

Treaty Settlements

Achieving enduring settlements

by Jeremy Gardiner

(Gardiner, J., n.d.)

Abstract

The goal for both parties in the settlement process is to achieve an enduring settlement. However, current Treaty policies, including the Crown's requirement for all settlements to be final regardless of whether they are full, may actually undermine that goal.

Treaty settlements are primarily political settlements rather than compensation. The Crown does not set out to compensate claimants for Treaty breaches, either because those breaches are too difficult to quantify or the remedy is out of reach legally, politically or economically. The settlements reached are rarely full. Despite this the Crown insists on defining all settlements as "full and final", which claimants must accept as a condition of settlement. The question then arises whether settlements that are not full can truly be final.

The risk is that by seeking to declare settlements as final to mitigate perceived political risk, without fully considering how to achieve that end, settlements will lack endurance.

Endurance

A more appropriate goal for the Crown and claimants to work towards is enduring settlements.

The characteristics of enduring settlements are:

- A sense of equity / fairness has been achieved. This must be judged both on a settlement's own merits and in relation to other like settlements.
- A sense of injustice has been resolved. Often the process of settlement is as important as the settlement itself.
- The approach to settlement is consistent over time. Major shifts of policy or approach to settlement are likely to undermine earlier settlements.

This approach would require the Crown to acknowledge that settlements are not full. Enduring settlements can only come where settlements meet both the initial needs of the claimant groups and yet are flexible enough to reflect changes in the aspirations of settled groups, Crown policy and time.

Endurance also requires that current and future approaches to settlement do not undermine earlier settlements and that the rules of engagement do not change significantly. Much of the Crown's early Treaty policy and rules of engagement (many of which are still used) were developed out of the Crown's experience of negotiating with Waikato-Tainui and Ngāi Tahu. As new negotiations take place opportunities arise for groups to develop new settlement mechanisms which may not have been available to earlier settlements.

Iwi who settled early were faced with three fundamental Crown negotiating positions: fiscal envelope, relativity and full and final. Subsequent developments have seen many of those

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fundamental negotiating positions change.

Fiscal envelope

The fiscal envelope policy was set in 1994. The policy fixed the value of all Treaty claims at \$1 billion. While the policy was officially rescinded in 1996 it had a major effect on the relativities of future settlements.

A review of the current list of settlements shows the fiscal envelope currently stands at between \$1.3 and \$1.4 billion. This figure does not include the settlements figures for Ngāti Porou, Tūhoe, Ngāti Kahungunu, Taranaki, Auckland, Wellington or river claims. A total figure of \$2 billion is a more realistic forecast.

This is double the original fiscal envelope figure. While the Crown provided a ratchet clause for Ngāi Tahu and Waikato-Tainui that will result in each iwi receiving an additional 17% of the final fiscal envelope total, in the event the total exceeds \$1 billion, this was not available for iwi that settled later.

Earlier claims were clearly settled with a view to not breaching the overall fiscal cap. Therefore if that cap is now twice the original level early settled iwi might feel aggrieved if their settlements are not allowed access to the ratchet clauses. This poses significant political problems for the Crown, who promoted full and final settlements to the public but may face even more modern Treaty claims arising out of the settlement process itself. If endurance was the focus for settlement then the Crown would be able to return to the negotiating table and address this issue.

Relativity

In 1995 the Crown set the relativity clause. This clause stated that all future settlements would be benchmarked against existing settlements. In effect this clause has seen all future claims assessed relative to the Ngāi Tahu and Waikato-Tainui settlements.

It is, however, unclear the basis on which the Crown assesses relativity. Outside of specific economic measures such as land loss, economic value or population it is very difficult to assess relativity: how do you assess the relativities of a settlement for land confiscation against one for land sale?

To add to the lack of clarity recent settlements appear to further challenge the notion of relativity.

Iwi	Summary of settlement	Value*
Ngāi Tahu (settled 1998)	<ul style="list-style-type: none">Iwi population (at settlement) = 29,000Loss of land and culture“nine tall trees”	\$170 million Ratchet clause = \$170m?
Waikato-Tainui (settled 1995)	<ul style="list-style-type: none">Iwi population (at settlement) = 22,000Confiscation of 1.2 million acresRiver	\$170 million Ratchet clause = \$170m? River claim =

		\$100m
Ngāti Awa (settled 2005)	<ul style="list-style-type: none"> • Iwi population (at settlement) = 13,000 • Confiscation of 245,000 acres • Execution and imprisonment • Further land alienation through Native Land Court 	\$42.35 million
Ngāti Toa (Agreement in Principle 2009)	<ul style="list-style-type: none"> • Iwi population by census (at settlement) = 3,500 • Land loss 	\$75.35 million
Ngāti pāhauwera (Deed of Settlement 2009)	<ul style="list-style-type: none"> • Iwi population by census (at settlement) = 1,700 • Land loss • Loss of life 	\$20 million
Ngāti Kuia (Deed of Settlement 2010)	<ul style="list-style-type: none"> • Iwi population by census (at settlement) = 1,600 • Land loss 	\$25 million
Ngāti Porou (Deed of Settlement)	<ul style="list-style-type: none"> • Iwi population (at settlement) = 72,000 • Land loss • Significant social damage 	\$110 million (estimate)

* = (not including forestry rentals)

In seeking to establish enduring settlements the Crown must ensure that settlements are equitable; ensuring relativity among early and current/future claims is one aspect of this. The Crown must also ensure that, for the duration of the Treaty settlement process, claimants should have access to the same opportunities whether they settled early or late.

For example, in order to ensure enduring settlements all iwi should have access to the ratchet clause. Similarly, future developments in settlement policy should be available to earlier settled iwi.

While this could be perceived as a revolving door for settlement, the reality is that a lack of equity (perceived or otherwise) threatens to undermine existing settlements. Each settlement contains the obligation on the Crown to act in good faith; acting equitably across settlements is one measure of this.

Developing the goal of enduring settlements requires a significant shift by the Crown to view individual settlements as final only once all settlements are final. This will ensure that whether a claimant group settled early or late they had access to the same opportunities. The advantage for

the Crown is this will likely lead to more enduring settlements. The disadvantage is that the Crown has already made this difficult for itself by declaring earlier settlements as full and final.

Public Good

One opportunity for the Crown to begin the public discussion on enduring settlements is by promoting the notion of iwi/Māori contribution to the public good through settlements.

Settlement groups generally make significant compromises to settle claims. One of those compromises is the acceptance (at least publicly) of the “full and final” condition.

The implications of the second compromise are not generally appreciated and recognised either by the Crown or the general public. Claimant groups, particularly larger ones, generally leave significant value on the table when they settle. For example, an economic impact report on the value of the Ngati Awa settlement in 1995 identified the ‘real’ value of the iwi’s loss at somewhere between \$500 million and \$1 billion. Ngati Awa eventually settled for \$43.25 million.

It could be argued, therefore, that Ngati Awa left anywhere between \$456 and \$956 million of value on the table in agreeing to its settlement. The ongoing value of this goodwill to the country is not generally appreciated or recognised by the Crown. So while these settlements cannot be full there should still be an onus on the Crown to continue to recognise the residual value of settlements.

Summary

Endurance rather than finality should be the focus for settlement.

While there are undoubted advantages to settling early, including having access to funds for investment and growth and the ability to move out of grievance mode, these real advantages may be outweighed by the perception (or even reality) that iwi who settled later are receiving a better deal.

At the same time it is clear that a revolving door approach to settling Treaty claims is neither sustainable nor desirable. However, in seeking to avoid this by declaring settlements full and final the Crown may in fact be exposing itself to this risk.

The only way to ensure Treaty settlements stay settled and the country moves past this part of our history is for settlements to be enduring. The pathway to this goal starts with the Crown recognising that individual settlements are not complete unless all settlements are complete. The Crown must also ensure that groups have equitable access to settlement mechanisms regardless of when they settled. And, finally, the Crown must continue to recognise and provide for the ongoing investment in the country by settlement groups through the value “left on the table” during the settlement process.

About the author



Jeremy Gardiner is Chief Executive of Te rūnanga o Ngāti Awa. The rūnanga is an iwi authority representing around 15,000 descendants of Ngāti Awa. Ngāti Awa's rohe (tribal area) is located in the Eastern Bay of Plenty, Aotearoa / New Zealand. The rūnanga has responsibility for progressing the economic, cultural, social, political and environmental interests of Ngāti Awa. The rūnanga was established in its current form in 2005 at the completion of Ngāti Awa's Treaty settlement

Jeremy has been Chief Executive since 2006 and was involved in the establishment of the current rūnanga structure. Prior to that he had a range of roles in public and private sector including the development of a new governance model for Māori, communications consultant and working on Y2K in London's investment banking industry.

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3 Comments



1. *Max* says:
June 25, 2011 at 3:39 pm

Thank you for providing such interesting information about the detail of the settlements. Sometimes I feel that there is not enough of this basic information out there (or perhaps it is that I am ignorant!). Maybe part of emphasising the "public good" nature of settlements is also the provision of information by iwi and other groupings about how settlement money is being used – Ngai Tahu, for instance, seems to have been very good at publicly explaining how settlement money has helped its nurturing of young people. Do you agree, and do you have any ideas about how this information might be disseminated to create further public support for settlements?



2. *Jeremy* says:
August 8, 2011 at 11:56 am

Kia ora Max. I think you will probably find that for most settlement groups information on what they are doing is publicly available via their websites. It is also important to remember that once settled the money is no longer public money and therefore there is no legal obligation to report publicly except to members of that settlement group.

However I do agree that the more we demystify the settlement process the more likely we are to address some of the negative views held of settlement.



3. *Hone* says:

September 12, 2011 at 10:46 pm

It seems that Maori have no choice but to rush towards settlement as we near the cut off date of 2014.

What most people don't understand is that this is not just about settlement.

The settlement document includes a clause that extinguishes the Treaty rights of those who sign and it is not negotiable.

By international law, this is the only way the crown can destroy the Treaty, by Maori signing it away, hiding it in a clause is the easiest way for it to go unrecognized.

The sad fact is that due to the time constraint, nine tenths of Maori tribes have signed already but not Nga Puhi and they are a good example to observe.

The question is, should our new future start with the crown one step ahead of everyone else again?

Through the Waitangi Tribunal so far, Nga Puhi have completed 5 weeks of stage 1 hearings to address the breaches of the 1835 Declaration of Independence and the 1840 Treaty of Waitangi.

The Tribunal's final report on this is due out in June 2012.

The Waitangi Tribunal has indicated in a memorandum that Stage 2 hearings are now underway to allow Nga Puhi claims to be heard.

The Tribunal has also stated in this memorandum that this is an enquiry like no other. Nga Puhi are the largest ever enquiry district in New Zealand, in terms of the number of claims, and the size of the claimant communities.

The majority of Nga Puhi leaders and claimant communities are in support of the Tribunal processes before any settlement is to be considered, if considered at all.

Meanwhile, the crown has allowed a charitable trust to seek a mandate to negotiate settlement for Nga Puhi. This charitable trust is called Tuhoronuku.

Contrary to what the media are saying, Tuhoronuku does not actually have the majority support of the leaders and claimant communities of Nga Puhi.

Tuhoronuku have been selective on who they invite to their meetings and have elected themselves from within the trust itself, making it appear as if they have wider support.

The actual majority of leaders and claimant communities of Nga Puhi are speaking out against Tuhoronuku but most of the media are not getting to the important facts, conveying

the story as if Nga Puhi is just fighting amongst its self.

On the 12th of August 2011, the crown supported Tuhoronuku to go for mandate to negotiate full and final settlement for all of Nga Puhi. This mandate closes for voting at 12 Noon, Wednesday the 21st of September 2011.

Nga Puhi don't want help towards final settlement, they want help for their claims to be heard.

The majority of informed Nga Puhi people are not after the money, they want their mana restored.

If we want to continue without causing new grievances for Maori, there is one simple solution that rests with the crown.

Will the crown start considering human life as its highest value, above profit?

Will the crown fulfill its treaty obligation and fund the Waitangi Tribunal adequately?

Will the crown fulfill its treaty obligation and drop its arbitrary cut off date of 2014?

If not, our new future may not be as bright as we may think when you consider the facts as opposed to wishful thinking or just opinions displayed through well-funded propaganda machines.

In time, history will tell the real story.

regarding settlement, the world economy is in decline, we are destroying our planet at such an alarming rate that people just switch off to the topic.

We have to create more products that break down faster because the economy is based on cyclical consumption. It is like a real life frankenstein!

What will happen if the native peoples of the world give up fighting to protect their land from ruin and take the money? How long does the human race have to live after that?

Maybe we should all become more like the natives, not the other way around.