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THE LEGACY OF THE LANDS CASE AND THE STRUGGLE FOR REDRESS: PERSPECTIVES FROM PRACTICE

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I. INTRODUCTION

In this paper we attempt to convey a sense of the current working world of the legal practitioner in the field of Māori historic claims as it stands at present, two decades on from the historic *Lands* case.[130] In mid 2007, almost twenty years to the day from the release of the Court of Appeal's decision, and within a period of only a few days, the Waitangi Tribunal released three major reports dealing with Māori claims. All three reports cited the Court of Appeal's *Lands* case, as indeed do nearly all Waitangi Tribunal reports. Two of these reports were highly critical of certain recent Crown actions in the area of redress, and we will return to them later in this paper. The other report was the Waitangi Tribunal's most recent major regional inquiry report, dealing with the Central North Island claims, a report which has followed a long and involved process of preparatory work, research and ten weeks of hearings all over

[130] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (commonly referred to as the *Lands* case).

the central North Island in the course of 2005.[131] This report is a comprehensive analysis of the traditional history of the Central North Island iwi (who include Te Arawa, Tuwharetoa, Raukawa, Ngāti Manawa and other groups), and goes into every aspect of their historic claims against the Crown. Chapter Three of this major text is entitled "Treaty Standards for the Political Relationship between the Crown and Māori", and one section of this deals with the Treaty principles of partnership and reciprocity. And here, as its starting point, the Tribunal begins with the *Lands* case. To cite the Tribunal:

> In the words of the President of the Court of Appeal, 'the Treaty signified a partnership between the races' and 'each partner had to act towards the other 'with the utmost good faith which is the characteristic obligation of partnership'. In our view, the obligations of partnership included the to consult Maori on matters of importance to them, and to obtain their full, free, prior, and informed consent to anything which altered their possession of those lands, resources and taonga guaranteed to them in Article 2.[132]

It is significant that twenty years on the Court of Appeal's words still form a key starting point of analysis in this way. Legal doctrine serves as a focus not only of judicial analysis and the construction of reports and judgments, but also as a framework for advocacy in the ordinary work of the practitioner, and it is certainly the case that the conceptual language of the *Lands* case plays a vital, day-to-day role in the formation of submissions and argument in the courts and tribunals of this country. This has been a constant, in a world of practice which has in many ways changed so much from 1987. Just how much can be illustrated by a description of what this working world is like.

What does the practitioner in this field do these days? Within the two-week period which included the presentation of this conference paper, we in the Māori-Treaty team at Kensington Swan received three Waitangi Tribunal reports which all relate to hearings in which we ourselves were involved for a range of claimant groups. All three are very substantial texts – one of them may be fairly described as colossal.

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[131] Waitangi Tribunal, *He Maunga Rongo: Report on the Central North Island Claims*, (Wai 1200, 2007). A pre publication version of Volume I of this report was released on 22 June 2006. The full text of the report is about 2000 pages long. Planning for these hearings began as long ago as 1999. The Central North Island (CNI) inquiry was an amalgamation of the Rotorua, Kaingaroa and Taupo inquiries and is one of the largest and complicated inquiries the Tribunal has undertaken to date.

[132] Ibid, ch 3, 15 (pagination will change when the final text of the report is released).

We have had to read these and report back to clients as to the implications of these reports both for those involved and for other clients with similar issues.

Within the same two-week period some of us were involved in yet another Waitangi Tribunal hearing in Rotorua, inquiring - yet again - into the contentious Te Arawa settlement. On this occasion the precise issue at stake was the commercial forestry aspects of the settlement. Shortly following the presentation of the original version of this paper we had to file closing submissions and, having received Crown closings a few days later, then had to file reply submissions by the end of that week. The following Monday, others of us were required to file reply submissions to the Crown's monumental closing submissions in the Tribunal's National Park inquiry (a full week of closing hearings began on 9 July). Some of us had also been involved in the Tribunal's Flora and Fauna (Wai 262) closing hearings. (Probably most members of the Waitangi Tribunal bar would have been far be too exhausted at the time of the original presentation of this paper in June 2007 to have been able to meet the National Park Tribunal inquiry deadlines.)

In the same two-week period, we and other members of our team were engaged in meetings with the Minister of Treaty Settlements and others in an effort to finalise complex negotiations involving one group and have had discussions with the Office of Treaty Settlements in respect to another iwi commencing negotiations. We met with the Waitangi Tribunal staff and the Crown Forestry Rental Trust staff to discuss research planning for an inquiry just underway. We gave advice to local authorities as to their statutory duties and the process for providing land as part of Treaty settlements and have advised them on the implications of the Foreshore and Seabed Act 2004. We also advised a major tourism operator as to the impact of a current Waitangi Tribunal inquiry and the effect of the claims of the groups involved on the operation of their business. At the same time we were advising other iwi on their applications under the Foreshore and Seabed and in respect to resource consent applications for resource projects and advised yet other iwi as to the establishment of their mandated iwi organisations ('MIOS') under the Māori Fisheries Act 2004. All this, in a period of just two weeks.

Those were just the standout events in an incredibly busy period which of course involved all the usual meetings with clients, liaising with government agencies, funding bodies, local authorities and courts and tribunals which is the staple day-to-day work of the practitioner in this area. The pace of work in this field has been, in fact, a process of continuous acceleration since 1987 (when, coincidentally, was when the

authors of this paper began active engagement in the field). Neither of us can recall a time which was busy and as pressured as at present. (Five months after the presentation of this paper the situation remains unaltered).

Thus we see that legal work for Māori clients has become mainstream and centre stage, and more than that, has become amazingly wide-ranging, extending from litigation in the Waitangi Tribunal, the Māori Land Court, both under its general legislation and its new jurisdiction in the Foreshore and Seabed Act 2004, and in the ordinary courts to the enormously complicated and draining process of direct negotiations with the Crown, to providing advice on corporate restructuring, forestry, the Resource Management Act 1991, and special complexities – such as doing our best to give advice on what the Foreshore and Seabed Act 2004 actually means.

The expansion of advocacy work has seen the emergence of a specialist Waitangi Tribunal (and related issues) bar, which has, like any bar, both its share of hardened veterans and idealistic newcomers. This specialist bar, sometimes deprecatingly referred to as "the Treaty industry" (why, we wonder, do we not hear of the vastly larger and more costly "crime industry" or the "tax industry" – all the more ironic given that many of us work entirely on legal aid) is simply an outcome of a colossal expansion of specialised advocacy work in this field. It is also a field to which many of the best and brightest of new legal talent coming out of the universities are increasingly drawn.

Would any of this been possible without the pioneering legal developments of the late 1980s and early 1990s, including, of course, what has come to be known as the *Lands* case of 1987? We doubt it. Looking back from the practising world of today, it seems clear that a legal revolution happened at that time, as a number of key developments coincided: the re-emergence of Native title law in this country with the 1986 *Te Weehi* decision,[133] the avalanche of case-law over state assets, headed by the *Lands* case itself (which allowed for the creation of a legal discourse relating to the content of the treaty in the ordinary courts),[134] the release of a group of critically important

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[133] *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680

[134] Without wishing to undermine the undeniable significance of the *Lands* case, it must be recognised that it forms part of a constellation of decisions from 1986 to 1995. These include *Te Weehi* [1986] 1 NZLR 680; *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188; *New Zealand Māori Council v Attorney-General* itself [1987] 1 NZLR 641, as well as *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142 (Forestry); *Tainui Māori Trust Board v Attorney-General* [1989] 2 NZLR 513 (Coal); *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR

Waitangi Tribunal reports (Orakei, Muriwhenua Fisheries, Ngāi Tahu)[135], and the litigation and negotiations relating to marine fisheries. No doubt some would see this as an incomplete legal revolution. But it certainly led to the creation of a new legal world in which the litigation and settlement of large historic claims play a central role.

II. THE REDRESS ASPECT OF THE *LANDS* CASE AND ITS RESOLUTION

Plaintiffs do not, of course, bring cases with a view to creating legal doctrine; they bring them hoping to win them and in the expectation of concrete and practical results. Taking a long-term, "legal Realist" stance, one obvious aspect, so obvious, that it is easily forgotten, of the significance of the case was simply that the Māori plaintiffs won, and the Crown lost. Before then the two most recent leading Court of Appeal decisions dealing with Māori issues, one relating to Ninety-Mile Beach[136] and the other to title to the bed of the Wanganui river[137], had been significant Māori defeats. The Māori courtroom victory in 1987 was in itself a significant power shift. Perhaps this was what Dr Ranginui Walker meant when he said in 1987 that the decision showed that New Zealand "had finally moved into a post-colonial era". Before 1987 it had

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641; *Attorney-General v New Zealand Māori Council* [1991] 2 NZLR 129 (Radio Frequencies No 1); *Attorney-General v New Zealand Māori Council* [1991] 2 NZLR 147 (Radio Frequencies No 2); *New Zealand Māori Council v Attorney-General* [1992] 2 NZLR 576 (Broadcasting); *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (Broadcasting Assets); *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (Whale Watching) .

[135] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9, 1987), Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, 1988), Waitangi Tribunal, *The Ngāi Tahu Report 1991* (Wai 27, 1991).

[136] *In re the Ninety-Mile Beach* [1963] NZLR 461. This was of course reversed by the Court of Appeal in *Ngati Apa and others v Attorney-General* [2003] 3 NZLR 643. The government has essentially now restored the *status quo ante*, and done much more besides, with the Foreshore and Seabed Act 2004. See generally R P Boast, *Foreshore and Seabed*, (Wellington:LexisNexis, 2004).

[137] *In re the Bed of the Wanganui River*, [1962] NZLR 600. This case was the end-point of a very lengthy process of inquiry and litigation: see *The King v Morison* [1950] NZLR 247; *Report of the Royal Commission on Claims made in respect of the Wanganui River*, 1950 AJHR G-2; *In re the Bed of the Wanganui River* [1955] NZLR 419. These decisions did not, needless to say, end the controversy over the river. The Wanganui river has formed the subject of a lengthy Waitangi Tribunal Report released in 1999 (Waitangi Tribunal, *The Whanganui River Report*, Wai 167, 1999). The claim is still being negotiated. Land issues in the Wanganui region are the subject of a separate Waitangi Tribunal regional inquiry, hearings of which began in the second half of 2007 and which will continue into 2008.

been a standard government strategy to move key cases from the Māori Land Court into the ordinary courts where, it seems, the government felt it could count on an acceptable result. After 1987 this was no longer so. Moreover in the years immediately following the *Lands* case the government of the day went on losing in the Court of Appeal, and Māori went on winning.[138] This reality was probably more important at the time than the actual doctrinal content of the cases, which arguably did not change the legal fundamentals relating to the status of the Treaty of Waitangi all that much. (More recently in the area of settlements and redress, Māori have been faring less successfully.[139])

The practical issue in the *Lands* case was the government of the day's 'corporatisation' programme, which involved the identification of certain state assets and their transfer to new state-owned commercial companies. The plaintiffs' fear was that this process of transfer would have implications for redress by placing many key assets effectively beyond reach, and thus prejudice their ability to obtain significant and meaningful redress for their historic claims against the Crown. But the issue in the case was actually even narrower: whether, in setting up its process of asset transfer, the Crown had an effective system in place for monitoring whether the transfer of any particular asset might amount to a breach of the principles of the Treaty of Waitangi – which, on the evidence, it did not. The principles of the Treaty of Waitangi had to be complied with simply because s 9 of the relevant legislation, the State-Owned Enterprises Act 1987, said that they did. This is shown by the actual remedy granted by the Court of Appeal, this being a declaration that:

> The transfer of assets to State enterprises without establishing any system to consider in relation to particular assets whether such transfer would be inconsistent with the principles of the Treaty of Waitangi would be unlawful.

The response of the government of the day was to pass legislation establishing such a system. This was the Treaty of Waitangi (State-

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[138] Apart from the *lands* case itself, perhaps the most important Maori victory was the Court of Appeal decision in *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513, relating to the transfer of certain mineral rights to the newly-formed Coal Corporation.

[139] *New Zealand Māori Council v Attorney General*, 4/5/2007, High Court Wellington, Gendall J, CIV-2007-485-95; although the Court of Appeal decision has yet to be reported.

Owned Enterprises Act) 1988.[140] A separate system relating to state forests was set up in 1989 following similar litigation[141] and negotiation with Māori over the sale of forestry assets (Crown Forests Assets Act 1989).[142] These legislative responses reflect creditably on the government of the day. No doubt the judges of the 1987 Court of Appeal bench would be disappointed to learn that the system put in place with respect to transfer of assets to state-owned enterprises is not working as well as might be hoped, and is indeed perceived by some claimants as a failure. Contemporary problems with redress will be returned to later on.

III. THE EVOLUTION OF REDRESS, 1987-2007

In 1987 the system of redress for historic claims was in its infancy. Although the Waitangi Tribunal had been in existence since 1975, its first really significant report (Motunui) did not appear until 1983. At the time of the *Lands* case there were just five Waitangi Tribunal reports in existence.[143] Today there are around 105 reports. Institutions that we have become familiar with the Office for Treaty Settlements and the

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[140] The Treaty of Waitangi (State-Owned Enterprises) Act 1988 was to "give effect to the agreement entered into between the [New Zealand Māori Council] and the Crown...". The Act did a number of things, the most important to which included the granting of the power *binding* recommendations to the Waitangi Tribunal in respect to any to land transferred to a state-owned enterprise. In order to ensure land remained available for settlements, even where held by a state-owned enterpise or third party, what are now known as "section 27B memorials" allowed for any such land to be resumed.

[141] In *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142, it was held that the Court of Appeal remained available to hear new developments in the original *Lands* case, including the sale of forestry assets. This grant of the right to proceed spurred the Crown into action and lead to an out of court settlement of the issues at stake.

[142] The Crown Forestry Assets Act 1989 provided that the Crown may not sell or dispose of any Crown forestry land, establishing a Crown Forestry Licence system where by commercial forestry licences may be granted over the trees, while the assets themselves were preserved for future Treaty settlements. Furthermore, importantly, the Act established the Crown Forestry Rental Trust which was to hold all Crown forestry licence rentals to be distributed to the relevant claimants when the Waitangi Tribunal makes a recommendation (again *binding* as with SOE land) about particular forestry land.

[143] *Report of the Waitangi Tribunal on a Claim by J P Hawke and Others of Ngāti Whatua Concerning the Fisheries Regulations* (Wai 1, 1978); *Report of the Waitangi Tribunal on the Waiau Pa Power Station Claim* (Wai 2, 1978); *Report of the Waitangi Tribunal on the Motunui-Waitara claim* (Wai 6, 1983); *Report of the Waitangi Tribunal on the Kaituna River Claim* (Wai 4, 1984); *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9, 1985).

Crown Forestry Rental Trust did not exist. Today the picture has been transformed beyond recognition. Many claims have been settled. Twelve Settlement Acts have been passed.[144] The Waitangi Tribunal has become an important part of national life as it continues to deal with its regional historic inquiries. The Tribunal and its work has become a focus for a growing analytical literature in its own right as its role continues to expand and evolve. A significant recent transition has been its evolution into a de facto specialist administrative law court, as it is able to venture into certain paths where the ordinary courts cannot, or do not want to go.

It is important to separate out the main legal trends. The first, as noted, has been the dramatic expansion of the functions of the Waitangi Tribunal and the scale of its inquiries. The second has been the rapid development and institutionalisation of the negotiation and settlement system, and the growing body of statute law relating to the implementation of particular settlements. The third (not dealt with in this paper) has been the very complex process of legislation, Waitangi Tribunal reports, and litigation in the ordinary courts relating to marine and freshwater fisheries, aquaculture and the foreshore and seabed.

In 1995 a new Crown agency, the Office of Treaty Settlements, was set up as a separate entity within the Department of Justice to deal specifically with the negotiation and settlement of historic (pre-1992) claims. The first major settlements, Waikato and Ngāi Tahu, were completed in 1995 and 1998 respectively. Since then the process of negotiation and settlement has become progressively a routine matter, with a sequence of prescribed steps. The number of settlements has grown considerably since 1993, as the Table below shows.[145]

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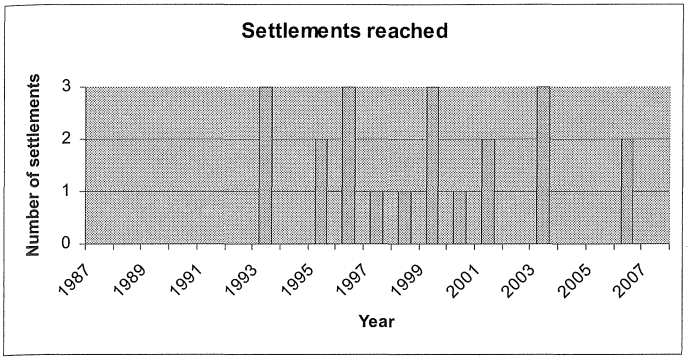
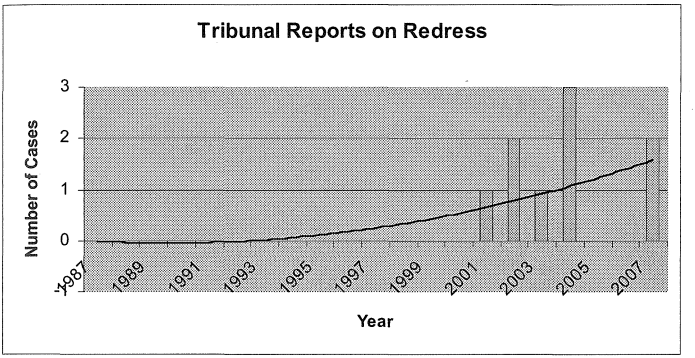
[144] Waikato Raupatu Claims Settlement Act 1995; Ngāi Tahu Claims Settlement Act 1998; Ngāti Turangitukua Claims Settlement Act 1999; Pouakani Claims Settlement Act 2000; Te Uri o Hau Claims Settlement Act 2002; Ngāti Ruanui Claims Settlement Act 2003; Ngāti Tama Claims Settlement Act 2003; Ngāti Awa Claims Settlement Act 2005; Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005; Ngāti Rauru Kiitahi Claims Settlement Act 2005; Te Arawa Lakes Settlement Act 2006; Ngāti Mutunga Claims Settlement Act 2006.

[145] For more detailed information See Appendix 5.

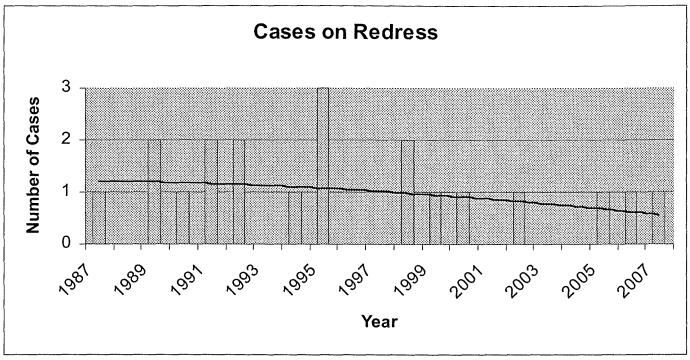


Yet as the settlement process has expanded and has become a routine function of government, it has also sailed into an ocean of difficulties. This is documented by the extent to which the Waitangi Tribunal has had to devote more and more of its time and energy to dealing with urgent claims relating to negotiation and settlement issues (as shown in the next Table).

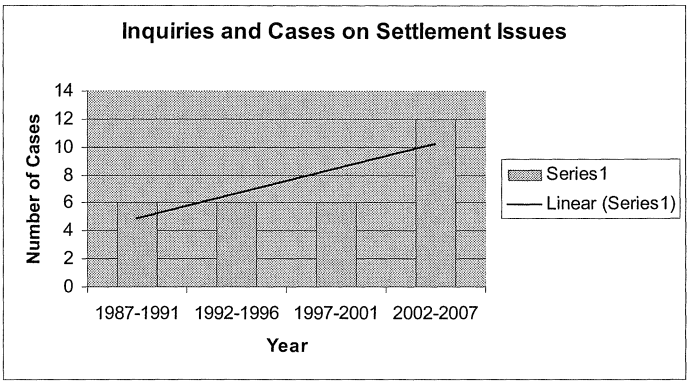


At the same time there has been a return to litigation in the ordinary courts in the last few years, as the below table illustrates.[146]

[146] For more information See Appendix 4.



The trends can be shown graphically as follows:



This might on the face of it show a process that is running into a great deal of trouble, and certainly the negotiation and settlement process seems to be a troubled one at the present time. But reverting to the point made at the start of our paper, the table shows probably just the dramatic increase in scale that has been happening in recent years.[147] Many of the settlements have proceeded rapidly and reasonably

[147] There has been a corresponding increase in statutory references to the Treaty and related Māori concepts and issues. Today there are over 5000 statutory references in over 300 statutes that refer to Māori-related issues. Of these, 39 are references to the Treaty of Waitangi (not including settlement legislation). See Appendix 7. There has also been a cumulative growth of historical inquiries by the Tribunal and settlement negotiations: see Appendices 5 and 6.

smoothly. The process is a new one, and inevitably there will be challenges to certain aspects of it as unforeseen problems emerge. The real difficulty is where claimant groups overlap, leading to inter-Māori contention about particular assets, forests, and other items of redress.

In our view, a decisive step was the Office of Treaty Settlements memorandum of November 2001 which formed the main Ministerial report resulting from a Baseline Review of the Office of Treaty Settlements.[148] The review identified three key objectives for the future of the Office of Treaty Settlements. These included the continuous production of a steady stream of Deeds of Settlement in order to maintain claimant and public support for the process, and importantly, that these should be with "large natural groupings". Furthermore, it was recognised that each settlement "must [meet] the government's settlement principles, and be final, durable, fair and timely". The 2001 memorandum went into detail about the benefits of settling with large natural groupings. Such settlements were perceived to be more durable, as less overlapping-claims issues arise, and more cost-effective and efficient, given that they will reduce the number of settlements necessary to complete the settlement process. This analysis put in place the major policy settings now in operation.

At the present time claimants and the Crown jointly prepare a document known as a Deed of Settlement, usually a very elaborate text containing lengthy recitals that narrate the history of the negotiations and of the historic events that gave rise to the claim. Such a Deed will also contain very detailed provisions relating to the return and management of various kinds of assets.[149] Before this the government first has to accept that the entity seeking to negotiate a settlement with it is a "large natural grouping" and that it has met the requirements for mandating as set out in the official guidelines. The actual negotiations process, which has some affinities with current processes in Canada, is far too elaborate to be described here, but in brief it involves a sequence of prescribed steps each of which results in a particular type of written agreement: Terms of Negotiation, Agreement in Principle, Deed of Settlement. Each negotiation takes at least several years.[150] The final

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[148] Office of Treaty Settlements, *Baseline Review of the Office of Treaty Settlements* (20 November 2001).

[149] Cultural redress may include the gifting of land, statutory protocols, acknowledgements, place name changes as well as various forms of commercial redress: transfer of Crown Forest lands under licence, Crown land, reserves, commercial town properties all to be 'purchased' through and agreed quantum figure.

[150] See Appendix 6.

settlement has to be ratified by the group: the "mandate" insisted on by the Crown at the start of the process is a mandate only to negotiate a settlement, not to accept it. The Deeds are then implemented in statute.[151]

IV. RECENT REDRESS ISSUES

Redress was, of course, what the *Lands* case was about. The key issue in that case was the Crown's proposed transfer of certain key assets to State-owned enterprises and hence the loss to Māori claimants of potential redress assets. Although the *Lands* case set some key guidelines for general principles for Crown behaviour, in practical terms the key issue was the implications such a step would have for redress. Despite all that was said in that case, and all the many developments that have occurred in the interim, redress is still a problem.

When the *Lands* case was decided, no one, of course, believed that there would not be problems and difficulties in future. Rather, the case seemed to promise a freshness of approach: while there would still be problems, these would be dealt with in a spirit of seriousness, good will and good faith. Those who participated in the case back in 1987 might well be disappointed by the extent to which redress remains a problem now. But even more important is the question as to whether that spirit of seriousness and good faith remains, or whether, rather, it has become attenuated over the years to be replaced by a settlement system which now seems to be missing in something fundamental. The emphasis now appears to be processing claims through the negotiations process, the primary objective being to achieve the maximum number of settlements as quickly as possible.[152] On the other hand a number of settlements have been successfully achieved and implemented. The settlement system has its problems, but these are not problems that are incapable of resolution.

The scale of the current negotiations and historic settlements dwarf anything agreed to in the earlier decades of the twentieth century and the elaborate processes involved are not well-understood by the public at large.[153] Legally the issue of redress has changed substantially since the time of the *Lands* case. Then, the key issue was ensuring that key

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[151] For example: Waikato Raupatu Claims Settlement Act 1995; Ngāi Tahu Claims Settlement Act 1998, Ngāti Turangitukua Claims Settlement Act 1999, Pouakani Claims Settlement Act 2000; Te Uri o Hau Claims Settlement Act 2002.

[152] Office of Treaty Settlements, *Baseline Review of the Office of Treaty Settlements* (20 November 2001).

[153] See Appendix 5, where the settlements are listed.

assets remained in Crown hands, or at least that the Crown did not divest itself of strategic assets without proper safeguards being in place. This was a precursor to a process of settlement. But now Māori, the Courts, the Tribunal, lawyers, and the government are in the very thick of that settlement process itself, which has turned out to be probably far more complicated and demanding than anyone realised in 1987. Although the issue of retention of assets has continued to be a problem, the core problem of the present time is Māori challenges to transfers of strategic assets not to the private sector, but rather to other Māori – the groups that the government happens to be in negotiation with.

While the process of asset identification and transfer was closely monitored by the ordinary courts in the late 1980s following the lead of the *Lands* case, the courts of the present day have found it much more difficult to grant remedies to Māori groups who wish to challenge negotiated settlements. Attempts to challenge the settlement process in the High Court and the Court of Appeal have on the whole failed, typically foundering on the problem that the current settlement-redress programme has no statutory foundation.

The courts have had difficulty in characterising the legal nature of a contemporary Deed of Settlement, and given that the negotiations and settlement system itself has no statutory underpinnings[154] have confined the whole negotiation and settlement process to the realm of policy and politics and as such not amenable to review by the Courts. According to Goddard J in *Pouwhare*:

> The negotiated settlement process and the development of policy in relation to that is not by its nature amenable to supervision by the Courts. The settlement of Treaty grievances involves the exercise of prerogative power and the enactment of legislation and for these reasons is the provision [sic] of Parliamentary sovereignty. There is ample authority relating to similar attempts to challenge what can only be described as a highly political process. [155]

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[154] The key text is the Office of Treaty Settlements publication *Ka tika a muri, ka tika a mua: Healing the past, building a future: A guide to Treaty of Waitangi Claims and Negotiations with the Crown,* (Wellington: Office of Treaty Settlements, 2002). This important publication, know as the "red book" (to distinguish it from its predecessor, "the green book") is both a set of guidelines and a summary of various policy decisions already taken at Cabinet level. There is no statute dealing with the negotiation and settlement *process,* although particular settlements are *implemented* in statute.

[155] *Pouwhare and Pryor v Attorney-General, Minister in Charge of Treaty Negotiations and Te Runanga o Ngāti Awa,* 20/08/2002, Goddard J, High Court Wellington CP 78/02.

This conclusion is perhaps understandable, given the absence of any statutory criteria on which a judicial review case would normally be founded. The effect is, however, that while an earlier process of asset identification and transfer to state-owned enterprises in the 1980s certainly was amenable to supervision by the Courts, as shown by the celebrated sequence of major decisions in this area relating to Māori claims based on the principles of the Treaty of Waitangi, the current, and vastly bigger, settlement process operates wholly within the realm of "policy" and the Courts have retired from the field.

By default, the Waitangi Tribunal is now the only forum where challenges to the government's settlement process by Māori groups unhappy with various aspects of it are able to be heard. These cases, usually heard under the Tribunal's urgency jurisdiction, are increasingly coming to dominate the Tribunal's time (see Appendix I) at the expense of its core jurisdiction of reporting into historic claims. In many instances the Tribunal is now the only place where affected claimants can go. And there are many benefits with the Tribunal process, allowing as it does a relatively quick and effective quasi-judicial review procedure where officials have to justify their processes in public and are subject to cross-examination, where all the documentation gets produced and where an independent body can turn its eyes on the process. It is a "quasi-review" process in that the Tribunal cannot, of course, unlike the ordinary courts, actually quash ministerial or other official discretionary decisions. The Tribunal's review process can nevertheless be very detailed and meticulous, as shown by the Tribunal's 2007 reports on overlapping claims/cultural redress issues and on forestry aspects of the current Te Arawa settlement.[156] This was the third occasion on which the Tribunal has reported on this vexed matter. In attempting to draw up a settlement with sections of Te Arawa, other sections of the iwi have become alienated and upset and local relationships have become very fraught, as the Tribunal explains:

Goddard J's decision was unsuccessfully appealed by some of the parties to the Court of Appeal.

[156] Waitangi Tribunal, *The Te Arawa Settlement Process Reports*, (Wai 1353, 2007). On 16 November 2007 the Treaty Negotiations Minister, Michael Cullen, and the Māori Affairs Minister Parekura Horomia released a media statement in which it was announced that the introduction of the Te Arawa settlement legislation would be delayed so that a collective negotiation process made up of a number of iwi with interests in Central North Island Crown forest licensed land could "run its course". This postponement of the introduction of the settlement legislation was a direct response to the repeatedly expressed concerns of the Waitangi Tribunal on various aspects of the Te Arawa settlement process.

> Te Arawa is now in a state of turmoil as a result. Hapu are in contest with other hapu and the preservation of tribal relations has been adversely affected. We are left fearing for the customary future of the Te Arawa waka as a result. OTS is the interface between Māori and the Crown charged with the responsibility of upholding the mana of the Crown. Now because of their practices, the claimants face real and serious prejudice.[157]

And the Tribunal follows up these rather pointed words by a detailed letter-by-letter, meeting-by-meeting analysis of some very recent events. Certainly the scrutiny has been extremely thorough. While in the case of the Te Arawa settlement the Tribunal was not prepared to recommend that the process come to a halt, in another recent report, dealing with the Tamaki Makaurau (Auckland) settlement the Tribunal set its sights on the settlement process as a whole and recommended that the current settlement negotiations with one Auckland group had to stop and the process begin again on a more inclusive basis.

At page 100 of *Tamaki Makaurau* we see, however, once again how the 1987 Court of Appeal decision lives on, even in the vastly different practising environment we have attempted to describe in our paper. Judge Wainwright cited a key passage from Richardson J's judgment, where he observed:

> The responsibility of one Treaty partner to act in good faith and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant fact and law as to be able to say it had proper regard to the impact of the principles of the Treaty.[158]

"We think", wrote Judge Wainwright, "that the Crown was under such an obligation here to be fully informed before making material decisions affecting Māori, but it did not fulfil that obligation to other tangata whenua groups in Tamaki Makaurau".

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[157] Waitangi Tribunal, *The Te Arawa Settlement Process Reports*, (Wai 1353, 2007), 5.

[158] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, at 682 (per Richardson J) cited in the Waitangi Tribunal's *Tamaki Makaurau Settlement Process Report*, (Wai 1362, 2007), 100.

Although the ordinary courts are no longer playing the key role that they did in the years around 1987, certainly the ideals articulated in the *Lands* case continue to live on in the Waitangi Tribunal.