Fighting over the land

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The New Zealand Government's proposals for final settlement of all Maori land claims.

On 8 December 1994, the New Zealand Government released a detailed set of proposals for finally settling the various claims by Maori regarding their wrongfully appropriated land.[1] On that day, a group of Maori protesters burned a copy of the proposals outside Parliament. At a hui (convention) called in February to discuss the proposals, a speaker representing Maori from the Waikato region tore up a copy of the proposals and threw the pieces at the Prime Minister's feet. This caused little surprise; Maori rejection of the proposals has been uniform.

The proposals have become known as the 'fiscal envelope'. The name comes from one of the proposals, which is to limit the settlement of land claims to $1 billion, available over about 10 years. That amount is itself the subject of controversy. It appears to have no more than a political basis; no costings have been provided by the Government to explain how the figure was reached. The Government was no doubt aware that to most people, especially the non-Maori public to whom the package must also be sold, $1 billion sounds like a lot of money.

In terms of the non-Maori public, the tactic was successful. One billion dollars is more than most of us can imagine. Along with conciliatory words of the 'healing the wounds' variety coming from the Government, most of the non-Maori public who did not consider the detail could not see why Maori were rejecting such a fair deal.

The Treaty of Waitangi

To understand why Maori are so opposed to the settlement envelope it is necessary to go back to New Zealand's foundation document, the Treaty of Waitangi. The Treaty was concluded between representatives of the British Crown and most Maori chiefs. The most famous signing was on 6 February 1840 at Waitangi, but versions of the Treaty were carried around New Zealand and signatures were collected. Some Maori refused to sign, and some were never asked to sign as the collectors did not make it to their door.

The English and Maori texts of the three articles of the Treaty are not exact translations. The English text of Article I states that the Maori chiefs cede their powers of sovereignty over their lands to the Queen of England. The Maori text uses the word 'kawanatanga', translated by Professor Sir Hugh Kawharu to mean 'government', rather than 'sovereignty'.[2]

In Article II the chiefs are guaranteed the 'full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other possessions.' In the Maori text the chiefs are guaranteed the unqualified exercise of their 'tino rangatiratanga' over their lands, villages and all their treasures. Tino rangatiratanga conveys the concept of full tribal authority. It is far wider than the mere possessory rights given in the English text. The cumulative differences between the English and Maori texts of the first two articles are critical in understanding all Maori claims of breaches of the Treaty. The English

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version has the chiefs surrendering total power apart from limited property rights. The Maori version has the Crown as a general administrator of the country, leaving the chiefs with their tribal authority undiminished. Article III gives Maori the protection of the Crown and gives them the same rights as British subjects.

Although Governor George Grey was told by the Colonial Secretariat in 1846 to 'honourably and scrupulously fulfil the conditions of the Treaty,' the Treaty could not withstand the ever growing demand by European settlers for more and more land. Tensions broke into war. Some Maori fought against the Government, some fought with it. After those Maori fighting against the Government were finally defeated in the late 1860s, much of their land was confiscated.

In 1877 the New Zealand Chief Justice declared the Treaty a legal nullity, as it had never been incorporated into municipal law. It could not be used by Maori as a basis for legal action in respect of land. For 100 years the Treaty was without legal effect.

The Waitangi Tribunal

Change came in 1975, with the establishment of the Waitangi Tribunal. The Tribunal was given the power to investigate Maori claims against the Crown arising on or after the day legislation establishing the Tribunal came into effect.

In 1985 the law was changed so the Tribunal could consider all claims resulting from conduct which occurred in 1840 or after. The Tribunal can do no more, in most cases, than recommend to the Government how the claim should be dealt with. It cannot recommend the return of land owned privately. Many of the Tribunal's recommendations have been given effect. Some have not, or have been given effect in modified form. Tribunal reports are sometimes lengthy and are always deeply considered. Anyone who wishes to learn more about Treaty of Waitangi claims would be well advised to look to major Waitangi Tribunal decisions, such as those dealing with Orakei, and Muriwhenua.

Claims can also be dealt with by direct negotiation with the Government. Such negotiations have occurred more frequently in recent years, and the Government has set up an Office of Treaty Settlements within the bureaucracy to work on the claims.

The recent Crown proposals

The latest Crown proposals are put forward as an attempt to finally settle up outstanding historical Treaty claims regarding Maori land and other property. The proposals begin with a statement of principles on which the Crown proposes to base its settlement program. Among the principles may be found an acknowledgment by the Crown of past injustices, a duty on the Crown to act in the best interests of all New Zealanders, an intention that settlements be fair, sustainable and remove the sense of grievance, and a need to take into account fiscal and economic constraints (p.6).[3]

The principles are no doubt an attempt to assure Maori of the Crown's honourable intentions at the same time as non-Maori are assured that unlimited resources are not about to pass from public into Maori hands. The difficulty is that once the detailed proposals are considered, it is apparent that Maori get more honourable intentions than redress.

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A Maori 'warrior' stamps on the NZ government's 'fiscal envelope' prospectus at a protest in February 1995 — Tauranga, NZ.

The fiscal envelope

The $1 billion is not as much as it sounds. A settled claim relating to fisheries is to be included in the envelope; that takes out $170 million. The Deed of Settlement from the fisheries claim acknowledged that the settlement would affect any future settlement fund. However, some Maori were opposed to the fisheries settlement. Those Maori are challenging the settlement before the Human Rights Committee of the United Nations in Geneva.

An agreement between the Government and the Waikato tribes regarding confiscated land is also to come out of the envelope. The agreement is not yet concluded but was begun well before any fiscal envelope was proposed. That takes out another $170 million.

Where claimants are reimbursed by the Crown for expenses in researching claims, that cost will be taken out of the total amount received by claimants. So Maori will lose the cost of proving their own dispossession. Any such reimbursements paid since 21 September 1992 (the date on which Cabinet approved the basic settlement principles) are to be taken out of the envelope, whether or not claimants were advised at the time (p.11).

Many Maori have asked what happens to legitimate claims which are lodged after the money has been used up.

The Minister in Charge of Treaty of Waitangi Negotiations, the Hon. Douglas Graham, has asserted that not too much emphasis should be placed on the $1 billion figure, that it is no more than an accounting measure, and no valid claims will be cut off. Yet the definition of 'settlement envelope' in the Crown proposals is unambiguous: 'A set amount of money that the Crown will put aside to settle all historical Treaty claims' (p.35 of the Summary).

Claims affecting conservation areas

Much of the settlement proposal is taken up with statements of what Maori can not have. The Crown states that 'Conservation estate is not readily available for the settlement of Treaty claims'. This is based on a number of considerations. Conservation land is said to be held by the Crown on behalf of all New Zealanders. A change in management of conservation land will not be approved if it results in a loss of protection to the natural and historic values, and if existing public access and recreation rights will be reduced. Last but undoubtedly not least, the Crown notes that 'the needs of sectoral interests (e.g. the tourism industry) will be considered' (p.13).

Allowance is made for discrete sites that are of such special significance to Maori that *the Crown* believes they are an essential part of a settlement (emphasis added). However that allowance is hedged with the added requirement that, even if the site is demonstrably special, its alienation from the Crown must not affect conservation management or values (pp.13-14). According to the proposals, there are at least 48 claims affecting conservation land.

Important questions are not addressed. If land now held as conservation land was improperly taken from Maori, or was used contrary to agreement with the original Maori owners, why should it be excluded? Maori cannot claim private land, only Crown land, of which a large part is held for conservation purposes.

The Government seems to fear that transferring conservation land to Maori will have negative effects on such land. This is ironic given that conservation areas were originally set aside to preserve those parts of New Zealand which had managed to escape the ravages of European settlement, farming and agriculture.

Claims affecting natural resources

Natural resources subject to Treaty claims include water, geothermal energy, river and lake beds, foreshore and seabed, sand and shingle, and minerals including gold, coal, gas and petroleum. The Government's proposals regarding claims to natural resources go to the heart of the Treaty of Waitangi and its two texts:

> The Crown proposes that Article II interests in natural resources are use and value interests and, therefore, it does not intend to negotiate Treaty claims based on Maori ownership interests in natural resources. [at 20]

> The Crown considers that Article I of the Treaty gives it the right, where necessary, to own or regulate natural resources in the interests of all New Zealanders. This right to act for the common good may, in a wide range of circumstances, allow the Crown to override Article II interests. Nevertheless, the Crown should take Article II interests into account when it exercises its powers. [at 21]

What the Government does here is to define 'tino rangatiratanga' in Article II of the Treaty in terms of English land law, with its concepts of 'bundles of rights' over land. Taking an approach familiar to lawyers in English-based legal systems, the Government proposes that Maori do not have all the rights of ownership, but only more limited rights of access and use. It is a bold enough move to purport to define the Maori phrase at all; to define it in terms of English land law verges on the foolhardy. Little wonder that so many Maori see the Government's approach on natural resources as ignoring the Maori text of the Treaty, and as an attempt to diminish the tino rangatiratanga guaranteed their leaders by the Treaty.

The Government also proposes that the only resources that Maori can lay any claim to are those reasonably contemplated as useful by the signatories to the Treaty in 1840. For instance, the hydroelectric generating power of rivers cannot be the subject of a claim.

> It is the Crown's view that resources which were substantially unknown or unused at 1840, and developments of those uses, are the heritage of all New Zealanders. [at 22]

This view has received some support in the New Zealand Court of Appeal. It has not received much support from Maori.

As one Maori response has stated, 'The Treaty of Waitangi was never intended to freeze Maori in a time warp'. The argument is that the Treaty was the basis for an on-going relationship between Maori and the Crown, not a one-off bargain.

These issues remain the subject of debate; the problem is that the Crown has come in with the narrowest possible reading of the Treaty. The detail of the natural resources proposal belies the Government's general statements about recognising legitimate Treaty grievances.

Claims affecting gifted lands

Maori often gifted land to the Crown, for the building of schools or other uses for the public benefit. In a number of cases the Crown went on to treat the land as the Crown's to use however it wished. Sometimes land was 'gifted' to third parties with encouragement, or pressure, from the Crown. Clearly there is much room for debate in each case as to what the conditions of a gift were, or whether there were any conditions at all. The Government proposal notes that the Maori concept of gifting often involved what English law might call implied terms. These were that the gift would have been returned once the purpose for the gift no longer existed, or that a gift might be given in return.

The Government doubts how often Maori concepts of gifting applied to gifts to Europeans:

> Thorough historical analysis will be required to determine the circumstances of each case and whether the application of Maori concepts of gifting is appropriate at all. [at 28]

Once again the Government works from a presumption that English property law applies. 'Thorough historical analysis' will be required to rebut the presumption, and, of course, the cost of this analysis will be charged against the fiscal envelope.

Claimants and their representation

The Government devotes many of its proposals to systems for identifying claimants, establishing mandates to negotiate, and creating 'governance structures' for assets transferred to claimant groups. It clearly does not want repeats of what occurred with the fisheries settlement. There, what was supposed to be a historic agreement between the Crown and all

Maori tribes is now being challenged by dissatisfied Maori before the United Nations. Representation issues identified by the Government are:

> that the proper claimant group has been identified and that an appeals process is in place to deal with objections about who the claimants are;
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> that the claimant negotiators have a mandate from the claimants to represent them;
>
> that the claimant group has established a governance structure to administer and manage any proceeds from a settlement and that there is an appeals process to deal with objections about the rules of the governance structure (p.12 of the *Summary*).

Although the proposals repeatedly mention the Government's wish to consult with Maori about these representation issues, the proposals are in fact very prescriptive about what the Crown requires. For instance, the Government proposes that claimant groups develop their own criteria for membership, subject to the requirement that objections to those criteria can be made to the Waitangi Tribunal, or perhaps the Maori Land Court, either for decision or to advise the Crown. Reference is made to the need for the Crown to be assured that there is independent verification of the process for establishing governance structures, that accountability systems are in place for the management of assets transferred to Maori, that minority Maori interests should not hold up majority wishes nor that the majority should oppress the minority.

Representation issues are obviously relevant, the question is the extent to which these issues should be subject to the dictation of the Crown. Many Maori consider that representation issues are for the tribes to decide. The Crown may not want a repeat of the fisheries controversy, but neither do Maori. The same applies to the question of what happens to assets transferred to claimants. To what extent is the Crown interested in the matter? The answer is political. The Government does not want to sustain damage from allegations that tax payers' money, used in settlement of Treaty claims, was spent improperly, or spent by one group for purposes not agreed to by others.

It is impossible to stop such controversies from arising. What the Government does to limit the risk is to require that Maori satisfy an exhaustive list of organisational requirements. The result is that it appears that the Government is approaching the claimants from a position of mistrust.

The negotiations process

The Government is proposing more stringent requirements for the historical evidence that must be collated before a claim is accepted. This is to guard against fishing expeditions. Costs of acquiring this evidence will be offset against the envelope.

The Crown provides little reassurance to claimants when it proposes that claims will only be accepted if the Government considers that a claim has 'sufficient priority, in terms of the Government's overall settlement strategy, to be included on the negotiations work program, given resource and financial constraints' (p.30). For a claim to be accepted, claimants must agree to negotiate knowing 'that the Crown's offer of redress will be based on the Crown's position on the nature and extent of the breach, despite the fact that the claim may include alleged breaches that are wider in extent and nature than those acknowledged by the Crown'. This proposal appears on page 31 of the booklet containing the Government's detailed proposals. It seems a long way from the Crown's acknowledgment, back at the start, of the need to remove the sense of grievance created by historical injustices.

Finality of settlements

The Government is concerned to remove other avenues of redress once claims are settled. It proposes to remove the Waitangi Tribunal's jurisdiction to enquire into settled claims.

> This would assist the durability of settlements by ensuring that the Tribunal cannot be used simply to keep grievances alive. Even if the Tribunal dismisses a subsequent claim, the very lodging and hearing of the claim may disturb the healing of the grievance, and the sense of conclusion for the wider community. [at 50]

What if the grievance is legitimate? There will be little healing. The Tribunal may dismiss a claim, but that does not mean the claim was spurious.

Maori have seen this proposal as another attempt to reduce their Treaty rights. Any bar on Treaty claims represents a closing off of the right to assert tino rangatiratanga, a diminishing of tribal authority guaranteed by Article II.

The rejection of the proposals

The Government's proposals have been torn up at hui all over the country. Over all the problems discussed above is anger at the Government's failure to consult Maori before the proposals were released. It is seen as a failure in protocol, at least, and something like coercion, at worst, to throw detailed proposals down without prior consultation. The initial Government response was that the proposals were there to be discussed, and, if necessary, amended. But the proposals do not read that way. They are rigid, and often harsh. The New Zealand Government cannot, for instance, define tino rangatiratanga in terms of English property law, and expect a jovial response. By now Mr Graham, the Minister in Charge of Treaty of Waitangi Negotiations, has recognised that the proposals read like an ultimatum.[4] The proposal for a $1 billion cap on settlements has quietly been abandoned.

The detailed proposals themselves will fade for a time. Along with the rejection of the proposals has come discussion by Maori of the most basic questions regarding their status as the indigenous people of the country and as one of the two contracting parties under the Treaty of Waitangi. The New Zealand Government will almost certainly have to address these basic issues if the settlement of historical Treaty grievances is to proceed.

References

1. *Crown Proposals for the Settlement of Treaty of Waitangi Claims: Detailed Proposals*, Office of Treaty Settlements, Department of Justice, New Zealand, 1994.
2. *Crown Proposals for the Settlement of Treaty of Waitangi Claims: Summary*, Office of Treaty Settlements, Department of Justice, New Zealand, 1994, p.33.
3. Unless otherwise stated, all page references are to the *Detailed Proposals* cited above.
4. *Australian*, 28.3.95.