Issues for Indigenous Claims Settlement Policies Arising in Other Jurisdictions

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I BACKGROUND

This paper does not purport to be a legal history on indigenous claims settlement policies arising in other jurisdictions. Rather it deals with issues raised from a consideration of other jurisdictions. The paper has been developed in part from the report that I wrote for the Parliamentary Commissioner for the Environment.[1] In that report much of the detail omitted from this paper may be found. The countries that I particularly want to focus on are Canada, the United States of America and Australia.

II INTRODUCTION

It would be a mistake to believe that Governments and the courts have always acknowledged the need to protect indigenous rights and settle indigenous claims fairly and equitably. The movement towards the recognition of indigenous rights has occurred because the countries concerned have been encouraged to change their approach since the establishment of the United Nations and the alignment of indigenous rights issues with human rights and equality. Many of the basic human rights instruments and complaint procedures[2] have contributed to changes in attitudes towards protecting human rights and one real and positive manifestation benefit for indigenous peoples has been the establishment and operation of the Working Group on Indigenous Populations.[3] That Working Group has recently completed the Draft Declaration on the Rights of Indigenous People and the Draft received its first reading before the Sub-Commission in August 1994. It is now only a matter of time before that Declaration will be before the United Nations General Assembly.

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1 The report was published as *Indigenous Claims and the Process of Negotiation and Settlement in Countries with Jurisdictions and Populations Comparable to New Zealand's* Background Report for the Parliamentary Commissioner's Report *Environmental Information and the Adequacy of Treaty Settlement Procedures* (Parliamentary Commissioner for the Environment, Wellington, 1994) ("Wickliffe Report").

2 I refer here to international instruments such as the Universal Declaration on Human Rights 1948, the International Covenant on Civil and Political Rights 1966, and the Optional Protocol, the International Covenant on Economic, Social and Cultural Rights 1966, the ILO Conventions 107 and 169 on Indigenous Populations and the range of human rights complaint procedures adopted by the United Nations such as General Assembly Resolution 1530 (1970).

3 The Working Group was established for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1982.

III ROLE OF COMMISSIONS, TRIBUNALS AND THE COURTS

The commissions, tribunals and courts in Canada, the USA, Australia and, of late New Zealand, have also evolved a common approach to the recognition of indigenous rights.[4] They have become the independent arbiters of the process for the validation and settlement of claims. Commissions, tribunals and courts have a major role to play in keeping the processes for settlement honourable. The major cases arising from the Canadian, USA and Australian experiences illustrate this trend.[5]

New Zealand courts are consistently referring to developments in comparative jurisdictions. Recent examples of this include the Court of Appeal discussions in the following cases: *Te Runanga Muriwhenua Inc* v *Attorney-General*,[6] *Te Runanga o Wharekauri Rekohu Inc* v *Attorney-General*;[7] and *Te Runanga o Te Ika Whenua* v *Attorney-General*.[8] The fact that New Zealand has different constitutional arrangements has not inhibited the Court of Appeal from considering and applying comparative jurisprudence to assist it understand the nature of native title and the fiduciary obligations of the Crown.[9] However the President of the Court of Appeal has cautioned that, in the end, a court in New Zealand must be guided by its own conception of the strength of the competing arguments and all other arguments relevant to this country's circumstances.[10]

The Waitangi Tribunal has also consistently referred to developments in comparative jurisdictions when defining the nature and extent of Treaty rights, when considering the extent of the obligations owed by Maori and the Crown under the Treaty, and when developing the fiduciary duty concept in this jurisdiction.[11]

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4 On the evolving nature of the court's responses in all four jurisdictions, JV Williams "Mana Motuhake Me Te Iwi Maori: Indigenous Self Determination" unpublished LLM thesis (University of British Columbia, 1985) offers some interesting insights. See also Professor Richard Bartlett, of the Law School of Western Australia and the University of Saskatchewan, in "An Overview of Pragmatism or Equality" unpublished paper, International Bar Association 25th Biennial Conference (Melbourne, October, 1994).

5 For more details see above n 1, Wickliffe Report.

6 [1990] 2 NZLR 641.

7 [1992] 2 NZLR 301.

8 [1994] 2 NZLR 20.

9 Above n 6, 655, in discussing the nature of the fiduciary duty owed by the Crown to indigenous people the Court stated that "there are constitutional differences between Canada, and New Zealand, but the *Guerin* judgements do not appear to turn on these".

10 Above n 8, 25.

11 See for example the following reports of the Waitangi Tribunal in *Motunui Report* (Wai 6), International and United States of America references on the extent of indigenous fishing rights; *Mohaka Report* (Wai 119), Australian references on native title; *Fisheries Settlement Report* (Wai 307), Canadian references on the relationship of the Crown with indigenous people.

Commissions, tribunals and the courts play a very important role in recognising and identifying the nature and extent of indigenous rights, in facilitating settlements and last, but not least, in acting as an independent arbiter of the process for the implementation of settlements. In Canada the British Columbia Treaty Commission and the Indian Claims Commission have been established to ensure that there are independent keepers of the process. These measures were seen as necessary to ensure that the Crown was not judge and jury in its own cause.

In the *Crown Proposals for the Settlement of Treaty of Waitangi Claims Detailed Proposals* ("the Crown's Proposals") the Government proposes that the independent monitoring and arbitration role of the New Zealand Courts and the Waitangi Tribunal will be reduced. The Government intends to wind back the institutional arrangements for historical claims. This will include preventing the courts and the Waitangi Tribunal from exercising jurisdiction over settled historical claims. More importantly the winding back process will occur once the Government decides that a sufficient number of historical claims have been dealt with. The justification for this is hard to understand. If what the Crown is attempting is the feeling of completion, resolution and finality, then such settlements must be able to withstand the test of time and independent analysis, and claimants who have been unable to settle should always have the basic right to have recourse to the law without discrimination and to the equal protection of the law as a matter of natural justice.[12]

IV THE LEGAL AND HISTORICAL BASIS OF CLAIMS

The common law doctrine of Aboriginal title and the recognition of Treaty rights are the basis for the negotiation and settlement policies developed in Canada, the United States of America and Australia.[13] Further protection is afforded by constitutional arrangements that:

a) in Australia, permit the Federal Government to make special laws for the protection of Aboriginal people;[14]

b) in Canada, recognise and affirm Aboriginal and Treaty rights;[15]

c) in the United States of America, accord Indian Treaties and tribes a unique status in the law.[16]

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12 These are fundamental rights recognised by the International Covenant on Civil and Political Rights 1966 and the New Zealand Bill of Rights Act 1990, s 27.

13 See for recent examples *R* v *Sparrow* (1990) 70 DLR (4th) 385; *County of Oneida* v *Oneida Indian Nation* 470 US 226 (1985); *Mabo* v *State of Queensland (No 2)* (1992) 175 CLR 1 ("Marbo").

14 The Constitution Act 1901, s 51(xxvi) (Cth).

15 The Constitution Act 1982 (Can), ss 25 and 35.

16 See above n 1, Wickliffe Report 60-61 and 66-67.

These additional constitutional protections are missing from the New Zealand experience.

In New Zealand, Maori expect that in settling Treaty claims negotiation and settlement policies should reflect the guarantees of the Treaty of Waitangi and Maori rights at common law. These two categories of rights are different and may result in different formulae for recognition and settlement. On this point, Cooke P has noted:[17]

> ... that the Treaty of Waitangi has been acquiring some permeating influence in New Zealand law, but also that Treaty rights and Maori customary rights tend to be *partly the same* in content.

The Waitangi Tribunal has also explicitly rejected the view that the Treaty merely affirmed common law rights under the doctrine of aboriginal title.[18]

V CLAIMS POLICIES IN CANADA, THE UNITED STATES OF AMERICA AND AUSTRALIA

In my report for the Parliamentary Commissioner for the Environment, I discussed at length the nature of the claims process in Canada, the Unites States of America and Australia and the policies implemented to attempt settlements. I intend here merely to summarise that material.

A Australia

Beginning with Australia, the process for the negotiation and settlement of land claims has largely been determined by statute. This was the position before and after *Mabo (No 2).*[19] However, *Mabo (No 2)*[20] provided fresh impetus for a co-ordinated national approach to the settlement of claims and in 1993, after negotiations with Aboriginal and Torres Strait Islander leaders and other sectors, the Commonwealth enacted the Native Title Act 1993. The Native Title Act 1993 falls well short of Aboriginal demands. However it has been rightly pointed out that the Native Title Act 1993 may be seen as the first of three possible instalments for the settlement of Aboriginal claims.[21]

The Native Title Act 1993 recognises native title, but this title is protected only in accordance with the Act. The Act also establishes a regime designed to "validate" past Crown acts that may have rendered existing titles to land invalid. The consequences that flow from this validation are that native title is wholly or partially extinguished

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17 Above n 8, 27 (emphasis added).

18 See for example the *Muriwhenua Fishing Report* (Wai 22) 208-209.

19 Above n 13, Marbo.

20 Above n 13, Marbo.

21 B Keon-Cohen "Native Title and Compensation: Or How to Enjoy Your Porridge" unpublished paper, International Bar Association 25th Biennial Conference, (Melborne, October, 1994). The second and third instalments are discussed later in this paper.

depending on the effect of the past act and the extent of any inconsistency with the continued existence of native title.

In addition, once these acts have been validated claimants are only entitled to a form of compensation similar to that enjoyed by an ordinary title holder.[22] Effectively the only real land and natural resources available to settle claims are unoccupied and unused Crown land. The regime under the Native Title Act 1993 also requires the enactment of complementary State legislation.

B Canada

Canada, on the other hand, has taken the long road to perfecting its settlement policies. As a result it has developed perhaps the most sophisticated arrangements of any jurisdiction to date. As earlier stated there are two claims policies in Canada: the Comprehensive Claims Policy 1987 and the Specific Claims Policy 1982 (Outstanding Business).

The Comprehensive Land Claims Policy displays a sensitivity for aboriginal aspirations. It provides for the possibility of self-government, for involvement in the regulation of wildlife and other natural resources, for the continuing interests of claimants in settlement areas once title questions have been addressed, for the recognition or transfer of land and subsurface rights, and for participation in environmental management. In addition, tribal autonomy is respected in the settlement process.

The Specific Claims Policy reflects a similar approach where an Indian Band may have a claim based on breaches of treaties, breaches of obligations under the Indian Act 1985 or other statutes, breaches of other governmental obligations [and/]or for the illegal disposition of band properties or assets.

In Annexes 1 and 2 of my report for the Parliamentary Commissioner for the Environment, I included an analysis of the Nunavut Comprehensive Land Claim Negotiation, Settlement, and Implementation Agreements and an analysis of two specific land claim agreements, all of which illustrate the effects of the policies described above.

C The United States of America

In the United States of America, the Federal Government has attempted different models for the settlement of indigenous claims. These models include the following:

(a) The Indian Lands Claims Commission was established in 1946 to hear historic claims based on five broad categories of wrongs committed by the United States against Indian tribes. Where the Indian Claims Commission found that a claim was well founded the Commission awarded monetary compensation. No land

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22 See above n 1, Wickliffe Report 22-26.

was ever returned to claimants as a result of a successful Indian Claims Commission determination.[23]

(b) The Alaska Native Claims Settlement Act 1971 ("ANCSA") saw the full extinguishment of Aboriginal title in exchange for a settlement that was to be "... accomplished rapidly, with certainty, [and] in conformity with the real economic and social needs of the Natives..."[24] The ANSCA provided for the creation of thirteen regional corporations and village corporations. The lands and natural resources that were used to settle the claim were transferred to these corporations. These corporations are charged with the responsibility for the administration of the settlement. ANCSA never quite worked the way it should. There have been ongoing problems relating to State and native land selections, the enormous powers of the Secretary for the Interior to declare villages eligible or ineligible for benefits, boundary disputes, taxation issues and the fear of alienation now that the twenty year moratorium on the sale of shares in the corporations has been lifted.[25]

(c) Ad hoc responses from the Reagan and Bush administrations to the eastern land claims based on breaches of the Trade and Intercourse Acts. These responses include President Reagan's veto[26] which related to the Mashantucket Peqout Indian Claims Settlement Bill settling their claim land in Connecticut. The President required that claims of this type be validated, that the compensation formula be the land value and compensation received at the time of the transfer (1835), that the State(s) contribute at least half the settlement costs, and that the tribe concerned be a federally recognised tribe.[27]

(d) The Senate Indian Affairs Select Committee, chaired before the recent congressional elections by Senator Inoyue, was used as an alternative claims forum, the expectation being that this could lead to law reform.

VI CONTENT OF NEGOTIATIONS AND SETTLEMENTS IN OTHER JURISDICTIONS

In Canada, the United States, and Australia there has been an emphasis on land and natural resources in the settlement process. But these Governments have also been concerned to acknowledge that issues such as self-determination and political, economic

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23 See above n 1, Wickliffe Report 62-64.

24 The Alaska Native Claims Settlement Act of 18 December 1971, Public Law No 92-203, 85 Stat 688, 43 USC, s 2.

25 See above n 1, Wickliffe Report 74-78.

26 Veto S 366 contained in the Congressional Record of the Senate of the United States of America 5 April 1983.

27 See above n 1, Wickliffe Report 69-71. These administrations did have a commitment to restoring to tribes a reasonable economic base. Such programmes included funding for tribal developments plans and projects.

and social reform must also be provided for in settlements. In relation to these issues the Canadian Government has stated:[28]

> It is recognised that land claims negotiations are more than real estate transactions. In defining their relationships, Aboriginal people and the Government of Canada will want to ensure that the continuing interests of claimants in settlement areas are recognised. This will encourage self-reliance and economic development as well as cultural and social well-being. Land claims negotiations should look to the future and should provide a means whereby aboriginal groups and the Federal Government can pursue shared objectives such as self-government and economic development.

One example of this approach is the Nunavut Agreement with the Inuit which provides for the establishment of a new Territory called the Nunavut with a new democratic government. The Inuit have title to natural resources, cash compensation, management and regulatory functions, a priority in the use and development of natural resources within certain areas such as conservation areas and national parks, and priority in the tendering process for government service contracts.

The Australian Government, while restricting the limits of native title, has been curiously at home with the concept of self-determination. The Minister of Aboriginal Affairs, the Hon Robert Tickner, talks often and comfortably on the subject at conferences, in the media, and abroad.[29] The national model for self-government in Australia is the Aboriginal and Torres Strait Islander Commission ("ATSIC"). This Commission was established under the Aboriginal and Torres Strait Islander Commission Act 1989 (Cth) to undertake a number of functions. Section 7 of the Act requires that the Commission undertake:

(a) the formulation, implementation and monitoring of programmes;

(b) the development of policy;

(c) assistance, advice and co-operation with Aboriginal and Torres Strait Islander communities and organisations;

(d) advice to the Minister of Aboriginal and Torres Strait Islander Affairs on different matters relating to their communities, including the administration of legislation and the co-ordination of activities of the Commonwealth bodies that affect them;

(e) provision of information and advice to the Minister when requested;

(f) such reasonable action as it thinks necessary to protect cultural material and information;

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28 See above n 1, Wickliffe Report 9-10.

29 See for example Hon R Tickner, unpublished address to the Annual Symposium of the University of New South Wales, "Self Determination for Aboriginal Peoples" (Sydney, August, 1993).

(g) research necessary to perform its functions.

In pursuing these functions ATSIC has developed programmes for economic independence, business development, social independence, health and social justice, land acquisitions and development and administration of the Aboriginal Land Rights (Northern Territory) Act 1976. ATSIC also runs an Office of Indigenous Women.[30] ATSIC handled a budget of approximately $600 million for the 1994-1995 year.

ATSIC is made up of seventeen elected and two appointed Commissioners. The Chairperson is appointed by the Minister. The elected Commissioners represent seventeen Regional Councils. Every Aboriginal and Torres Strait Islander on the Australian Electoral Roll is entitled to nominate for and vote in ATSIC regional elections. In total 573 Councillors and 35 Council Chairpersons are elected. These Chairpersons and the Commissioners are all full-time salaried positions. In 1994, after the ATSIC Act was amended the Torres Strait Regional Council became the Torres Strait Regional Authority and it now performs all the functions of ATSIC in that region.[31]

A New Zealand equivalent of ATSIC could only become a viable option in New Zealand after full consultation with the tribes. Many tribes feel that they are quite capable of undertaking all the ATSIC functions themselves in the same way that indigenous groups in Canada, the United States and the Torres Strait Islands have done. The ATSIC model may be viewed as an unnecessary layer over tribal development and autonomy. The functions of ATSIC are certainly matters that the tribes could undertake themselves as part of a settlement package if sufficiently resourced to do so. As Mr Mahuika has said today "Tu mai Porourangi i te Toka a Taiao Ki Potikirua - taku whenua - taku mana - taku rangatiratanga."

The second instalments for the settlement of claims in Australia (the first being the Native Title Act 1992) has been developed in recognition that during the process of colonisation some Aboriginal peoples suffered more as they took the full brunt of colonial settlement, losing their land and natural resource base in the process.[32] For people such as this, the Australian Government has committed extra funds to the establishment and operation of an Indigenous Land Corporation and Land Fund. The priorities and policies of the Corporation and its administration of the Land Fund have yet to be determined but its three basic functions will be:

(a) land acquisitions;

(b) land management; and

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30 See above n 21.

31 Aboriginal and Torres Strait Islander Commission Amendment Act 1994 (No 3) (Cth).

32 See discussion on these instalments and on the Native Title Act 1993 (Cth), above Part VI.

(c) servicing the Corporation's running cost.[33]

The third possible instalment in the settlement of land claims in Australia has been dubbed the "social justice package".[34] This package is still being developed in consultation with Aboriginal and Torres Strait Islander peoples. Consultations have focused on what the social, cultural and economic need of the communities are.

The United States of America model provides for, and recognises, the inherent sovereignty of the tribes, and as a result, tribes run their own governments, justice, health and education systems.

VII THE CONTENT OF THE NEW ZEALAND CROWN PROPOSALS

I do not intend to traverse in detail the Crown's Proposals. Rather, I will select those aspects of the Proposals that I believe require comment.

A Natural Resource Claims

The Crown will not recognise anything more than Maori use and value interests in natural resources. Furthermore it justifies this approach on the basis that:

> The Courts have found that Treaty interests in a resource do not include uses of a resource outside those contemplated at the time of the Treaty. By *implication, therefore,* the Courts have not recognised an Article II ownership interest in natural resources. (emphasis added)

The case relied on by the Crown is *Te Runanga o Te Ika Whenua*.[35] With respect, there is something meanspirited about a proposal that depends on "implication" to justify such an important result. To put this into perspective it is useful to remind ourselves of the essential features of Aboriginal title. Cooke P in the *Te Runanga o te Ika Whenua*[36] case reduced the doctrine of Aboriginal title to a few basic points. The basic features of Aboriginal title are reproduced below:

(a) Aboriginal/native title covers the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of colonisation.

(b) On acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title which goes with sovereignty.

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33 See above n 21.
34 Above n 21.
35 Above n 8.
36 Above n 8.

(c) Where the colonising power has been the United Kingdom, that title vests in the Crown.

(d) But, at least in the absence of special circumstances displacing the principle, the title is subject to the existing native rights. They are usually, although not invariably, communal or collective.

(e) These rights may not be extinguished other than by free consent of the native occupiers, and then only in favour of the Crown and in strict compliance with the provisions of any relevant statutes.

(f) Extinguishment by less than fair conduct or on less than fair terms would be likely to be a breach of the fiduciary duty owed by the Crown to indigenous peoples. (In the United States of America this concept has evolved into a trusteeship.)

(g) Sometimes the requirement of free consent must yield to the necessity of compulsory acquisition of property for public purposes but there is an assumption that on extinguishment of Aboriginal title proper compensation will be paid.

(h) The nature and incidents of native title are matters of fact dependent on the evidence in any particular case and also on the interpretation of a particular court. Some authorities suggest that it as sacred as the "fee simple of the whites" and others have suggested that these rights are no more than mere permissive and apparently revocable occupancy.[37]

Cooke P, however, did not provide an opinion on the issue of ownership to natural resources, his decision turning on the specific nature of the claim to the dams in that case.

The Crown's Proposals therefore unduly limit the settlement proposals to the strictest interpretation of what the doctrine of Aboriginal title is without regard to what the obligations of the Crown are, and without regard to the full extent of the rights protected by the Treaty of Waitangi. In addition they are based on an "implication" that lacks a solid legal foundation. This is a strange result, given that the Proposals attempt to provide an honourable framework for the settlement of Treaty claims.[38]

B Conservation Estate

In Part 2 of the Crown's Proposals the Crown has made it clear that the conservation estate is not readily available for the settlement of Treaty claims and should only be considered in certain circumstances. Since the restructuring of the public sector commenced in 1987, we have seen Governments systematically divesting themselves of

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37 Above n 8, 23-24 for a discussion on the features of Aboriginal title.

38 See for example the discussion on natural resources .

Crown assests to newly created State corporations, Crown entities, local and regional authorities, port companies, and other public ammenities such as hospitals. Since the enactment of the Treaty of Waitangi Amendment Act 1993, arguably the Waitangi Tribunal cannot recommend the return of lands and other natural resources or assests held by these bodies corporate. If that is the correct interpretation of the law then the only lands left to settle claims will be those still in Crown ownership such as the Conservation Estate.

The overseas experience points to the value of joint management regimes over conservation and environmentally sensitive areas. The Canadians and the Australians are making enormous advances in providing recognition for indigenous interests in these areas with title being revested, regulatory and management responsibilities being shared. In addition agreements such as the Nunavut Agreement display an understanding that indigenous people have a priority of interest in the use, management, and development of these areas.[39]

C The Full and Final Requirement

In the *Fisheries Settlement Report* [40] the Waitangi Tribunal had no doubt that a settlement policy should be looking to the future rather than seeking the extinguishment of rights or finalisation of the relationship that exists between Crown and Maori. In other words full and final settlements are inconsistent with the ongoing nature of the partnership established by the Treaty.

D Representation

The Crown's Proposals correctly identify that the issue of Maori representation and mandate to settle claims needs close attention. Any Maori can make a claim to the Waitangi Tribunal[41] or rely on the doctrine of aboriginal rights where those rights have not been extinguished.[42] In *NZ Maori Council* v *Attorney General* Bisson J recognised that the Crown's obligations under the Treaty were to each individual Maori when he said:[43]

> The Maori chiefs looked to the Crown for protection from other foreign powers, for peace and for law and order. They reposed their trust for these things in the Crown believing that they retained their own rangatiratanga and taonga. The Crown assured them of the utmost good faith in the manner in which their existing rights would be guaranteed and in particular guaranteed down to *each individual Maori* the full exclusive and undisturbed possession of their lands which is the basic and most important principle of the Treaty in the context of the case before this court.

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39 Above n 1, Wickliffe Report 28-31 and 56.
40 Above n 11, 11.
41 The Treaty of Waitangi Act 1975, s 6.
42 See generally *Te Weehi* v *Minister of Fisheries* [1986] 1 NZLR 682.
43 [1987] 1 NZLR 641, 715 (emphasis added).

Consequently each individual Maori of a tribe has an interest, in common with other members of the tribe, in the natural resources or other taonga within that tribal domain. Logically it would follow that the Crown has an obligation to ensure that those who purport to represent Maori do so with an adequate mandate to deal with all those individual interests.

In the past there has been no easy solution to this problem. For instance the Waitangi Tribunal has pointed out the difficulties of identifying representative capacity to settle claims and has suggested that this may be directly linked to the repeal of the Runanga Iwi Act 1990.[44] In *Te Runanga o Wharekauri Rekohu* v *Attorney-General*[45] the Court of Appeal also recognised the difficulty, noting that the negotiators of the "Sealords Deal" only signed on behalf of those who authorised them to do so. The Court then noted that it was unable, with any accuracy, to determine "the degrees of support and opposition that the proposal in the deed has from Iwi generally, still less from hapu or individual Maori generally".[46] The tribes unhappy with the "Sealords Deal" have filed a complaint with the International Human Rights Committee alleging breaches of the International Covenant on Civil and Political Rights. The result of the "Sealords Deal" process suggests that under the current arrangements, it is almost impossible to confirm a mandate at a national level and it further suggests that national generic settlements should be avoided.

The Crown in New Zealand has attempted to deal with the problems of representation through the enactment of section 30(1)(b) of Te Ture Whenua Maori Act 1993. Under section 30(1)(b), at the request of the Chief Executive of Te Puni Kokiri or the Chief Judge of the Maori Land Court, the Maori Land Court may determine:[47]

> In relation to any negotiations, consultations, allocation, or other matter, the persons who, for the purposes of the negotiations, consultations, allocation, or other matter, are the most appropriate representatives of any class or group of Maori affected by negotiations, consultations, allocation, or other matter.

Before invoking the procedure the Chief Executive or the Chief Judge must be satisfied that reasonable steps have been taken to determine the representatives of the class or group of Maori affected and that the steps taken have been unsuccessful.[48] The Chief Executive and the Chief Judge may accept a determination on representation by

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44 Findings of the Waitangi Tribunal above n 11, Wai 307, 15, where the Tribunal stated "There was a proposal to provide formally for Iwi structures and give certainty to the situation, in the Runanga Iwi Act 1990. There were arguments over the details however, and rather than deal with them, the Act as a whole was recently repealed. This was unfortunate in our view. Now the position remains as it was, fluid or even flaky".

45 Above n 7.

46 Above n 7, 307. However to determine the issue before the Court it was immaterial to make such an assessment, the decision turning on matters of law and not fact.

47 Te Ture Whenua Maori Act 1993, s 30(1)(6).

48 Above n 47, s 30(2).

the Maori Land Court as conclusive.[49] On the nature of such applications the Maori Land Court has stated:[50]

> The whole purpose of the section 30(1)(b) proceedings is to determine the issue of representation. It is to determine what class or group of Maori are to be recognised as having authority to speak and act for any particular Iwi, hapu or whanau for the purpose of any negotiation, consultation or allocation. It is not an action to determine the allocation or other subject matter for which the representation is needed.

The problem is that the Maori Land Court is only authorised to determine representation issues and allocation. It cannot determine who has the right to settle a claim.

For a number of reasons, certain Maori leaders from various tribes in New Zealand have assumed major positions of influence and have been identified as key representatives of Maoridom. This leadership has come under increasing attack in recent times. For example at the annual meeting of the Maori Women's Welfare League in May 1994 the issue of Maori leadership was identified by the conference as a very real problem. In stressing the importance of whanau and the role of Maori women within the hapu and Iwi, one speaker noted:[51]

> It is my view that we suffer from a paucity of good leadership at present. With some notable exceptions - most of whom are probably here - the leaders of Maoridom are mainly, middle-aged, media addicted men. They have had an increasing tendency over the past decade to mimic the behaviours of government that have been roundly criticised by Maori.
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> They do not share information, or only selectively so, they do not consult, or they do so only partially and often after the real decisions and commitments have already been made, they closet themselves away in secret and private meetings, they set priorities without seeking input, they spend money like water, they play favourites, they use terms and language that exclude rather than include, they always seem to have layers of agenda, they are elusive and unaccountable. They are our current crop of leaders.

This controversy over Maori leadership has major ramifications for the effective negotiation and settlement of Maori claims.

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49 Above n 47, s 30(4).

50 *Mana Cracknell & Rongomaiwahine Tribe* v *Treaty of Waitangi Fisheries Commission* (Unreported, Maori Land Court, Deputy Chief Judge McHugh, 13 October 1993) 6.

51 Hekia Parata *Te Roopu Wahine Maori Toko I Te Ora* \speech to Maori Womens Welfare League, National Conference (Ikaroa, 8-12 May 1994).

E The Billion Dollar Cap

Enough has been said about this aspect of the Crown's Proposals. I merely reiterate that justice will not be served and full and final settlements will never be achieved if claimants do not feel that their claims have been adequately dealt with.

F Omissions from the Crown Proposal

The Crown's Proposals limit the nature and scope of negotiations and settlements to natural resources.

This approach fails to accord any significant weight to decisions of the Waitangi Tribunal, for example the *Te Reo Maori Report*[52] and the decision of the Privy Council in *NZ Maori Council* v *Attorney-General* [53], where quite clearly the extent of Article II rights captures not only tangible assets but intangible matters as well. It may also include matters such as the right to language and culture, control over health systems, justice systems, education systems, and economic development.

The Crown's Proposals prefer to reduce these matters to Article III rights of citizenship. There is something illogical about this approach. It is illogical to suggest that these are Article III rights when Maori are entitled to claim the proper provision of health, education, justice and other similar services with or without the Treaty. An Article II approach on the other hand recognises the rights of tribes to control and deliver these services in a uniquely Maori way through a self-government model.

VIII CONCLUSION

The Government has spent a lot of time and effort on preparing these Proposals. However it is my view that the Proposals fall well behind those developed in similar jurisdictions. This is an unfortunate state of affairs given that twenty years ago, with the establishment of the Waitangi Tribunal,[54] we once led the world in our desire to address historical claims.

As I completed this paper I reflected on the protests and comments made by politicians over the last few days and was reminded of the words of JS Mill in his essays *On Liberty* when he said:[55]

> The worth of a State, in the long run, is the worth of the individuals and bodies composing it; and a State which postpones the interests of their mental expansion and elevation, to a little more of administrative skill, or of that semblance of it which practice gives, in the details of business; a State which dwarfs its men in order that they may be more docile instruments in its hands even for beneficial purposes - will

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52 *Te Reo Maori Report* (Wai 11).
53 [1994] 1 NZLR 513.
54 The Treaty of Waitangi Act 1975.
55 JS Mill, *On Liberty* (1858).

find that with small men no great thing can really be accomplished; and that the perfection of machinery to which it has sacrificed everything, will in the end avail it nothing, for want of the vital power which, in order that the machine might work more smoothly, it has preferred to banish.