

Ko Ngaa Take Ture Maori

Full and Final Settlement of Treaty Grievances: The Crown's Constitutional Agenda¹

Te Tiriti o Waitangi represents a threat to the supremacy of the New Zealand Parliament. It is the charter for a unique constitutional relationship wherein colonial and indigenous political and legal power co-exist in partnership, rather than the Crown holding absolute sovereign power according to the Westminster model of government. This article is concerned with the constitutional agenda underpinning the Crown's attempts to settle Maori grievances under the Treaty. The settlement process is a power struggle over constitutional control which will decide whether Maori will be in any way exempt from the supremacy of parliament. This struggle is characterised by the notion of *full and final* settlement as embodied in the Crown's Fiscal Envelope proposal. This mechanism seeks to remove the threat to parliamentary supremacy by neutralising Article Two of the Treaty, effectively denying Maori any special constitutional status or recognition.

Defining the Boundaries of the Settlement Process

Maori understand grievance on both a temporal and a spiritual level. In Maori cosmology, the entire natural world is interrelated through a web of physical and spiritual relationships called *whakapapa* (genealogy). Humans are related to the land and are nurtured by it. So for Maori, to be dispossessed of their land is not only to lose their economic and political base, but to be alienated from the spiritual source of their existence. Grievance in Maori eyes therefore extends to a spiritual level involving the *mana* of the aggrieved *iwi* or *hapu*. Maori also define their grievances in terms of the Maori text of the Treaty. Thus grievances arise where the Crown has failed to protect *tino rangatiratanga* as guaranteed under Article Two.

The Crown employs a narrow approach to grievance, focusing only on "those specific acts of land grievance which [it] is prepared to acknowledge."² It chooses to recognise only those 'principles' of the Treaty which reflect the Crown's traditional interpretation of the English text. These assume that the Crown legitimately holds sovereign power and that Maori grievances arise only out of a wrongful use of that power. In fact the Crown goes so far as to say "that its

¹ This note is an amended version of a larger work written on the subject of Contemporary Tiriti Issues.

² Jackson, *Return to Sender - An Analysis of the Fiscal Envelope*, Maori Legal Services Inc., Wellington, 1995, 6.

exercise of Article One powers [shall] be considered reasonable unless there is strong evidence to the contrary.”³ It does not address the spiritual aspects of dispossession.

A Maori perspective of settlement requires the restoration of the spiritual balance upset by the colonial experience. This means not only the return of land and resources to *iwi* and *hapu*, but also the recognition of their *mana* as embodied in *Te Tiriti o Waitangi*. A constitutional transformation replacing the existing framework of political and legal power with that contained in *Te Tiriti o Waitangi* is necessary to ensure the finality of settlement.

The settlement envisaged by the Crown does not include such a transformation. Their proposals indicate a desire to cause the least possible disruption to the status quo. It asserts that settlement shall not create further injustices, must be in the best interests of all New Zealanders, will not restrict Maori access to mainstream government programmes and will recognise the fiscal and economic constraints on the Crown’s ability to pay compensation.⁴

The Fiscal Envelope

The Fiscal Envelope is the Crown’s proposed framework for all future Treaty settlements. Essentially, the Crown is to make available a total fund from which Maori grievances are to be given redress (The value of the fund is to be determined by the Crown, the current figure being one billion dollars). In return, Maori are to accept that their current and future claims to the full, exclusive and undisturbed possession of lands and resources are extinguished. The costs of settling all Maori historical grievances will be funded from the Fiscal Envelope.

The fundamental concept in the Crown’s approach is that of *full and final* settlement. The Fiscal Envelope is simply the mechanism to achieve this higher goal. The Crown wants to do away with Treaty claims to land and resources and ensure that no more can arise in the future, leaving Maori with no special recognition of their status as *tangatawhenua*. The Crown would then be free to lead New Zealand into the next century without threat to its sovereignty or the supremacy of its parliament.

The Crown has been solely responsible for determining the principles and criteria by which the settlement process will operate. These create a number of problems which necessarily restrict possible settlement options for Maori.

First, the Crown’s strict definition of grievance includes only those specific acts of land or resource grievance which it is prepared to acknowledge. Crown complaints of fiscal constraints purport to prevent a “damages” approach to grievances. Yet without this compensation there is “no real recognition of the effects which the land alienations of the past have on Maori today.”⁵

3 *Crown Proposals for the Settlement of Treaty of Waitangi Claims: Detailed Proposals*, Office of Treaty Settlements, Department of Justice, Wellington, 1994, 19.

4 *Crown Proposals*, supra at note 2, at 6.

5 Jackson, supra at note 3, at 15.

Second, the Crown requires Maori claimants to provide “strong evidence” that the Crown had unreasonably caused injustice, meaning a grievance must be specifically and substantively identifiable.

Third, the Crown has tightly determined what will be available for settlement. Only that Crown-owned land which has not been expressly excluded from consideration may be claimed by Maori.⁶ Natural resources have been excluded from consideration to the extent that Maori may only claim a use and value interest in them.⁷

Fourth, the Crown has determined that settlement must not create new injustices against other New Zealanders, thus subordinating Maori interests to those of “all New Zealanders.” This could be seen as a further breach of the Crown’s obligation’s to protect *te tino rangatiratanga* under the Treaty.⁸

Finally, the Crown has limited the total amount to be spent on the settlement of Treaty claims to one billion dollars. Settlements to date and other costs deducted from the envelope mean there is approximately \$650 million remaining.⁹ This is about the same amount spent by the government on the first bail-out of the Bank of New Zealand. In the words of Jane Kelsey, “[i]s 150 years of systematic dispossession of tribal control over the whole country, with the accompanying lost opportunities and development rights, worth no more than the bail-out of a bank?”¹⁰ It seems miserly of the Crown to offer such an inadequate sum (and arrogant that they offer it at all), given that they are in effect trying to buy from Maori their special constitutional status under *Te Tiriti o Waitangi*.

Full and Final Settlement

Full and final settlement means more than just the settlement of Treaty grievances. It means the extinguishment of Treaty rights and the permanent removal of the threat of *tino rangatiratanga*, thereby safeguarding the supremacy of Parliament. It is about removing all trace of special constitutional significance belonging to Maori and rendering them ordinary New Zealand citizens. Full and final settlement embodies the colonial power struggle for constitutional supremacy.

This power struggle is fundamentally the conflict between the different perspectives and expectations of the Treaty partners. These perspectives and expectations are founded in their respective cosmologies and politico-legal histories. The Maori perspective involves a world-view based on *whakapapa* and the holistic concepts of *mana* and *rangatiratanga*. Maori understood the Treaty to promise self-determination and co-existence with the Pakeha. The Pakeha

6 For example, the Conservation Estate is “not readily available for settlement” *Crown Proposals*, supra at note 2, at 13.

7 Ibid, 21.

8 Durie and Asher, “A Report Concerning the Governments Proposals and the Settlement of Treaty of Waitangi Claims and Related Constitutional Matters”, The Hirangi Hui, Hirangi Marae, 1995, 13.

9 Jane Kelsey, “The Mystery Envelope: What is the Government up to?” Presentation to a public meeting on the Fiscal Envelope, Wellington, December 1994.

10 Ibid.

perspective came from a long history of sovereign power, common law and Christianity. Their expectation of the Treaty was that it granted them the absolute authority to rule over New Zealand.

Pakeha expectations have prevailed and the Crown has established itself as the dominant party. The guarantees of *tinō rangatiratanga* in Article Two now present a threat to this dominance. Any co-existence of ultimate authority is considered inconsistent with the Western doctrine of sovereignty. Hence the Crown desires to extinguish Article Two rights to remove this threat. It is in this desire that the notion of full and final settlement has its genesis.

Yet, the notion of full and final settlement is inherently flawed. To think that Treaty rights and grievances can be dealt to and extinguished by the simple application of money, or money's worth, is to miss the point. The Treaty is not about money. The Treaty is about authority. The redress of historical grievances cannot fully and finally settle this issue. Only the constitutional recognition of *tinō rangatiratanga* can possibly lay the matter to rest.

Full and final settlement is also a necessarily one-sided concept. A sovereign Parliament cannot bind its successors, thus any subsequent Parliament would be free to override any settlement of Treaty claims. Thus the Crown would not be subject to the settlement which it alone had defined, determined, interpreted and implemented. Maori on the other hand would be bound by the settlement. The extinguishment of their Article Two rights would leave them without special constitutional recognition or protection for their interests. They would in effect become ordinary New Zealand citizens wholly subject to the laws of Parliament.

The objective of the Crown processes for settlement is to extinguish the rights guaranteed to Maori by Article Two of the Treaty. It is hoped that by providing redress for historical grievances the Crown will be able to persuade Maori to fully and finally forgo their Treaty rights to *tinō rangatiratanga*, which will reduce them to the status of ordinary citizens. Approaching any settlement from this perspective cannot lead to a "fair and durable" solution. Ultimately the issue of constitutional recognition and protection for *tinō rangatiratanga* must be properly addressed for *Te Tiriti o Waitangi* to be finally settled.

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