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IMPACT ON GOVERNMENT – A POLITICAL PERSPECTIVE

Hon Mark Burton

E ngā mana, e ngā reo e ngā rangatira	I would like to greet the respective tribal groups and leaders [here today],
Tēnā koutou, tēnā koutou, tēnā koutou katoa	Greetings, greetings, greetings to one and all
E ngā mate, haere, haere, haere ra	I would like to farewell those who have departed, farewell, farewell, farewell
Tēnei te mihi ki a koutou katoa e haere mai ana	I would also like to greet those gathered here today
Tēnā koutou, tēnā koutou, tēnā koutou katoa	Greetings, greetings, greetings to one and all

Madam Speaker; Mr Jim Nicholls, other members of the New Zealand Māori Council; Sir Ivor Richardson and Sir Maurice Casey, Chief Judge Joe Williams. Parliamentary Colleague; Professor Mark Henaghan and other Members of the University of Otago Law Faculty; Sir Tipene O'Regan, members of Kāi Tahu; Distinguished guests; Ladies and

gentlemen. It is a privilege to be able to participate in this symposium today as we reflect on what was a significant moment in the history and development of the Crown-Māori relationship. The public sector reforms of the 1980s revolutionised the way the government carried out its service delivery. Section 9 of the State-Owned Enterprise Act 1986 declared that nothing in the Act permitted the Crown to act in a manner that was inconsistent with the principles of the Treaty of Waitangi. This reference paved the way for the courts to test the Crown's actions against the principles of the Treaty for the first time. The first opportunity was acknowledged by Justice Heron in the Wellington High Court, when granting the interim relief and ordering the removal of the substantive proceedings into the Court of Appeal. I understand Sian Elias, Counsel for the plaintiffs, carried the order up Molesworth Street from the High Court to the Court of Appeal.

The Court of Appeal applied that first test, and found the Crown's transfer of assets – involving the ownership of thirty-seven percent of New Zealand's land – did not accord with the principles of the Treaty of Waitangi. The Court of Appeal went on to articulate the principles of the Treaty which the Crown needed to abide by, in carrying out the business of devolving assets to state-owned enterprises. The Court then left it to the Crown and the New Zealand Māori Council to agree on a mechanism to ensure that state-owned enterprise assets remained available to settle historical claims.

For the first time in New Zealand's legal history, the *Lands* case[118] articulated and interpreted the principles of the Treaty. As Sir Robin Cooke, writing in 1994, observed, the line of twelve decisions from the Court of Appeal between 1987 and 1993 on matters relating to the Treaty of Waitangi enabled a new line of jurisprudence to emerge in New Zealand – Treaty jurisprudence. These seminal judgments, augmented by other decisions from the Judicial Committee of the Privy Council and from the High Court, changed the landscape of the Treaty debate, and provided an impetus for more constructive engagement between the Crown and Māori in New Zealand. It is fair to say that the *Lands* judgment sits behind the creation of the Ministerial portfolio I now hold.

President Cooke expressed the hope that "this momentous agreement will be a good augury for the future of the partnership".[119] I believe it has been. Māori and the Crown have made considerable use of the guidelines set down by the Court of Appeal's decision in reaching agreements that settle longstanding grievances. The *Lands* case

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

[119] *New Zealand Māori Council v Attorney General* [1987] 1NZLR 641, 719.

established standards that provided a foundation intended to enhance the relationship between Māori and the Crown. Importantly, and appropriately, it left the parties to work through what this meant in practice.

I want to take this opportunity to discuss how the principles articulated by the Court of Appeal, have shaped the settlement process through which Māori and the Crown confront their grievances of the past, and move forward. I also want to reflect on what it means to be in the "front-line" of this process where the concepts articulated by the Court of Appeal have to be given shape and substance. It is particularly appropriate, I think, that I am to deliver this speech in the Kai Tahu takiwa; a part of the country where the Treaty claims against the Crown have been settled for some time. The comprehensive and detailed Waitangi Tribunal report, delivered in 1991, and the foundations provided by the *Lands* judgment, underpinned this settlement.

I. BACKGROUND TO SETTLEMENT PROCESS

In 1975, the third Labour government passed legislation to set up the Waitangi Tribunal. Its establishment represents a critical point in New Zealand's history, and a moment that demonstrated our growing maturity as a nation. The Waitangi Tribunal has provided a forum where Māori claims against the Crown can be heard. The Tribunal has also been a place where the Crown's policies and actions in negotiating settlements have been tested against the Treaty, and it has provided guidance and recommendations to the Crown in this respect. In 1987 the *Lands* case characterised the Treaty relationship as "akin to a partnership". A number of fundamental principles underlying this partnership were identified. They include:

- fiduciary duty;
- good faith;
- the honour of the Crown; and
- fair and reasonable redress.

Two years later the Government established the Treaty of Waitangi Policy Unit to co-ordinate the Crown's response to Māori claims under the Treaty and develop clear and consistent policies for settlements.

Also in 1989, David Lange's fourth Labour government developed a set of principles it undertook to abide by when dealing with matters arising in the context of the Treaty of Waitangi. These principles were consistent with observations made by both the courts and the Waitangi Tribunal. In the booklet setting out these principles, David Lange

referred to his belief that "the Treaty of Waitangi has the potential to be our nation's most powerful unifying symbol". I too share that vision - the intent and the principles behind the Treaty are forward looking and can be unifying. In 1994 in the *Broadcasting Assets* case, the Privy Council echoed this message when it stated: "The Treaty records an agreement executed by the Crown and Mäori, which over 150 years later is of the greatest constitutional importance to New Zealand".[120]

II. DEFINING THE PRINCIPLES OF THE TREATY

The Courts and the Waitangi Tribunal have emphasised that the principles are not set in stone and that they may change as the Treaty relationship evolves. While there has been much debate and angst (particularly political) about the principles of the Treaty, I suggest that it is not difficult to come to grips with what is meant by the principles of the Treaty. At their heart, I suggest they are quite simply about respect.

III. SETTLEMENT PROCESS

So how do the principles of the Treaty of Waitangi impact on me in my role as Minister of Treaty Negotiations? The principle of fair and reasonable redress underpins the Treaty settlement process. It is this principle that I propose to focus on today. I want to explore the ideas of good faith and co-operation, and traverse what these mean in practice, in the context of the settlement of historical Treaty claims.

The Treaty settlement process and the framework that guides negotiations are well established. Settlements are becoming familiar territory for New Zealanders. There are fundamental principles that sit behind the Crown's settlement policies, such as fairness, durability, affordability and the requirement that Parliament protect the interests of all New Zealanders. These principles, and the policies that have sprung from them, are enduring. To throw away the settlement framework as some want to suggest, as a reaction to the inevitable criticism of certain aspects of the process that arise from time to time, would potentially put at risk all the good work done and could well undermine the settlements reached to date. Treaty settlement negotiations are unique and the conduct of Treaty settlement negotiations cannot be compared to commercial negotiations. They are conducted in a very different environment, in a unique way, and with a very different purpose. We do not seek to adopt an adversarial approach in this settlement process.

In order to properly remove the sense of grievance carried by a

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[120] *New Zealand Māori Council v Attorney General* [1994] 1 NZLR 513, 516.

given group, it is essential that the Crown not only negotiates fair redress, but also restores the honour of the Crown by conducting ourselves in good faith and as far as possible, in the spirit of co-operation during these negotiations. It is incumbent on us to overcome the mistrust felt by those groups who enter negotiations, and rebuild the Treaty relationship having confronted the wrongdoings of the past. To do this, the Crown sets out to be upfront about what it can, and cannot deliver. We are respectful of the group we are sitting around the table with, and we endeavour to protect the interests of those groups yet to enter negotiations. It is essential that we act with integrity and we do. Considerable time is given to listening carefully to what is being said about what groups have experienced in the past, and about what their aspirations are for the future.

We are mindful of the settlement framework in order to meet our obligations of being fair and equitable in our dealings with all tribal groups. But we also need to be flexible in our approach and endeavour to provide meaningful redress that meets the specific and unique interests and aspirations of each group. We endeavour to offer redress that satisfies groups that the Crown has been fair in the circumstances, and enables groups to settle long held and deeply felt grievances, but that also allows the Crown to do so with their neighbours in the future. It is a difficult and complex process. Indeed, an increasingly difficult and complex process that involves frustrations and disappointments as inevitable and unavoidable markers along the pathway.

IV. CONFIDENTIALITY

Negotiations must be conducted in good faith, based on mutual trust and co-operation toward a common goal. In part, this trust is built during negotiations by maintaining confidentiality and creating an environment that encourages the open exchange of information. Maintaining confidentiality, and respecting the integrity of the process each group has embarked on, is critical to achieving our common goal.

V. TE ARAWA TELLING THE STORY

I would like to draw on some actual examples of how the Crown has endeavoured to rebuild the Treaty relationship in the context of the negotiations I have been personally involved in since my appointment to the Treaty Negotiations portfolio.

As you know, a number of Te Arawa hapü and iwi chose to forgo a district inquiry and join together for negotiations with the Crown. However, they wanted the opportunity to give voice to their grievances

and have them heard directly by the Crown. The Affiliate Te Arawa Iwi and Hapū held a weeklong "Telling the Story" hui. Kaumatua and kuia told the story of their grievances – their own personal experiences and that of their parents, grandparents and great-grandparents. Crown representatives were there to hear them, in person. The Minister of Māori Affairs Parekura Horomia, the then Treaty Negotiations Minister Margaret Wilson, the local Member of Parliament Steve Chadwick, and I as Associate Minister and Minister of Justice attended, and officials transcribed and recorded the week long hui. The hui enabled the Crown and the Affiliate Te Arawa Iwi and Hapü to embark on the process of negotiating a settlement with a very real appreciation of what the settlement was intended to redress. It was a humbling experience, and essential to rebuilding our Treaty relationship.

A unique feature of this settlement was the development of redress mechanisms that enabled a settlement to be reached with this group, while preserving the Crown's ability to provide redress over significant sites to those yet to enter negotiations. This settlement was the largest comprehensive settlement, in terms of the population covered, since Ngāi Tahu and was ratified by over ninety per cent of votes by the people of the iwi and hapū. It is now conditional only on the passage of settlement legislation. While that settlement continues to be challenged, what cannot be challenged is the high level of support from the people of the Affiliate Te Arawa Iwi and Hapū for a settlement that returns their wahi tapu, includes a sincere Apology from the Crown, and the transfer of Crown assets. They want to be able to move forward.

VI. WAIKATO TAINUI

This year, the recent draft Agreement in Principle reached with Waikato-Tainui, and the process undertaken by the parties to get to that point, is an important illustration of the way in which the principles of redress and partnership have been given shape – both in the actual negotiation of the redress, but also, importantly, in the redress itself. The Waikato-Tainui Co-Negotiators, Lady Raiha Mahuta and Tukoroirangi Morgan, and I were focused on developing a redress package that reflected the Crown and Waikato-Tainui's shared interest and common concern – the health and well being of the Waikato River.

The redress package negotiated is unique and reflects the very intent, or principles, of the Treaty of Waitangi, as elaborated in the *Lands* case. The intention of the proposed settlement is to provide for the Crown and Waikato to enter into a new era of co-management over the Waikato River. Co-management, in this context, reflects the highest level of good faith engagement and consensus decision-making over the

Waikato River.

Of course, the concepts of co-management and partnership are not revolutionary. 160 years ago a Treaty that encapsulated these principles was signed between the Crown and Māori. That was revolutionary. Twenty years ago the Court of Appeal's articulation of these principles as being the spirit, or intent of that Treaty, was considered to be revolutionary. Today, these principles are embedded not only in the settlement framework and the Crown's decision-making framework, but also in the redress itself.

VII. SETTLEMENT NEGOTIATION ACTIVITY

The Crown is currently working with over twenty claimant groups covering parts of the Far North, Auckland, the central North Island, Rangitikei, the Chatham Islands, Taranaki, the top of the South Island and Wellington. Some specific examples:

We are currently in negotiations with three groups who, together, cover the remainder of the South Island not covered by the Ngāi Tahu settlement. These negotiations are happening in parallel and present a unique opportunity for the Crown and the iwi to reach agreement on how to deal with the issues arising from the nature of their shared interests. It is naturally easier to do so when all of the groups are engaged in negotiations and it is in everyone's interest to take a constructive and pragmatic approach. It is not, however, always possible to adopt this approach as, in some regions of the country, various groups are at differing stages of readiness for negotiations and the Crown must, in good faith, be receptive to groups that are ready and willing to settle.

Recently the Tuhoe mandate was publicly advertised and submissions sought. Tuhoe numbered over 32,000 people according to the 2006 Census. Tuhoe's claim area encompasses Te Urewera in the Central North Island and extends north to Ohiwa Harbour in the Bay of Plenty. The historical claims of Tuhoe are extensive and include confiscation in the 1860s and Crown military operations in Te Urewera during the 1860s and 1870s.

We also recently signed Terms of Negotiations with Turanganui-a-Kiwa, a group representing three iwi based around Gisborne. The historical claims of the Turanganui-a-Kiwa groups include the war between the Crown and Turanga Māori in the 1860s and subsequent loss of land, the detainment of Te Kooti on Chatham Islands without trial, and the execution of unarmed prisoners by Crown forces. In engaging with this grouping and acknowledging their willingness to join together

for the purposes of entering negotiations, our challenge will be to ensure that the Crown gives appropriate recognition to the distinctive interests and mana of each of the three groups.

VIII. 2020

This government is committed to settling all claims by 2020. Our 2020 timeframe is ambitious, but is realistic. Promising to settle all outstanding claims in a shorter timeframe than this is, I believe, unrealistic and, in all likelihood, unachievable. The historical grievances held by Māori are deeply held and have been carried for generations. It is not sustainable to have a significant portion of our population burdened with a strong sense of grievance about their history. It is not right, and it is not just. In order that we can move forward as a nation, it is our responsibility to engage to resolve these grievances as quickly as possible, whilst committing sufficient time and careful attention to the complexity of those grievances. Striking that balance is critical. So how do we propose to achieve our goal of settling all claims by 2020?

There are several elements to our strategy. First, to advance negotiations with the larger iwi and where appropriate, encourage groups to work together. The Crown has identified a preference to negotiate settlements with "large natural groups". There is no set of criteria that defines what this means. Generally, it is an aggregation of hapū or iwi interests who share the same grievances, and who are committed to reaching a settlement with the Crown. Every negotiation is different – we do not take a "one size fits all" approach.

Another element of our strategy is through even greater political engagement. Treaty settlements are at heart, political compacts. Recent experience has emphasised again for me the role of political judgement and decision-making on both sides, in bringing together the many interests required to reach a settlement. This is particularly so with the large natural groups policy. My colleagues and I are committed to working directly with Māori leaders at an early stage of the negotiations in particular, to generate momentum and set a strong foundation for future discussions. In the last four months I have engaged in around thirty meetings with groups in negotiations. I envisage that my direct involvement in negotiating settlements, and the involvement of my colleagues, will continue to grow.

As with the negotiations we are about to embark on with Turanganui-a-Kiwa in Gisborne, the challenge for the negotiators around the table is to ensure that the specific and unique aspirations of all of the groups represented are recognised and provided for. We certainly know this will not be easy. We believe this is achievable. It is

in the Crown's interests as well as in the interest of the particular group in negotiations that redress offered is meaningful and will be endorsed by their people.

IX. OVERLAPPING CLAIMS

One of the most challenging aspects of the negotiation process is protecting the interests of groups with shared interests in an area, who are not yet in negotiations. Recently there has been some pressure on the Crown to delay negotiations until all groups in particular regions are ready to negotiate. Indeed, there are recommendations requiring careful consideration and reflection. However, the reality we face is that every area yet to be settled has shared interests. In Auckland for example, the area covered by the groups who share interests in this region stretches as far south as Tauranga and right up into Northland. Not all of these groups are prepared and ready to enter negotiations with the Crown.

Mandating is another difficult and complex aspect of the negotiation process. For example, there has, and continues to be, an unprecedented amount of litigation challenging the mandate of the Kaihautu Executive Council. On the other hand, the mandate of claimants appearing before the Tribunal is untested. The mandate of the Kaihautu Executive Council has been demonstrated to be strong and secure through mandate reconfirmation ratification processes. Further, in the case of the Kaihautu Executive Council, some groups did decide to withdraw from the KEC mandate, and this was recognised where it was clear due process had been followed.

It is essential that credible ways are found to navigate these difficult issues but I do not believe that it is necessarily fair or just to delay – potentially for years, the resolution of the historical grievances of groups who have committed to taking their people forward. As I noted earlier – it is an increasingly complex and challenging process – one that requires great care and respect from all those involved.

X. SUMMING UP STATEMENTS ABOUT SETTLEMENT PROCESS

It is I think fair to suggest that as a country, we have accepted (though certainly not universally) that the Crown has a moral obligation to resolve historical grievances of the past, in accordance with the principles of the Treaty of Waitangi. Our collective willingness to address the breaches of the Treaty of Waitangi and its principles, face to face between the Crown and Māori, is good reason for New Zealanders to feel some sense of pride. We have, despite our healthy internal

debate, a settlement process that has earned considerable regard in many jurisdictions.

XI. THE FUTURE

So, what will the post settlement landscape look like? Our aspirations for Māori governance entities and the communities they represent being at the forefront in the future economic, social and cultural prosperity of New Zealand. Our aspiration is of a positive ongoing relationship between Māori and the Crown, the foundations of which stem from the political compacts entered into through settlements.

This government sees settlements as a stepping-stone for Māori communities in "unleashing their potential", individually and collectively. I have been privileged to sit around the table with extraordinary men and women who have dedicated their time and resources to working for their people, to resolve the grievances of the past.

These leaders have represented a broad and diverse constituency. They represent the children who welcome us onto marae through waiata and haka, carrying forward the traditions and taonga of their forebears. They represent the ancestors themselves whose images line the walls of the wharenui which host us, and who experienced and carried forward the grievances of the past. These leaders carry a dominating burden of responsibility, and I acknowledge with respect their courage and determination. Leaders who take on the responsibility of managing their tribe's assets, also take on the role of managing their tribe's relationship with the Crown into the future. Sir Ivor Richardson described the way forward as requiring "positive, rational dialogue and, above all, a generosity of spirit."

Like any relationship, it will be a work in progress. Like any relationship, we will not agree on everything. What gives me confidence in the future of the Crown-Māori relationship is the generosity of spirit, and willingness to engage in dialogue and debate exhibited by Māori leaders. I say with sincere respect in this company - the future of this relationship does not lie in the courts of this country. Indeed the very nature of court proceedings means it cannot. It was for this reason that Sir Robin Cooke, on being informed of the Government's legislation to give effect to the agreement reached between the New Zealand Māori Council and the Crown, five months after the *Lands* judgment, issued the Court's minute which stated:

> We left the Treaty partners...to try to work out the details. The Court is glad they have succeeded....The Court hopes that this

> momentous agreement will be a good augury for the future of the partnership. Ka pai.[121]

The Court of Appeal gave us the "ground rules" for this relationship, and this is worthy of celebration. The future Crown-Māori relationship does, I believe, lie outside the courts, in face to face dialogue, in conversation and debate, and constructive engagement. This relationship will not stop when all historical claims have been settled. On the contrary, it will take on a new face and new strength, as Māori are better resourced to engage in this dialogue and can increasingly focus their energies on building their social, cultural and economic future.

This is the future we are committed to. This is the future in no small way, underscored by the Court of Appeals landmark decision of 29 June 1987.

Tēnā koutou, tēnā koutou, tēnā koutou katoa.

[121] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 719.