culture of ruling has been a major determining factor on how it approached the development of its Proposals for settlement of Treaty claims. The conventional system of power-bargaining employed by the Crown is, for a number of reasons, not only inadequate and inappropriate for negotiations with iwi, but more importantly creates an air of illegitimacy of the negotiations with iwi upon which it embarks. The balance of power in favour of the Crown precludes any notion of the Crown acting *in good faith* toward the other negotiating party. These and other structural factors have combined to result in a huge volume of commentary and critique from Māori and non-Māori alike concerning the fairness of the negotiations process. In this kind of environment future generations of Māori will continue to challenge even so-called 'full and final' settlements.

If the Government genuinely wishes to fairly and equitably resolve Treaty grievances with iwi, it would do well to review its current approach. A more problem-solving method is offered by this writer as an alternative which holds great potential for addressing some of the problems with the Crown's Proposals for settlement of Treaty claims identified in this paper. However, the single most important action that the Crown can take is to talk openly and honestly with iwi about an approach which they may find agreeable instead of unilaterally imposing conditions. This will only result in a dramatic reduction in the fairness

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<sup>100</sup> J Chadwick *Radio New Zealand "Mana News"*, 31 January 1995.

of outcomes for iwi, and it is an approach which the Crown cannot, in all good faith, continue to advocate.

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