The Challenge of the Treaty for Lawyers and Judges: 25 Years On

By Hon Justice Mark O'Regan*

E ngā mana, e ngā waka, e ngā reo, tēnā koutou, tēnā koutou, tēnā koutou katoa.

Thank you for inviting me to speak to you tonight. I particularly want to thank the two institutions responsible for the lecture series of which this is the 2019 instalment: the partners of Norris Ward McKinnon not only for their support of the lecture series but also for their generous hospitality to me and Te Piringa, Faculty of Law, University of Waikato, for its support and for hosting the event tonight. I acknowledge the presence of the Dean, Associate Professor Rumbles, of Professor Margaret Wilson who, among her many distinguished roles, was a Minister in Charge of Treaty of Waitangi Negotiations, and of my judicial colleagues.

It is nice to be back in the Waikato. I spent quite a lot of time here in 1994–1995, during the negotiation of the WaikatoTainui treaty settlement and again in the early 2000s when I was a High Court Judge based in Auckland. But it has been a long time between drinks as they say.

As the title of my lecture foreshadows, I am going to talk about some of the significant events relating to the Treaty of Waitangi in the last 25 years. My focus will be Treaty settlements and cases dealing with Treaty settlements.

"Why the last 25 years?" I hear you ask. There are two reasons. The flyer for this lecture probably sets them out, but for those who haven't seen it, let me tell you.

The first reason is that two important Treaty of Waitangi-related events happened in the Waikato in 1994, almost exactly 25 years ago. These two events provide a natural starting point for what I want to say.

The first was that the 1994 Harkness Henry lecture (the forerunner of tonight's lecture) was given by Sir Robin Cooke on the topic "The Challenge of Treaty of Waitangi Jurisprudence".[1] Sir Robin was, of course, the President of the Court of Appeal at the time. He later sat in the House of Lords as Lord Cooke of Thorndon. I will call him Sir Robin, because that is what he was when he gave the lecture. In that lecture, Sir Robin reviewed Treaty jurisprudence going back to *R v Symonds* in 1847.[2] He covered the leading but perhaps infamous cases of *Wi Parata v Bishop of Wellington*,[3] and *Te Heuheu Tukino v Aotea District Maori Land Board*.[4] In the *Wi Parata* case, Prendergast CJ infamously observed that the Treaty was a "simple nullity".[5] In *Te Heuheu Tukino*, the Judicial Committee of the Privy Council observed that rights purporting to be conferred by a treaty of cession, as it considered the Treaty of Waitangi to be, could not be enforced in the courts,

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1 Robin Cooke "The Challenge of Treaty of Waitangi Jurisprudence" (1994) 2 Waikato L Rev 1.

2 *R v Symonds* (1847) NZPCC 387 (SC).

3 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC).

4 *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC).

5 *Wi Parata*, above n 3, at 78.

except in so far as they have been incorporated into municipal law.[6] According to the Appeal Cases report, the successful counsel in that case was one AT Denning KC. He later became Lord Denning, every law student's favourite English judge. (The NZLR report refers to him as "Dunning", but that appears to be an error).

A very young Kenneth Keith, later a colleague of Sir Robin on the Court of Appeal, then a judge of the Supreme Court and later a Judge of the International Court of Justice, put forward an alternative view about the place of the Treaty in the courts in an article written in the 1960s.[7] It may be that the practical significance of *Te Heuheu Tukino* has decreased because the principles of the Treaty have, in fact, been incorporated into "municipal law", as their Lordships called it, on a number of occasions in recent years.[8]

Sir Robin then spoke of the Treaty cases he had dealt with at the bar. There was none of any significance, perhaps reflecting the forgotten status of the Treaty in the 1950s and 1960s. He then referred to those recent cases that had been dealt with in the Courts, in most of which he had had personal involvement. This was a much more fruitful field for him, recalling the great cases of the 1980s, particularly the famous *Lands*[9] and *Forests*[10] cases and what he described as "the great *Tainui* case of 1989".[11] They are very important cases all right, but they are outside my 25-year timeframe. I cannot describe them better than Sir Robin did, so I will leave you to read his lecture in volume 2 of the Waikato Law Review / Taumauri if you are interested.[12]

Sir Robin's lecture covered the field, but much of it was also about his personal experience both in practice and as a Judge. I am going to use the same model. That means this is not an academic paper but a recounting of personal experience and observations of developments in what is now an important element of New Zealand's legal history.

The second event of 1994 in the Waikato was the signing on 21 December 1994 of the heads of agreement between the Crown and Waikato-Tainui relating to the Raupatu claim. That was the prelude to the signing of the deed of settlement in May 1995, which settled the Raupatu claim and was the first major tribal settlement. I will come back to that in a minute.

So those are the two events that happened here or hereabouts 25 years ago.

And what is the second reason for choosing this 25-year timeframe? It is because my own involvement in the Treaty settlement process began with my participation on the Crown side of the negotiations leading up to the signing of the heads of agreement I have just referred to. I am going to limit myself to the last 25 years, because that is the time span of my involvement in Treaty settlement matters and because this is, in effect, an update from Sir Robin's lecture. And I will focus on the settlement process, because that reflects my own experience and is perhaps the area of greatest change in the Treaty environment since the time of Sir Robin's lecture.

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6 *Te Heuheu Tukino*, above n 4, at 596–597.

7 KJ Keith "International Law and New Zealand Municipal Law" in JF Northey (ed) *The A G Davis Essays in Law* (Butterworths, London, 1965) 130 at 146–148.

8 There are now over 40 Acts that require consideration of the principles of the Treaty in exercising statutory powers of decision: Ministry for Culture and Heritage "Treaty events since 1950" (26 August 2019) New Zealand History <nzhistory.govt.nz>.

9 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands* case].

10 *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA) [*Forests* case].

11 Cooke, above n 1, at 7, referring to *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA).

12 Cooke, above n 1.

In those 25 years, I have seen the Treaty settlement process from two perspectives: from that of a practitioner involved in the negotiation and documentation of Treaty settlements on the one hand and that of a Judge dealing with litigation arising out of Treaty settlements on the other.

These are personal perspectives and, in the case of my experience of the negotiation of settlements, they reflect experiences of events that occurred more than twenty years ago. So, there are some caveats.

First, I am relying on memory, which may affect precise description. However, I am talking about events that stood out as unique experiences in my career as a lawyer, so my memory of them is, I think, pretty accurate.

Second, my experience was of the process as it was in its infancy and may not (indeed, almost certainly does not) reflect the reality of the process today.

Third, the settlements I was involved with – in particular, those of Waikato-Tainui and Ngāi Tahu – were very significant claims. I think they remain among the largest settled claims.

When I was in practice, I was a commercial lawyer, not a litigator. It was this background as a commercial lawyer that led to my being asked to become a part of the Crown legal team in relation to the Waikato-Tainui settlement in 1994. It was recognition of the fact that the settlement would be, in addition to the resolution of a longheld grievance, a large commercial transaction that would require detailed negotiation. I had no experience of Treaty law or tikanga. In fact, in my studies for my law degree at Victoria University of Wellington in the 1970s, I do not recall any reference to the Treaty at all, even in the constitutional law class. That may be a failure of memory, but I don't think so.[13] I am sure that would not now be the experience of any law student at a New Zealand law school.

I led a team from Chapman Tripp in relation to the commercial and property law aspects of the Waikato-Tainui settlement. All the Treaty law aspects of the settlement were handled by a Crown Law team led by Ellen France, then the team leader of the Crown Law Treaty team and now a fellow Judge of the Supreme Court. I was asked to undertake the role by John McGrath, who was then the SolicitorGeneral, and who was also later a judicial colleague on both the Court of Appeal and the Supreme Court.

My role involved being part of the Crown negotiating team, being responsible for the drafting of the deed of settlement and, later, assisting with the drafting of the legislation to give effect to the settlement. I will come back to this a bit later.

The legal background to the early Treaty settlement negotiations also needs to be understood.

The Treaty of Waitangi Act was passed in 1975 and created the Waitangi Tribunal. But at that stage, its jurisdiction was limited only to claims alleging contemporary breaches. An amendment in 1985 changed this, giving jurisdiction to the Tribunal to investigate claims relating to events from the date of the Treaty itself.[14]

The Ngāi Tahu claim, which I will discuss later, was subject to the process of investigation envisaged by the Treaty of Waitangi Act. Its claim was filed in 1986 and the Tribunal issued the Ngāi Tahu Land Claims Report in 1991.[15] After that, negotiations began between the Crown and

13 Judge Carrie Wainwright made a similar observation about her studies at Victoria University of Wellington Law School, which would have been 8 or 9 years after mine: Carrie Wainwright: "Māori Representation Issues and the Courts" (2002) 33 VUWLR 179 at 179.

14 Treaty of Waitangi Amendment Act 1985, s 3.

15 Waitangi Tribunal *The Ngāi Tahu Report 1991* (Wai 27, 1991).

Ngāi Tahu against a background of findings by the Tribunal of significant and numerous breaches of the Treaty, which the Tribunal said entitled Ngāi Tahu to "very substantial redress from the Crown".[16]

The process contemplated under the Treaty of Waitangi Act was then augmented by amendments made to that Act as a result of the creation of state owned enterprises and the vesting of Crown owned assets, particularly land, in them. The concern by Māori that land vested in the state-owned enterprises would be beyond their reach in the event of successful Treaty claims was met by the inclusion in the State-Owned Enterprises Act 1986 of section 9. That section provided that nothing in the StateOwned Enterprises Act permitted the Crown to act in a manner that was inconsistent with the principles of the Treaty. That in turn led to the two landmark cases of the 1980s to which I have already referred, the *Lands* case and the *Forests* case. Sir Robin took a leading role in both. Those cases led to amendments to the Treaty of Waitangi Act to give powers to the Tribunal to make binding recommendations for the return of certain land to Māori. Although much forestry land has been vested in iwi as part of Treaty settlements, I am not aware of any land ultimately being returned to Māori pursuant to the binding recommendation regime. However, the existence of that regime and the potential for binding recommendations to be made provided leverage to Māori in negotiations with the Crown.

So the 1980s was a decade to remember for the Treaty – the conferral of jurisdiction on the Tribunal followed quickly by the State-owned Enterprises Act and the great cases that followed it. Sir Robin had plenty to talk about. There was also a significant development in the 1990s on the policy front, with the Crown developing proposals for the settlement of historical Treaty claims. It undertook a consultation process in which the policies were met with a hostile reception from Māori.[17] Among many controversial policies, the one which had the greatest prominence was the decision to create the socalled fiscal envelope of $1 billion to be set aside for the settlement of all historical Treaty claims – ie those relating to events predating 21 September 1992. That was intended to be spread over a period of 10 years, which implied the settlement of all claims would occur in that period. There have been a number of deadlines set since then, but none has been met.

The other important developments in the early 1990s were the appointment of a Minister in Charge of Treaty of Waitangi Negotiations (MICOTOWN) in 1993 and the establishment of the Office of Treaty Settlements (OTS) in 1995. The Office of Treaty Settlements has now become Te Kāhui Whakatau (Treaty Settlements), part of The Office for Crown Māori Relations – Te Arawhiti.

We have come a long way since the 1985 amendment to the Treaty of Waitangi Act. Since 1989, 75 Treaty settlements have been passed into law,[18] and total government spending on Treaty

16 Waitangi Tribunal *The Ngāi Tahu Report 1991* (Wai 27, 1991) vol 3 at 1051.

17 For a description of the process leading to the development of these proposals from a Crown perspective, see chapter seven of Douglas Graham *Trick or Treaty?* (Institute of Policy Studies – Victoria University of Wellington, Wellington, 1997).

18 See Andy Fyers "The amount allocated to Treaty of Waitangi settlements is tiny, compared with other Government spending" *Stuff* (online ed, Wellington, 3 August 2018). Fyers observed there had been 73 settlements as at August 2018 and there have been two further settlements since then. A detailed schedule of settlements is set out in Te Arawhiti – Te Kāhui Whakatau "12 Month Progress Report: 1 July 2018 – 30 June 2019" (30 June 2019) Te Kāhui Whakatau (Treaty Settlements) <www.govt.nz/organisations/te-kahui-whakatau-treaty-settlements> at 6–9.

settlements now exceeds $2.3 billion.[19] This is a significant sum, but as Andy Fyers pointed out in his article on the topic on in August 2018, it seems less so when compared to the projected government expenditure in the 2018 financial year of $87 billion including $14 billion on national superannuation. Fyers calculated that the total amount spent on Treaty settlements since 1989 was equivalent to about two months of superannuation payments.[20]

The settlement process that was envisaged at the outset was that the first step was for the Tribunal to undertake its process of investigation and hearing from the parties. It would produce a report with recommendations to the Crown as to the substance of the claim and the need for redress. Then, a process of negotiating a settlement between the Crown and the iwi concerned would follow. However, the Waikato-Tainui claim negotiations did not follow from a report of the Tribunal: Waikato-Tainui decided to proceed directly to negotiations with the Crown, as have many claimant groups since that time.

In Waikato-Tainui's case, this was perhaps an unsurprising approach because the negotiations were limited to the Raupatu claim, that is the claim arising from the confiscation of Waikato-Tainui's lands pursuant to the New Zealand Settlements Act 1863. The confiscation was on the pretext that the Waikato-Tainui people had rebelled against the Crown, but, as recorded in the deed of settlement, the Crown of the 1990s accepted that the confiscations were both unjust and in breach of the Treaty. The fact that this claim arose from a confiscation carried out pursuant to an Act of Parliament meant that there was a historical record of the claim and the land to which it related and no dispute, except at the margins, that the correct claimant was WaikatoTainui.

As this was the first iwi claim to reach a negotiated settlement, there were a number of challenges in the drafting of the deed of settlement. In particular, the definition of the claim and of the excluded claims. As the settlement related only to the Raupatu land, other claims had to be excluded, including the claim to the Waikato River. The acknowledgements made by the Crown and the terms of the Crown's apology were also important to both sides. The acknowledgements by WaikatoTainui were also important from the Crown's point of view particularly the acknowledgment that the Crown had acted honourably and reasonably in relation to the settlement and that the settlement was final. Although drafted in the form of a deed having contractual effect, the deed of settlement was in fact conditional on the passing of the settlement legislation, and it was unable to be implemented unless the legislation was passed.

At the time, I was surprised that it was intended that not just the WaikatoTainui settlement, but every future settlement, would have its own Act of Parliament. I thought it would have been better to have a global Treaty Settlements Act, providing for a mechanism for approval of a settlement by a resolution of Parliament, after which the implementation could be done by subordinate legislation. But as I soon found out it would have been very difficult to make it work for the most claims. I say that because many of the grievances arose under legislation and could be resolved only by legislation and because much of the redress required amendments to existing legislation.

The challenges of settling disputes arising from events that occurred decades or in some cases more than a century ago are significant.

The historical nature of the claims and the myriad of changes that have occurred since the events leading to the claim mean the settlement process is a very inexact process. In practice, this

19 As at August 2018, total spending was $2.2 billion: Fyers, above n 18. Since then there have been two further settlements for $25 million and $100 million respectively.

20 Fyers, above n 18.

has meant the redress is constrained by what is considered by the Government of the day to be within the boundaries of political acceptability. The negotiations are unlike the negotiation of an ordinary commercial transaction where there is equality of bargaining power and no real constraint on what the negotiating parties have to offer to each other than their assessment of the value of what the other party is offering. It is, as Sir Robin said for the Court of Appeal in the case dealing with the fisheries settlement in the early 1990s, the *Sealords* case, an inherently political process.[21]

The model for settlements involving separate legislation for every settled claim does make Treaty settlements an unusual hybrid of contract and statute, involving a combination of actions by the executive and legislative branches of government. As I will come to later, this has had a significant impact on the role of the judicial branch of government in litigation related to the Treaty settlement process.

From a commercial point of view there were reasonably complex provisions relating to the transfer of land to Waikato-Tainui, spread over a five-year period. Provision was made for Waikato-Tainui to choose particular properties and not others and with a right of first refusal over a number of other properties owned by the Crown or Crown entities in the Waikato area. Some of the properties transferred to Waikato-Tainui were transferred on the basis that the unimproved land would be transferred and leased back by the Crown agency occupying the land, which would continue to own the improvements. Many of these transfers were significant transactions on their own. The property lawyers on both sides (not me!) were kept busy on these over the five-year transfer period in documenting and settling these transfers. So were the property valuers.

The signing of the deed of settlement in May 1995 was a special day. The most memorable aspect of it was when the Korotangi was carried on to the marae at Tūrangawaewae and given back to Waikato-Tainui. This occurred just after the deed of settlement had been signed. The Korotangi is a bird made of serpentine stone which is a taonga to Waikato-Tainui. It was apparently found near Kāwhia in the 1870s and was eventually deposited in the Dominion Museum, but subject to some complex trust arrangement which did not make it easy to extract it from the museum and return it to Waikato-Tainui. The Minister came to an arrangement to accommodate the trust that involved possession of the Korotangi being entrusted to WaikatoTainui, and it was a very emotional moment when it was handed over.

In the afternoon on the day before the deed of settlement was to be signed, I was told that the Minister of Finance and the Minister in Charge of Treaty of Waitangi Negotiations had agreed to include in the deed of settlement a relativity mechanism. This came as something of a surprise to me and the others in the legal team, because we had thought the deed was finalised. The background to the relativity mechanism was that the $170 million redress figure set for the Waikato-Tainui settlement was 17 per cent of the $1 billion fiscal envelope. The relativity mechanism was a commitment by the Crown that the Waikato-Tainui redress amount would be topped up if the total redress paid to claimants for historical breaches of the Treaty exceeded $1 billion, so the Waikato-Tainui proportion remained at 17 per cent of the total. That is reasonably easy to explain but it was obviously necessary to make provision for the time value of money which required the provision to include a number of mathematical equations, using mathematical symbols I was not familiar with. It was like drafting a document in Japanese or Russian. The symbols were completely foreign to me and I had to rely on others in the Crown team to act as translators from maths to English. The

21 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 308 [*Sealords*].

fact that we were still negotiating the drafting of the document in the early hours of the morning did not help.

After the signing of the deed of settlement, there was a party hosted by the Waikato-Tainui people to which the Crown team was invited. Two comments made to me during that party remain with me.

The first was by an elderly gentleman who said to me "You Crown people never really understood. All we wanted was an apology and to get the korotangi back". I suspect he was a minority of one among those present, but, having just witnessed a Crown commitment to pay $170 million, I had to ask him not to repeat that to any of the officials from the Treasury who were present.

The second comment was from Sir Robert Mahuta, WaikatoTainui's principal negotiator. He told me how much he liked the relativity clause. I didn't find that surprising, because it clearly was going to be a significant benefit to Waikato-Tainui. He then continued: "I call it my Fairlane clause". When I asked him why, he responded "Because it means the other O'Regan won't overtake me". He was, of course, referring to Ngāi Tahu's chief negotiator, Sir Tipene O'Regan. As it turned out, a similar relativity clause was included in the Ngāi Tahu deed of settlement, so neither overtakes the other. But both have received substantial top-up payments of about $250 million under the clause so both of them overtake, or rather go further ahead of, other iwi claimants.[22]

The Ngāi Tahu settlement was very complex. Whereas the Waikato-Tainui settlement was essentially a land for land settlement, reflecting that it was limited to the Raupatu claim, the Ngāi Tahu settlement had numerous different components to it. By the time I became involved in it, there had been some years of negotiations which had effectively broken down and had been revived through the intervention of the then Prime Minister, the Right Honourable Jim Bolger.

The magnitude of the task of negotiating and documenting the settlement is illustrated by the size of the deed of settlement, which was well over 2,000 pages long, not including the large number of survey maps, which were appendices to the deed. I have somewhere a photo of the Crown representatives (the OTS negotiators and the lawyers) carrying the deed of settlement on to the Takahanga Marae at Kaikōura where the deed of settlement was signed. There are 11 people in the photo, and each of them is carrying two or three Eastlight folders of the deed itself or A3 folders of maps. We had to divide up the task of initialling every page of the deed among the teams from both sides so that nobody got writer's cramp.

The Ngāi Tahu settlement required the Crown to formulate new policy as the negotiations were proceeding. For a private sector lawyer, the exposure to this process of policy formulation was interesting. Because there were often differences of views between different departments, issues were often escalated to Cabinet committees, and while the Crown Law people were the major legal participants in these meetings, I sometimes attended too. In the Ngāi Tahu negotiations, the Government was the first MMP coalition government (National and New Zealand First) so it was interesting to see how these committees worked. As Minister in Charge of Treaty of Waitangi

22 The total settlement redress surpassed $1 billion in 1994 present value dollars in October 2012. Waikato-Tainui received an additional $70 million and Ngāi Tahu $68.5 million: Lee Taylor "Historical Treaty settlements" in *Current issues for the 51st Parliament* (Parliamentary Library, Wellington, 2014) 21 at 21. In 2018, Waikato-Tainui and Ngāi Tahu received further payments of $190 million and $180 million respectively: Tony Wall and Carmen Parahi "Ngāi Tahu and Tainui receive $370 million in Treaty payment top-ups, with more to come" *Stuff* (online ed, 21 January 2018). Both iwi received an additional $1.2 million in 2019 following a long-running dispute over the 2012 payments: Andrew Little "Ngāi Tahu, Waikato-Tainui relativity adjustments" (press release, 28 June 2019).

Negotiations, Doug Graham was a very good advocate for the Treaty settlement cause. Once he had been convinced something was necessary, he was very good at persuading his Cabinet colleagues to agree.

Although both the Waikato-Tainui and Ngāi Tahu claims were very large claims and, in particular, the Ngāi Tahu one was a very complex claim, the inter-iwi issues that have arisen in later settlements (where more than one claimant lays claim to a particular site or other form of redress) did not loom large as they have in later settlement negotiations, or at least were not apparent to me. This, and the fact that my involvement was related to the commercial and property aspects of the settlement rather than the Treaty aspects, may mean that I had something of a rose-tinted view of the process.

The parliamentary process leading to the passing of the settlement legislation was unusual. The deeds of settlement were, in many ways, just precursors to the legislation, because, with a few exceptions, none of their provisions was legally enforceable without the passing of the legislation. Of course, the deeds of settlement were clear in their own terms that they were conditional upon the passing of the settlement legislation. Indeed, in the Waikato-Tainui case, the clause required the passing of the legislation by a majority that "is satisfactory to the Crown". When I asked the Minister what that meant, he replied that he would tell me after the votes were in! As the then opposition supported the Bill, the issue never had to be addressed.

The fact that the settlement legislation had to give effect to the deed of settlement meant that there was a need to ensure that what had already been agreed did not get lost in translation between the contractual language of the deed of settlement and the statutory language of the legislation. The Settlement Acts were substantial documents in themselves: in the case of the Ngāi Tahu Claims Settlement Act 1998, there were nearly 500 sections and well over 100 schedules. In the case of the Waikato-Tainui settlement, by the time the legislation was drafted the recorded history to appear in the legislation referred to events which had not been mentioned in the historical account in the preamble to the deed of settlement. That led to concern among the lawyers on the Crown side that the historical account in the Bill dealt with events that had not been included within the definition of the claim to be settled in the deed of settlement, and left the Crown exposed to having acknowledged a wrong but not settled it. Eventually the deed of settlement had to be amended before the Bill was passed to align it with the Settlement Bill.

This need to maintain the agreed deal meant that the normal parliamentary processes were somewhat restricted. The drafting conventions and style adopted by the Parliamentary Counsel Office did not fit well with the essentially contractual subject matter. The Bill was scrutinised by a Select Committee, but on quite a restrictive basis. It was, of course, open to the Select Committee to propose amendments to the Settlement Bill. But any amendments which had the effect of changing the agreed deal ran the risk that they would lead to conditions in the deed of settlement not being satisfied and the settlement not proceeding.[23] That meant that, in reality, the Select Committee process did not offer much to those who were opposed to aspects of the Settlement Bill and who sought amendments to it. As I am about to come to, the court process didn't either.

So, that is what I want to say about my experience of Treaty settlements as a lawyer and negotiator.

23 See, for example, the observations of the Māori Affairs Select Committee about this limitation of its role in Te Uri o Hau Claims Settlement Bill 2001 (156-2) (select committee report) at 1–2.

I have now been a judge for over 18 years and am quite out of touch with Treaty settlement negotiations. I am sure much has been learned since the time I was involved in the initial settlements and that the process is now better than it was then. The only perspective I now have is that of a judge, from the cases I have sat on and, more broadly, cases I have become aware of in the course of my work as a judge. This is quite a different perspective from the one I had as a negotiator. It focuses on areas of dispute as to how the Treaty negotiations process plays out, rather than how settlements are made.

Some further background to this discussion is required. The Crown's policy on negotiations does not have a statutory underpinning. The Treaty of Waitangi Act does not govern it. Rather, it is a statement of policy, contained in a publication by the Office of Treaty Settlements (now Te Kāhui Whakatau) that is universally referred to as "The Red Book".[24] There are two significant features of the Crown's policy that I note at the outset. The first is the stated preference for negotiating with "large natural groupings rather than individual whānau and hapū",[25] which carries with it various requirements as to how those negotiating for the large natural grouping obtain their mandate to do so.[26] That policy has attracted criticism from those who see hapū as the appropriate level for engagement, at least in some cases. There are practical reasons for the policy from the Crown's point of view however. Even when negotiations are with large groupings, there are inevitably overlaps in the claims made by different groupings that can mean settlement with one grouping impinges on the ability to settle later with another, leading to cross-claims or separate but overlapping claims. The second feature is the Crown's policy for dealing with these.[27]

Many of the disputes about the settlement process concern these two features: mandating issues and overlapping claims. As mentioned earlier, overlapping claims did not loom large in my time as a lawyer/negotiator, though in Ngāi Tahu's case they arose later.

Parties to disputes about mandate or about overlapping claims that are unable to resolve the disputes themselves seek resolution from the courts, the Waitangi Tribunal and from the Select Committee considering the Settlement Bill. None has been particularly fruitful. I will focus on challenges in the courts. That is not to ignore the importance of the Tribunal, which has been significant. Rather, it reflects where my experience of these disputes has been. As mentioned earlier, the Select Committee process for Settlement Bills does not provide much scope for meaningful change to draft Settlement Bills and so has not been as productive a forum as it would at first blush appear to be.

I will start with cases about mandate.

The first important case actually falls outside my 25-year period, so I have my own problem of overlapping claims here. It is the 1992 decision of the Court of Appeal in the *Sealords* case, which Sir Robin spoke about in 1994 and which I mentioned earlier.[28] In that case, which involved a challenge to the Māori fisheries settlement by iwi opposed to the global settlement, Sir Robin

24 Office of Treaty Settlements *Ka tika ā muri, ka tika ā mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna, Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Office of Treaty Settlements, Wellington, 2018) [The Red Book] <www.govt.nz/browse/history-culture-and-heritage/treaty-settlements/the-red-book/>.

25 At 27, 29 and 39.

26 At 39–48.

27 At 53–55.

28 *Sealords*, above n 21.

observed that the deed of settlement was "a compact of a political kind, its subject so linked with contemplated parliamentary activity as to be inappropriate for contractual rights".[29] He emphasised the nature of deeds of settlement, namely that they are essentially a precursor to legislation; many commitments by the Crown contained in them are, in essence, commitments to introduce legislation for consideration by Parliament, which leaves the final decision as to whether the settlement will proceed to Parliament. He said:[30]

> There is an established principle of noninterference by the courts in Parliamentary proceedings. Its exact scope and qualifications are open to debate, as is its exact basis. … However it be precisely formulated and whatever its limits, we cannot doubt that it applies so as to require the courts to refrain from prohibiting a Minister from introducing a Bill into Parliament.

These words set the tone for the treatment of future challenges to Treaty settlements, whether in relation to mandate or to overlapping claims. In the *Sealords* case, the claim was for interim relief to restrain the Crown from introducing a Bill to give effect to the settlement. It was struck out on the basis it had no realistic prospect of success. As we will see, the political nature of the process has led the Courts to take a hands-off approach, following Sir Robin's lead. This has attracted some adverse and some positive comment.[31]

An example of a challenge relating to mandate is a case that relates to the Waikato-Tainui Raupatu settlement itself, *Greensill v Tainui Maori Trust Board*.[32] The plaintiffs were 12 individual members of Waikato-Tainui who challenged the mandate of the Tainui Maori Trust Board to enter into the deed of settlement. The claim was heard by Hammond J. He dismissed it on the basis that the plaintiffs had no cognisable right to be enforced, there were doubts about their standing and, in any event, the heads of agreement on which the deed of settlement was based was a purely political document and, as such, not justiciable. So, even when the claim was against the mandated entity, rather than the Crown, the political nature of the process, reflecting the view of Sir Robin in the *Sealords* case, was an important factor in the Court's refusal to intervene. The case was decided a day or two before the deed of settlement was signed. I was only peripherally aware of it at the time because my focus was on finalising the deed for signing and I was probably trying to get my head around the relativity clause.

While I am talking about Hammond J, I just want to pay tribute to him. As you know he died earlier this year. He was a highly valued colleague of mine on the Court of Appeal and I know he was highly regarded in Hamilton when serving here as a resident High Court Judge.

There were two cases based on mandate issues in relation to the Ngāi Tahu claim as well.[33] Neither succeeded.

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29 At 308.

30 At 307.

31 See Wainwright, above n 13; Jessica Andrew "Administrative Review of the Treaty of Settlement Process" (2008) 39 VUWLR 225; and John Dawson and Abby Suszko "Courts and Representation Disputes in the Treaty Settlement Process" [2012] NZ L Rev 35.

32 *Greensill v Tainui Maori Trust Board* HC Hamilton M117/95, 17 May 1995.

33 *Te Ngai Tuahuriri Runanga v Te Runanga o Ngai Tahu* HC Christchurch CP187/97, 13 May 1998 (Master Venning); and *Waitaha Taiwhenua o Waitaki Trust v Te Runanga o Ngai Tahu* HC Christchurch CP41/98, 17 June 1998 (Panckhurst J).

Perhaps the most important case on mandating issues is the claim by the Puketapu hapū challenging the mandate relating to Te Atiawa's Treaty claim.[34] The claim failed, with the Judge, Doogue J, observing that it was "yet another case where the Court has been asked to intervene in what is essentially a political process without any proper foundation of law being put before it."[35] Sir Robin's words again.

I am going to talk about two older cases that relate to overlapping claims and some more recent, and probably more significant ones.

The first is *Milroy v Attorney-General*.[36] The case arose in the context of the settlement of Ngāti Awa's Treaty claim, which involved a cross-claim by Tuhoe. Tuhoe was concerned that the return of certain forest land to Ngāti Awa would make the Crown unable to transfer forest land to Tuhoe in the event that the Waitangi Tribunal made a binding recommendation requiring that. Tuhoe commenced proceedings challenging the decisions of the Minister in Charge of Treaty of Waitangi Negotiations relating to the allocation of forest land to Ngāti Awa and also the advice she received from officials.

The claim was dismissed by Goddard J in the High Court.[37] Her decision was upheld by the Court of Appeal, which described the proceeding as an attempt to draw the court into an examination of the accuracy and completeness of advice of officials in the course of the formulation of government policy even though no rights are affected by the advice (because legislation was required before the Minister's decisions would have any effect on anyone). It reiterated the approach taken in *Sealords* that the formulation of government policy preparatory to the introduction of legislation is not to be fettered by judicial review. It also reiterated a comment made by Goddard J that the Court could not help the plaintiffs. It noted the Crown's proposed legislative conduct could be within the jurisdiction of the Waitangi Tribunal or subject to representations to a Select Committee.

The approach taken in *Milroy* was applied in a later Court of Appeal case, *New Zealand Maori Council v Attorney-General*, known as the *Crown Forests Assets* case.[38] I was on the Court of Appeal panel for that case and wrote the judgment for the Court. The case concerned the proposed settlement with a number of iwi and hapū affiliated with Te Arawa. The New Zealand Māori Council and others instituted proceedings on behalf of cross-claimants to the forestry land that was to be transferred in the proposed settlement.

The Court of Appeal accepted the Māori Council's submission that the proposed arrangements set out in the settlement deed with the Te Arawa entities were not contemplated by the Crown Forests Assets Act 1989. But the Court said it was not appropriate to make the declaration sought, that a future Act of Parliament (the Act giving effect to the proposed settlement with the Te Arawa entities) would, if passed, override an earlier one (the Crown Forests Assets Act). The Court saw the declarations as predicated on the proposition that the Crown had bound itself to the transfer, when, in fact, the proposed settlement was conditional on the passing of legislation and the Crown's

34 *Kai Tohu o Puketapu Hapu Inc v Attorney-General* HC Wellington CP344/97, 5 February 1999, discussed in Wainwright, above n 13 at 189–190; and Dawson and Suszko above, n 31 at 47–49.

35 At 18.

36 *Milroy v Attorney-General* [2005] NZAR 562 (CA).

37 *Pouwhare v Attorney-General* HC Wellington CP78/02, 30 August 2002; and *Milroy v Attorney-General* HC Wellington CP77/02, 30 August 2002.

38 *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318.

commitment was, in effect, a commitment to introduce a Bill to give effect to the settlement. So, the Court said the case fell within the same rubric as *Sealords* and *Milroy* and the question of whether the settlement deed should become unconditional was one for Parliament.

The theme of these cases was that some claims relating to Treaty settlements failed on the basis that the decisions subject to challenge were seen as decisions that would have no substantive effect unless legislation was passed, so they essentially amounted to decisions as to what would be proposed to Parliament, rather than decisions having their own practical impact on the legal rights of the claimants.

This reflects the unique interplay of the three branches of government in the Treaty settlement process, involving a negotiation conducted by the executive culminating in a deed of settlement followed by settlement legislation, calling for both parliamentary approval of the terms of the settlement and the legislative authorisation of the necessary action to give effect to the settlement.

That means that, as a general statement, at least some of the decisions made by the executive in relation to Treaty settlements will ultimately become legislative proposals, so that, as the courts have noted, such executive actions are preparatory to the introduction of legislation. In the cases I have mentioned so far, the Court of Appeal found that, if the decision in respect of which judicial review is sought is a decision to introduce legislation, then the Court will not intervene if that would be regarded as an interference in the processes of Parliament.

So, the upshot of this is that attempts to judicially review decisions made by the executive in relation to Treaty settlements largely foundered on the basis that the decisions relate to the introduction of legislation, and the court's role has therefore been limited.

However, the recent Supreme Court case in *Ngāti Whātua Ōrākei v Attorney-General* suggests that the principle of non-interference with parliamentary proceedings should not always be applied so widely in the Treaty settlement context.[39] The cases I have just referred to now need to be read in light of the Supreme Court's decision. Where there are live and ongoing issues as to rights and obligations, interpretation of settlement deeds or the exercise of statutory powers, the court's jurisdiction will not be ousted by the mere prospect of legislation.

A decision of Williams J in the High Court provides some background to the *Ngāti Whātua Ōrākei* decision. In that case, *Port Nicholson Block Settlement Trust v Attorney-General*, Williams J applied a more nuanced analysis to the declarations sought. He emphasised that the courts should be careful not to leave the Crown "as sole arbiter of its own justice".[40]

The case concerned the proposed Treaty settlement between the Crown and Ngāti Toa. The Port Nicholson Block Settlement Trust, representing the Taranaki Whānui, argued the terms of the Ngāti Toa settlement were inconsistent with the deed of settlement and Settlement Act relating to the Crown's settlement of the Taranaki Whānui claim. By the time the proceeding came to a hearing the pleading had changed from an attempt to prevent the Crown from proceeding with the Ngāti Toa settlement to a prayer for a declaration that the redress proposed to be granted to Ngāti Toa would be inconsistent with the Crown's obligations to Taranaki Whānui under the settlement already reached with it.

39 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 [*Ngāti Whātua* (SC)].

40 Port Nicholson Block Settlement Trust v Attorney-General [2012] NZHC 3181 at [63], citing *Wi Parata*, above n 3.

The approach taken by Williams J is summarised in these paragraphs from his judgment:

> [60] The declarations sought in this case … focus on consistency only between the Taranaki Whānui Deed and Act and the Ngāti Toa Deed. Taranaki Whānui has stepped back from an attempt to have the court order the Crown to amend the Ngāti Toa Deed of Settlement to a less problematic process of construing the promises the Crown made to Taranaki Whānui in its Deed and comparing those to the promises made to Ngāti Toa in its Deed.
>
> [61] In my view, this relief, if justified on the merits, does not cross the line ascribed by the Court of Appeal in the *Milroy* and *Crown Forests Assets* cases. It does not attempt to intervene in the legislative process, leaving it to the executive to decide what, if anything, it should do with such declarations if made.
>
> [62] There are additional considerations. Unlike the way the case appears to have been pitched in *Milroy*, there are rights at issue here. If Taranaki Whānui is correct in the assertions made, then they have rights and interests under their Settlement Deed and Act that are, or may be, justiciable. There is a satisfactory legal yardstick that a court can utilise in resolving the controversy.
>
> (footnotes omitted)

He went on to consider the merits of Port Nicholson's claim but dismissed it.

Ngāti Whātua Ōrākei was a case which arose in the aftermath of the Ngāti Whātua Ōrākei settlement and the collective Ngā Mana Whenua o Tāmaki Makaurau settlement. Ngāti Whātua Ōrakei sought to challenge decisions made by the Minister for Treaty of Waitangi Negotiations to include certain land in central Auckland in settlements with Ngāti Paoa and Marutūāhu respectively. The land was land in respect of which Ngāti Whātua Ōrākei claimed mana whenua and ahi kā. Under the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, it was land subject to a right of first refusal in favour of the Collective. However, the Act allowed the Minister to remove land from the scope of the right of first refusal where required for another Treaty settlement.

Ngāti Whātua Ōrākei asked the court for a number of declarations. The first was a declaration that it has ahi kā and mana whenua in relation to certain land in central Auckland. The second, third and fourth declarations all sought to clarify the Crown's obligations to Ngāti Whātua Ōrākei when applying its overlapping claims policy to land within Ngāti Whātua Ōrākei's area of interest, and in particular when making offers to include that land in settlements with iwi that do not have ahi kā in the area. The fifth and sixth pleadings sought declarations that the Crown had acted inconsistently with those obligations when making the two decisions at issue in the case.

The High Court struck out the claim on the basis that it was not justiciable because the proposed transfers would take effect only once authorising legislation was passed.[41] The Court of Appeal upheld the decision.[42]

The Supreme Court took a different approach. The majority's view was that the principle of noninterference with Parliament did not require the claim to be struck out in its entirety. It held that there was a live, ongoing issue in respect of Ngāti Whātua Ōrākei's rights according to customary law, the Treaty of Waitangi and its 2012 Settlement Act and that it must be open to Ngāti

41 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZHC 389, [2017] 3 NZLR 516.

42 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZCA 554, [2018] 2 NZLR 648.

Whātua Ōrākei to seek to clarify its status in the area.[43] The same applied to the challenge to the Crown's overlapping claims policy in the Red Book and the process which it argued the Crown must follow when making decisions to withdraw land from the statutory right of first refusal. The declarations sought by Ngāti Whātua Orākei were framed generally and would have application to future decisions. Further, the pleadings raised issues about the Minister's decision-making power under the Collective Redress Act, which it held can be reviewable independently of the particular decision triggering the proceeding.[44]

However, the majority considered that the final two pleadings were problematic because they sought declarations that the particular decisions at issue were made in breach of the Crown's obligations. It saw this as a challenge to a decision to legislate, which would constitute interference with the parliamentary process.[45] It restored the claim, except for the final two paragraphs of the declarations sought by Ngāti Whātua Orākei. Elias CJ agreed but would have restored the claim in its entirety.[46]

Although it was unnecessary to express a final view on the scope of the principle of noninterference with parliamentary processes, the majority made the following comment in the judgment delivered by Ellen France J:[47]

> It is, nonetheless, appropriate to sound a note of caution at the extent to which the principle of non-interference in parliamentary proceedings has been held to apply to decisions somewhat distant from, for example, the decision of a Minister to introduce a Bill to the House or from debate in the House. It would be overbroad to suggest that the fact a decision may, potentially, be the subject of legislation would always suffice to take the advice leading up to that decision out of the reach of supervision by the courts. That would be to ignore the function of the courts to make declarations as to rights.

This echoed a similar observation made by Arnold J, writing for the majority in an earlier case, *Ririnui v Landcorp Farming Ltd*.[48] He noted that decisions about Treaty settlements had been treated as inappropriate for judicial review but observed that this is not always the case. He said the fact that a decision subject to a judicial review application had a Treaty context did not preclude review where the decision under challenge breached a principle of public law.[49]

The *Ngāti Whātua* decision means that the courts may in future play a greater role in Treaty settlement disputes. The balance struck by the Supreme Court in that case means that there is more scope for clarifying the rights and obligations of both disputing iwi and hapū and the Crown during settlement negotiations, without interference into parliamentary processes. That may give iwi and hapū a forum for grievances which arise during the settlement process itself, or a way to prevent such grievances from arising at all. Of course, the Waitangi Tribunal will remain an important forum, as will alternative dispute resolution mechanisms which have had some measure of success in the past.

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43 *Ngāti Whātua* (SC), above n 39, at [53] and [59].

44 At [63].

45 At [65]–[66].

46 At [127].

47 At [46].

48 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 623, [2016] 1 NZLR 1056.

49 At [90].

The Supreme Court decision was a decision overruling the striking out of Ngāti Whātua Orākei's claim, which involved making a finding that the claim was not so untenable that it should not be allowed to proceed. It was not a decision that the claim succeeded. There is a lot of water to go under the bridge before the merits of the claim are determined.

In perhaps an appropriate bookend to my discussion of the cases, I want to refer to a recent High Court decision of Cooke J, who is, of course, Sir Robin's son. The case is *Ngāti Mutunga o Wharekauri Iwi Trust v Minister for Treaty of Waitangi Negotiations*.[50] It was an application for interim relief to restrain the signing of a deed of settlement with Moriori that would provide for the transfer of land to Moriori that Ngāti Mutunga also claimed. Cooke J discussed the *Ririnui* and *Ngāti Whātua* decisions and concluded that judicial review was available but only where there has been a breach of a principle of public law or a public law error that is properly corrected by the Court on judicial review.[51]

An important difference between *Milroy* and *Ngāti Whātua* was that in the former, counsel accepted that the officials' advice that was under challenge did not affect anyone's rights. In the latter, the Court found the decisions and policies under challenge did potentially affect rights.[52]

In his lecture of 25 years ago, Sir Robin began his conclusion with a statement that seems surprisingly defensive now. It was: "I hope this excursion [referring to his discussion of the leading cases of the 1980s] may have helped to show that Māori claims to remedies are not totally unfounded".[53] For my part, I hope my recounting of the early settlements and the litigation relating to settlements shows the that as a country we have tried to confront our past and recognise the claims are not only "not totally unfounded" but have been clearly made out. Ministers, officials and negotiators have confronted this, but their efforts are themselves often challenged. The challenge for the courts is to identify where and when decisions made in the settlement process should be subjected to the supervisory judicial review jurisdiction of the courts while respecting the parliamentary process. There are still many claims to be settled. And based on past experience, there will be many disputes about the settlement process that will need to be addressed by the courts. So this will be a developing area.

50 *Ngāti Mutunga o Wharekauri Iwi Trust v Minister for Treaty of Waitangi Negotiations* [2019] NZHC 1942.

51 At [25].

52 *Ngāti Whātua* (SC), above n 39, at [46].

53 Cooke, above n 1, at 11. It may be that this was a response to a claim to the contrary.