Negotiating historical settlements with Indigenous People – the New Zealand Experience

Introduction

The purpose of this address is to discuss the possibilities of Alternative Dispute Resolution (ADR) in New Zealand in disputes between the Crown and indigenous groups, and also in intertribal disputes. Many such disputes come before the courts of New Zealand, normally in the form of judicial review of some decision by the Crown. Court resolution obviously has its place but ADR offers a more expeditious and effective means of resolving many of the disputes in which I was involved in my nine years as Attorney-General of New Zealand and Minster for Treaty of Waitangi Negotiations.

Background

Māori first came to New Zealand, probably from Japan or Taiwan via northern Polynesia, about 1000 years ago. They are divided into tribes or iwi, and each tribe consists of a number of sub-tribes or hapū. For example, for hundreds of years the hapū of Whanganui lived alongside the Whanganui River which flows from the central North Island down to the Tasman Sea. It is New Zealand's longest navigable river. The hapū were known as the River People who lived in a narrow margin along the banks of the river. At one stage there were 140 river settlements. Some iwi have hundreds of hapū; others are very small and may only have a few hapū.

In the early 19th Century, Europeans began visiting New Zealand on a regular basis and, in 1840, the Crown signed a treaty with Māori. This treaty, known as the Treaty of Waitangi, was a very short document which said:[1]

> HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect

> their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands—Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.
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> **Article the First**
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> The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.
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> **Article the Second**
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> Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.
>
> **Article the Third**
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> In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

There has been a vigorous debate over the meaning and effect of the Treaty, and whether the English version differs in meaning from the Māori version. For many years, the status and effect of the Treaty has been debated. Scholars have asked whether the Treaty has a status in international law, and whether, apart from the Treaty, Māori customary law has protection in common law. I will not address any of those issues in this speech.

Promises made at Waitangi were not kept. So, for example, in 1840 Māori owned most of New Zealand but within 100 years, they owned virtually nothing. This was because of:

a. Dubious private and government land purchases. For example, the largest tribe in the South Island (Ngai Tahu) sold most of the South Island to the Crown for around 15,000 pounds (or about a fraction of a penny per acre). Promises were made about providing schools and hospitals but this never really happened. By the turn of the 20th century there were very few members of Ngai Tahu left.
b. Raupatu or confiscation. This was land seizure sanctioned by Parliament. Māori land was confiscated from so-called rebel tribes who had objected to their land being taken. Some of the worst confiscations occurred in what are now the rich North Island dairy farming areas of Waikato and Taranaki. Tribes who supported the Crown, or who didn't take sides in the disputes, fared little better because most of their land was taken as well.
c. The Crown also established the Native Land Court which didn't operate as a court so much as an agent of the Crown. Legislation passed in the mid-1860s converted customary lands (which were held in collective ownership) to individual title. Obtaining title was a very time consuming and expensive operation. To add insult to injury, those costs were generally borne by the Māori. It was not unheard of for both the hearings and surveying to absorb the entire value of the land so owners were left with nothing.

When Europeans first came to New Zealand, local Māori took to capitalism and commerce very well. They exported fish over to New South Wales and trade with your colony was highly successful in other products like flax. Exports of other products went to Asia. Māori

owned flour mills throughout New Zealand. For example, over 50 were built in Waikato in the years following the signing of the Treaty. One of the great tragedies of New Zealand was that the actions of the Crown and settlers destroyed the commercial trade of the Māori and reduced them to penury. With the loss of land came the inevitable loss of population. At the time the Treaty was signed it was estimated that there were around 100,000 Māori but, by 1900, that population was reduced to around 40,000. Life expectancy figures were appalling. Today there are around 700,000 New Zealanders of Māori decent. Life expectancy figures are still behind Europeans (or Pakeha).

In the years after the signing of the Treaty, not only land was lost. Indigenous language use declined. I remember meeting an elderly lady in a remote part of the North Island who told me that she was beaten at school for speaking Māori. That was the pattern throughout New Zealand for many years. Today only around 20% of the Māori population can speak its own language.

A change of attitude

In the early 1970's there was a growing awareness of the aspirations of Māori and the need to start to address these longstanding historical grievances. In 1975 Parliament passed the Treaty of Waitangi Act, the preamble of which explains its purpose:[2]

> *Whereas on the 6th day of February 1840 a Treaty was entered into at Waitangi between Her late Majesty Queen Victoria and the Māori people of New Zealand: And whereas the text of the Treaty in the English language differs from the text of the Treaty in the Māori language: And whereas it is desirable that a Tribunal be established to make recommendations on claims relating to the practical application of the principles of the Treaty and, for that purpose, to determine its meaning and effect and whether certain matters are inconsistent with those principles.*

Initially the Tribunal could only inquire into contemporary grievances, but its jurisdiction was enlarged in the mid-1980's[3] so that any Māori could claim that he or she, or any group of Māori of which he or she is a member, is or is likely to be prejudicially affected –

a) *"by any ordinance of the General Legislative Council of New Zealand, or any ordinance of the Provincial Legislative Council of New Munster, or any provincial ordinance, or any Act (whether or not still in force), passed at any time on or after the 6th day of February 1840; or*
b) *by any regulations, order, proclamation, notice, or other statutory instrument made, issued, or given at any time on or after the 6th day of February 1840 under any ordinance or Act referred to in paragraph (a) of this subsection; or*
c) *by any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown; or*
d) *by any act done or omitted at any time on or after the 6th day of February 1840, or proposed to be done or omitted, by or on behalf of the Crown,—*

and that the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section."

This amendment has transformed the Crown/Māori relationship in the years following its passage. Since the mid-1980's Māori, either individually or in groups, have made claims to the Tribunal which has produced many reports recommending action by the Crown to remedy its past failures.[4]

The first reports started to be released in the late 1980s/early 1990s and the Government of the day, led by Rt. Hon Jim Bolger[5], had to determine how to respond to them. In 1992 it set aside $NZ 1 billion for settlement of all historical claims. (This was never going to be adequate and this figure was abandoned by the late 1990's. The settlements are currently worth about $NZ 2.5 billion and the final figure will be probably around $NZ 3.5 billion). Mr Bolger created a new portfolio called Treaty of Waitangi Negotiations. The responsible Minister was to negotiate and conclude the settlements of all historical grievances.[6]

The first major settlement was concluded in the mid-1990s with Waikato Tainui in the Central North Island in respect of land confiscation (or raupatu) during the Māori Land Wars.[7] This settlement only related to land claims. The Settlement Act specifically excluded

claims by the Waikato Māori to the rivers and harbours within their territory. So the settlement was not full and final but partial.

The Waikato River claim was settled in 2010[8] and the Waikato harbours claims are yet to be resolved. Settlements with many other tribes have been concluded since the mid 1990's.[9]

Settlements have been signed with 61% of all expected groups and have generally enjoyed support across the political divide. They have also gained increased public understanding and support over the last two decades, although that support can never be taken for granted. The goal is to achieve just and durable settlements with Māori to address past failings properly and then move the country forward.

The negotiation process

What are the key stages in a settlement negotiation? The process has been reviewed and refined several times since the first negotiations in the early-1990s. All steps present opportunities for litigation and therefore ADR. The current approach is as follows:

a) Deed of mandate: - This is the first and vital stage. The Crown needs to know with whom it is negotiating and must therefore recognise the mandate of an entity endorsed by the claimant community to represent it in negotiations with the Crown. This can be a difficult (and litigious) process especially if, for example, a dissenting faction is opposed to one group representing the negotiating tribe. Disputes over mandates have blighted many negotiations. For example, in the north of New Zealand, the largest tribe, Ngapuhi, has been unable to progress its negotiations with the Crown because of a seemingly never ending dispute over mandate – who will represent Ngapuhi and how will power be devolved? When I made a decision

recognising the mandate of one group, opponents took me to the Waitangi Tribunal. These kinds of disputes are tailor made for ADR.

b) Terms of negotiation: - The next stage is to be very clear the way in which the negotiation will be conducted. The terms will set out the "ground rules" and objectives for the negotiations.

c) Agreement in principle: - After sometimes lengthy negotiations, the parties will agree the essential elements of a settlement and will sign an agreement in principle or heads of agreement. This is a non-binding agreement which outlines, at a high-level, all redress proposed to settle the claims. Technical and drafting details are agreed during the deed of settlement and legislation phases. Some agreements in principle are skeletal whilst others are very detailed and approach the level of detail required in a deed of settlement. It all depends on the circumstances.

d) Initialling a deed of settlement: - An initialled deed of settlement sets out in technical detail the historical claims and the redress agreed between the Crown and mandated body. For the purposes of the Crown's internal accountancy this is the point at which the value of the settlement is counted against multi-year Treaty settlements appropriation. Interest on the settlement figure usually commences from this date, although some settlements have started to accrue interest once the agreement in principle is signed.

e) Ratification: - During ratification, the claimant community has the opportunity to vote on the final Crown offer as set out in the initialled deed of settlement. It will also usually vote on the proposed post-settlement governance entity which will receive, hold and manage settlement redress on their behalf. This stage can also be very litigious as dissenters sometimes try to stop a settlement proceeding. Some

recent settlements have been delayed because of ratification problems. It is also inevitable that there will be disputes about overlapping claims. One tribe will challenge the granting of particular redress to the settling tribe on the grounds that some specific redress should be given to them. At least one of these cases has recently reached the Supreme Court and there is other litigation in the High Court and Court of Appeal. One unresolved overlapping claims case highlights the difficulty and intensity of the issue. In the Bay of Plenty in the North Island, there are many tribes with overlapping claims. One group of three tribes settled with the Crown in 2011/12. Part of their package was a framework for restoring Tauranga Harbour. To the north of this group of tribes is another group who maintain that they too have rights in Tauranga Harbour and the right to be represented on a new statutory board. It raises a reasonably commonplace issue of whether an interest creates a right of representation. Some would contend that an exiguous interest should not have the right of representation. This dispute has poisoned relationships between the two groups and caused delays to deed signings. The economic consequences of delay can be serious.

f) Signing a deed of settlement: - The mandated body, the post settlement governance entity and the Crown sign the final deed of settlement once the Crown is satisfied that the claimant community has accepted, by ratifying, the deed of settlement as concluding all their historical claims.

g) Legislation: The Crown's office responsible for drafting statutes drafts a settlement bill for introduction to Parliament. This legislation must be agreed to by the negotiating group. It gives effect to the ratified deed of settlement and also

authorises settlement redress to transfer to the ratified post-settlement governance entity.

Most negotiations are led by Chief Crown negotiators appointed by the Minister. They come from both the private and public sectors.[10] At key points in a negotiation, the Minister will be available to conduct a face to face negotiation. This can be very useful if there is a stalemate in negotiations.

What is contained in a settlement?

First (and arguably most importantly), an acknowledgement of historical acts or omissions by the Crown which may have resulted in the erosion of traditional tribal structures and practices, loss of tribal lands, loss of access to forests and waterways, food sources and sacred places.

Secondly, an apology for the Crown's actions. Apologies are not pro forma; they are carefully drafted by Crown and Māori historians. They can be the source of intense debate between the parties. They can also upset some of the more conservative groups in society, some of whom write to me to say Māori are not indigenous and that the Greeks were here first!

Thirdly, commercial redress. This is not restitutio in integrum or full compensation. The country could never afford to pay such large sums. Nor is it notional, as is often alleged by some people. It is redress which is designed to strengthen the capital of tribes alongside existing tribal assets within tribes that have been built up outside of settlements.[11] An important aspect of commercial redress is a right of first refusal to purchase surplus property owned by the Crown for a period following settlement. In urban areas this can be a

very valuable part of the settlement package. I have already mentioned the original $1 billion figure set aside for settlement of these claims in the early 1990s, and that all claims will probably cost the Crown around $3.5 billion. The two tribes which settled first in the mid-1990s both have relativity clauses in their deeds, entitling them to a percentage of any sum exceeding $1 billion in 1995 dollars. There are arbitrations with both tribes at the present time to determine what should be included in the figure to be recovered by them. These arbitrations are being conducted by Sir Andrew Tipping, a retired Supreme Court Judge. These relativity clauses cause angst in the claimant community as some allege the "early settlers" will be unjustly enriched. Some incentive, however, was required to start the process in the early years.

Fourthly, the return to the tribe of culturally significant land now in the ownership of the Crown. This will include, for example, ancient burial sites and places where villages once stood. Originally Crown policy provided for the return of small and significant sites but the policy has been applied more liberally in recent years.[12]

Fifthly, an agreement will provide for a post settlement relationship between the Crown and the settling tribe. These settlements are not "commercial deals" as they are sometimes inaccurately and derisively called; they are important historical settlements which will hopefully transform the relationship between Crown and Māori in the future. A detailed and meticulous approach is taken to settlements because they are designed to last forever.

As has been said, these settlements are to be full and final. However, the greatest risk to finality is that the Crown forgets its obligations in settlements. There are currently around 7000 ongoing commitments to date. That is why a Post-Settlement Commitments Unit has been established to work within the Crown to safeguard the durability of settlements. New

Zealand history is littered with examples of agreements between Crown and Māori which have been undermined or ignored because of Crown action and inaction.

The final component of a settlement may be an agreement to give a tribe an opportunity to co-govern a natural resource like a river or lake. The extent of the co-governance mechanism will depend on the intensity of the relationship between the settling tribes and the resource.[13] There is no "one size fits all" approach to this aspect of a settlement. It all depends on the circumstances. So, for example, the arrangements negotiated with Whanganui River groups are very different to those negotiated with other tribes over the Waipa[14] or Rangitaiki[15] Rivers, or over arrangements for rivers in an area of the east coast of New Zealand's North Island called Hawke's Bay.[16]

The negotiating process is far from perfect. A former UN Special Rapporteur, James Anaya, visited New Zealand in 2010 to look at the way this country negotiated historical settlements with Māori. He noted the various (and obvious) faults with the settlement process but concluded that "the Treaty settlement process in New Zealand, despite evident shortcomings, is one of the most important examples in the world of an effort to address historical and ongoing grievances of indigenous peoples, and settlements already achieved have provided significant benefits in several cases. However steps need to be taken to strengthen this process."[17]

Opportunity for ADR

I have summarised the key components of the historical settlement work in New Zealand and have shown how litigation can affect every stage, if not in the senior courts, then before the Waitangi Tribunal.

I would make a number of observations about these disputes:

a. First, ADR is in many cases a superior method of dispute resolution. Many of the disputes arise because of personality differences and poor interpersonal relationships. I often quote former Northern Ireland Secretary Willy Whitelaw who would lament about meeting Catholics and Protestants in Belfast. He concluded that some of them couldn't even agree on what day it was. I know the feeling! Such ill will is often exacerbated by expensive and time consuming litigation.
b. Secondly, much litigation is conducted by lawyers who are not up to it. The Treaty Bar is patchy. It is self-evident that the better the lawyer, the better the result for the client (obviously) and the better for the administration of justice. Some of the major law firms and senior members of the Bar act in these matters but more should do so. I was appalled recently to hear of the amount of legal aid paid out after an eight day hearing of a mandate dispute in the Waitangi Tribunal. Over $1 million dollars was expended on a matter that should have been the subject of mediation for a quarter of that sum. Part of the problem is that the lawyers believe in their clients' case. As you know, that is a fatal flaw. The lawyer is not there to believe in a case; he/she is there to win.
c. The Waitangi Tribunal was, as noted earlier, established in 1975 to investigate contemporary grievances. Then in 1984 its jurisdiction was expanded so that it could inquire into historical grievances. When a Settlement Act is passed, the jurisdiction of the Tribunal to investigate the matters covered by the legislation is extinguished. The Tribunal's historical work has been of very high quality; its reports are an invaluable historical resource and they deserve careful consideration. The Tribunal

is, however, an unsuitable forum to resolve mandate disputes and overlapping claims. Their role is to investigate Crown action so to bring a claim within the Tribunal's jurisdiction where, for example, the dispute is in reality one between tribes. The claim has to be fashioned as some kind of failure on the part of the Crown. Cases often go off the rails at an early stage as a result. It is the wrong forum to determine these disputes; ADR is a superior and more effective form of dispute resolution.

Conclusion

I suppose that at a conference focusing on ADR, one could expect someone like me to deny litigation and praise other forms of dispute resolution. I emphasise, however, that I am not doing that. Litigation in the senior courts and the Waitangi Tribunal has its place. Had it not been for the work on the Court of Appeal and the Privy Council in the 1980s and 1990s, New Zealand would arguably not be where it is today in this hugely important area. In many disputes, ADR will be the preferable means of dispute resolution, particularly for inter and intra tribal disputes. Protracted litigation is not the answer for all the obvious reasons – it is time consuming and expensive and should be where possible. Some lawyers who would work in this area are yet to learn this lesson. I hope they will some time soon.

Hon Christopher Finlayson QC

Wellington

10 August 2018

[1] Found in Schedule 1 of the Treaty of Waitangi Act 1975

[2] Treaty of Waitangi Act 1975

[3] Treaty of Waitangi Ammendment Act 1985

[4] See, for example, the report on which the Whanganui claim was negotiated – WAI 167, The Whanganui River Report (1999), ISBN 1-86956-250-x

[5] Rt. Hon James Bolger ONZ, Prime Minister of New Zealand 1990-1997; subsequently Ambassador to USA 1998-2002. His autobiography *A view from the Top: My Seven Years as Prime Minister*, Viking Press, 1998, has a very interesting account of his stewardship of the early Treaty Settlements, see pp 176-184. An excellent summary.

[6] The author held this position from 2008 to 2017, as well as being Attorney-General

[7] Waikato-Tainui Raupatu Claims Settlement Act 1995: see particularly section 8 for the meaning of the phrase "Raupatu Claims"

[8] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010

[9] A full list of settlement legislation is contained in schedule 3 of the Treaty of Waitangi Act 1975. Once an historic claim has been settled, the Waitangi Tribunal has no jurisdiction to inquire or further inquire into a claim – see section 6

[10] For example, the Chief Crown Negotiator for the Whanganui River Claims was John Wood CNZM, QSO, a retired diplomat who served as New Zealand's Ambassador to Iran, Turkey, Pakistan and twice in the United States (1994-1998 and 2002-2006). He is also a former Deputy Secretary of Foreign Affairs, and is currently Chancellor of the University of Canterbury. He was recommended to the author by New Zealand's current Ambassador to the United States, Hon Tim Groser, who described John as a brilliant and innovative negotiator. Groser was completely correct. See a very recent interview with him in Wellington's Dominion Post on 8 August 2018.

[11] See, further, http://www.chapmantripp.com/Publication where the Māori economy is estimated to be worth approximately $NZ 50 billion of which $NZ 6 billion comes from Treaty Settlements.

[12] See, for example, part 2 of the Ngati Pahauwera Claims Settlements Act 2012 which sets out the cultural redress negotiated with the iwi

[13] For example, some iwi will be satisfied with an advisory body while others seek a full co-governance arrangement

[14] Nga Wai o Maniapoto (Waipa River) Act 2012, a full co-governance and co-management regime for the Waipa River, the King country.

[15] Ngati Whare Claims Settlement Act 2012; see especially sections 108-120 which provide for the establishment of the Rangitaiki Rivers Forum, the purpose of which is the protection of the wellbeing of the Rangitaiki River in the Bay of Plenty

[16] Hawkes Bay Regional Planning Committee Act 2015

[17] See fn iii (above) at p22, para 67