

One Head of the Hydra: Personifying ‘the Crown’ in the Pioneering Treaty of Waitangi Settlement Negotiations.

[This is a revised version of a paper presented on 2 November 2017 to a conference at the University of Auckland: ‘The Crown: Perspectives on a Contested Symbol and its Constitutional Significance in New Zealand and the Commonwealth’.¹]

The following thoughts are based on my recall of the use and concept of the term ‘the Crown’ during the early years of negotiations between the New Zealand state and Maori claimants under the rubric of the Treaty of Waitangi. Memory is, of course, exceedingly fallible. To help counter this factor, I consulted some documented evidence from this pioneering period to test the accuracy of my memories. More broadly, over the last three decades I have on occasions discussed the issue of the Crown and its role in Treaty negotiations with colleagues who were tribal or Crown negotiators at the time, as well as with scholars and students at the Stout Research Centre for New Zealand Studies in more recent years.²

The purpose of the paper is to examine whether, during the first ten years of Crown-Maori negotiations to settle Treaty-based grievances, the virtual conflation of Crown and state by both sides of the negotiating table helped or hindered Treaty settlements and relationships. I conclude that it did both, but that on balance the concept of the Crown, with all its malleability, proved to be considerably more useful than counter-productive.

I joined the Department of Justice in 1989 as a member of a new six-person Treaty of Waitangi Policy Unit (TOWPU), formally established in 1988, just as it was becoming fully operational the following year. Headed by the legal scholar Alex Frame, TOWPU was established to provide policy advice to government.³ As the only historian in the team, my life became particularly busy when the unit was instructed by the government to carry out, on a ‘scoping’ basis, negotiations with the Waikato-Tainui tribes – and soon with other claimant groupings.

¹ I decided to submit this paper to the *Treaty Research Series* after I had received several requests for the text. I am grateful to both the paper’s referees and the conference organisers for providing the initial opportunity to collect together my thoughts on this issue. Some other articles which take their origin from the conference can be seen in a special issue of *The Round Table: The Commonwealth Journal of International Affairs*, Volume 107, Number 4 (2018), ‘The Crown and Constitutional Reform’, edited by Cris Shore, Sally Raudon and David V. Williams.

² For two Victoria University of Wellington doctoral theses covering the foundational period for Treaty of Waitangi settlements see: Martin Fisher, ‘Balancing rangatiratanga and kawanatanga: Waikato-Tainui and Ngāi Tahu’s Treaty settlement negotiations with the Crown’ (2015) and Therese Crocker, ‘Settling Treaty Claims: The Formation of Policy on Treaty of Waitangi Claims in the Pioneering Years, 1988-1998’ (2016).

³ Alex Frame, ‘Raupatu Settlement – Legal Finality and Political Reality’, in Richard Boast and Richard S Hill (eds), *Raupatu: The Confiscation of Maori Land*, Wellington, 2009.

Such ‘direct negotiations’ by-passed the Waitangi Tribunal, the standing commission of inquiry into grievances under the Treaty which was established in 1975 to advise on contemporary claims but whose powers were extended in 1985 to encompass historical claims. The political experiment of entering into direct negotiations was partly motivated by the neoliberal Fourth Labour government’s desire to deflect a major threat from the Waikato-Tainui confederation to its asset sales processes, and more broadly by the need to address increasing pressure from tribes at a time when the lengthy and expensive hearings processes of the Tribunal had not led to compensation for historical grievances. When the scoping negotiations quickly showed promise, direct negotiations were offered to all iwi/tribal, hapu/subtribal and other claimant groupings which were willing to bypass Tribunal hearings and which met the appropriate criteria with respect to research and representation.⁴

The Fourth Labour government had divided public sector functions into policy and operations, and the two were supposed to be separated. But it was TOWPU, established to provide policy advice, which was given the task of negotiations. In these the Crown became, for me, a far more prominent concept than it had been in my previous role as an historian in the Department of Internal Affairs. That department’s roles included constitutional responsibilities (such as official insignia or royal tours) but my section had an institutional subculture that was state-centred. We were called ‘official’, not ‘Crown’, historians, and we saw ourselves as ‘public servants’, rather than as agents or representatives of the Crown.

In the Department of Justice, however, I found a more Crown-orientated discourse. This was perhaps in part because of its many operational functions – in particular, it continued to run the country’s courts and prisons (until its deconstruction in the mid-1990s under the Fourth National government). Its vast operations explicitly involved the legitimacy of the power of ‘the sovereign’ to detain and incarcerate a citizen, an assumption which goes to the heart of the meaning of sovereignty. At Justice, in fact, I was explicitly deemed to be a *Crown* official. Since I had written a great deal about Crown depredations against Maori in the 19th Century, I was not entirely comfortable about this. I became even more uncomfortable when, drafted into negotiations (there were no negotiators in the founding complement of TOWPU so the task fell to its existing professional staff), I soon had to present ‘Crown positions’ to Maori claimant groupings.⁵

As an official historian in Internal Affairs, I had been able to take any position the evidence had led me to. In my capacity as the person in charge of history on Treaty issues in Justice, I could still provide free and frank policy advice based on my efforts to understand the events of the past and what had motivated them. But now, too, I also sometimes had to take negotiating positions I personally disagreed with – the result of

⁴ For general context for Treaty negotiations see: Claudia Orange, *An Illustrated History of the Treaty of Waitangi*, Wellington, 2004, chapters 7 and 8, and Richard S Hill, *Maori and the State*, Wellington, 2009, chapters 9 and 10.

⁵ Other TOWPU staff also felt such discomfort. Sally Mclean recalls (in an email to me of 20 September 2018) ‘struggling with sitting on marae as the embodiment of the Crown, when, as historians, we had a keen understanding of how badly the Crown had behaved in the past’. Maori staff were especially conflicted, but as Tom Winitana (who advised the Minister in Charge of Treaty of Waitangi Negotiations) would note, without pressure from within the Crown’s progress would be much slower, and once the decision had been made to join TOWPU there was no choice but to ‘wear the Queen’s hat’ (email, Sandra Thomas to Richard Hill, 11 September 2018).

decisions which emerged from interactions within the public sector bureaucracy and between bureaucrats and Ministers, sometimes in the course of which TOWPU had been overridden. Some of these positions, which I had to present in the name of Ministers of the Crown, made me query how far ‘the honour of the Crown’ extended.⁶ More broadly, as an historian I knew full well that governments do what is expedient, not necessarily that which might be deemed to be ‘honourable’.⁷

All the same, I quickly came to see efficacy in use of the term the Crown, rather than that of ‘the state’ or ‘the government’. This was partly because, from the late 1980s, one could argue to some effect within the bureaucracy that the Crown’s honour needed to be invoked in meaningful ways to right the wrongs of the past’ at a time when such issues were being addressed internationally.⁸ Once an official decision had been reached on any given issue, moreover, its issuance in the name of the Crown gave it a potency in Maori eyes that it might otherwise have lacked. This was important because, in those days, almost all new commitments on Treaty matters were an advance on what had preceded them.

Ever since 1840, Maori had looked to the Crown, on the basis of the contract which they had signed with Queen Victoria (though her proxy, Lieutenant-Governor William Hobson), to rectify the many and endemic state violations of that agreement. When in mid-1989 Prime Minister David Lange issued the *Principles for Crown Action on the Treaty of Waitangi*, in which for the first time the state acknowledged a responsibility to provide redress for proven grievances of the Treaty, their release in the name of the Crown gave them greater gravitas.⁹ While they sought to declare how the government would operationalise its responsibilities under the Treaty, they were also pegged to the words of the Treaty itself, including the Maori text.

The *Principles for Crown Action* took Crown-Maori discourse to a new level. They accepted, for example, that the *kawanatanga* (a term traditionally translated as ‘sovereignty’, but at that time increasingly being tied back to its derivation from a transliteration of ‘governor’) passed by Maori to the Crown in the First Article of the Treaty was qualified by *rangatiratanga* – a term once generally translated as ‘chieftainship’ but increasingly, by the late 1980s, as ‘autonomy’ or self-determination. This qualification, whose significance has generally been overlooked by scholars, reflected recent judicial and scholarly findings. It paved the way for the possibility of some kind of Crown ‘partnership’ with Maori, itself a word that was a recent addition to Treaty-based discourse. Maori had some hope that, whatever its shortcomings, this

⁶ The ‘honour of the Crown’ was increasingly being used at the time as the rationale for settling the historical grievances of Maori.

⁷ This is not to argue that individuals and units within government machinery cannot behave or have not behaved honourably within the parameters of their times; historians of the state are well aware of this, and Treaty officials of the early 1990s experienced many instances.

⁸ See, for example, Ruti G Teitel, *Transitional Justice*, New York, 2000 and Manfred Berg and Bernd Schaefer (eds.), *Historical Justice in International Perspective: How Societies Are Trying to Right the Wrongs of the Past*, New York, 2009.

⁹ Department of Justice, *Principles for Crown Action on the Treaty of Waitangi*, Wellington, 1989. For context see Therese Crocker’s introduction to facsimiles of these principles published by the Treaty of Waitangi Research Unit at the Stout Research Centre for New Zealand Studies in 2011.

concession could be used to hold governments to account through time *because* it was issued as a set of ‘the Principles on which the Crown proposes to act’.¹⁰

More broadly, in formulating policy positions the very fact that intra-state deliberations would result in *Crown* policies ‘made a big difference in the internal negotiations between government departments in arriving at those decisions’, the lead official on the Crown team negotiating with Waikato-Tainui later recalled. To ‘be able to invoke a higher interest than the reporting line back to the individual minister’ could be a useful device when, say, discussion were being held with Treasury over financial redress or with the Department of Conservation over aspects of cultural redress. The fact that the new aspiration of partnership had its origin in judicial as well as political decisions, themselves based on increasing public support for the aspirations of the ‘Maori Renaissance’ of the 1970s and 1980s, encouraged the emergence of progressive policies out of often rather fraught internal discussions.¹¹

Soon after it came to office in late 1990, the incoming National government – which was even more neoliberal than its Labour predecessor – sought to fundamentally revise the *Principles for Crown Action* in ways that would water down the Crown’s commitments. TOWPU officials advised that any such attempt to turn back the clock would be a retrograde step for Crown-Maori relations. They deployed arguments based on upholding the honour of the Crown and invoking the aspiration for partnership between the ‘descendants of Queen Victoria’ and those of the signatory chiefs of 1840: whatever National may have been said during the election campaign about the Treaty (and they said much that was negative), the sovereign entity could not be seen to be backsliding. In the event, Cabinet assigned the revising of the document to a broad group of officials, who quietly dropped the issue with the tacit agreement of Minister of Justice Douglas Graham in his capacity as Minister in Charge of Treaty of Waitangi Negotiations. Since that time, no government has explicitly rescinded the *Principles for Crown Action*, and they continue to be used from time to time as guidelines despite many developments over the last three decades.

Working under the broad umbrella of the *Principles for Crown Action*, the lead state negotiators in the early years of negotiations were regarded by their Maori counterparts as *personifying* the Crown. That was manifested in a number of ways. When I headed Crown teams, for example, the iwi negotiators would tell me in no uncertain terms what they thought of ‘my’ violations of Treaty undertakings. I needed to listen to many accounts (sometimes from direct descendants of Treaty signatories) of the way ‘I’ had seized land, denigrated culture, killed tupuna/ancestors – and the way ‘I’/the Crown was continuing to behave towards Maori. As someone who had a history, dating back to the 1960s, in anti-racist and self-determination movements, and who had written extensively about state coercion of Maori¹², this was not easy to process. But I had to recognise that the Crown was like the mythical Greek monster, the Hydra, with its many heads, and that I and my colleagues constituted just one new head. Moreover, regardless of TOWPU’s positions (let alone my own), in negotiating rooms I was seen to be talking on behalf of the whole monster.

¹⁰ *The Crown & the Treaty of Waitangi: A short statement of the Principles on which the Crown proposes to act*, nd [but Department of Justice, 1989].

¹¹ Thomas to Hill, 11 September 2018.

¹² Principally in the first two volumes of ‘The History of Policing in New Zealand’ series: the two-part *Policing the Colonial Frontier*, Wellington, 1986, and *The Colonial Frontier Tamed*, Wellington, 1989.

The task of fronting for a state which had with a long history of transgressions against its indigenous people was made easier, however, by iwi negotiators' appreciation that we were, as one head of the Hydra, working hard to persuade Ministers to pursue settlements. Trust was built up *kanohi ki te kanohi* – through many face to face meetings – and by some early progress, such as agreements on negotiating processes and parameters. In an attempt to reflect the principles of partnership, regular negotiations were held 'chief to chief' on the major claims negotiations of the 1990s – between Douglas Graham on the one hand, and Ngai Tahu's Tipene O'Regan and Waikato-Tainui's Bob Mahuta on the other.¹³ There were a number of the off-record meetings which are often essential for securing success in negotiations between parties holding formal positions a very long way apart. While officials in such back-stairs meetings were not, of course, speaking in the name of the Crown (and in fact Ministers did not always know about them), any informally agreed arrangements could become Crown policy if officials were persuasive in intra-Crown discussions – as sometimes happened. Maori knew, in short, that it was worth talking to this particular head of the Hydra.

The Hydra nature of the Crown, moreover, helped ensure the survival of trust between iwi and Crown negotiators even when things went wrong. Early in the days of direct negotiations, for example, Cabinet lowered a settlement offer that I and other officials – on behalf of the responsible Minister – had tentatively negotiated with a claimant group. At the next negotiation meeting, in my capacity as the head of the Crown negotiators and hence the official personifying the Crown, I needed to listen to angry rhetoric from the lead Maori negotiator. The setback was represented as yet another in a long history of Crown betrayals, with the implication that the new negotiating system had changed nothing. When he had finished his speech, my counterpart called a tea break and took me aside to tell me: 'No hard feelings; it's not personal'. He knew that my team had been strongly advocating the justice of the claim within the bureaucracy – he had independent evidence for this from his own 'intelligence' sources in the state machinery – and his presentation had two real audiences.

These were, firstly, the claimant collectivity, which needed to know that the Crown had been admonished for reneging on an offer which, while tentative, had held out hope of a settlement that they could accept. The tribal negotiators in the room would convey that message back to marae. The second audience comprised the Cabinet Ministers who wielded the ultimate power within 'the Crown in right of New Zealand'. It was my job to impart to them the anger of the claimants, which I duly reported back to my Minister.

Essentially, all involved parties knew that personification of the Crown had an instrumental purpose. So far as claimants were concerned, it did not generally have *personal* ramifications for state servants genuinely seeking Crown-Maori reconciliation. It was the Hydra per se that was the problem, not in this instance its negotiating head. It suited both sides of the negotiating table, however, to employ the term 'the Crown' because of its conceptual flexibility. Iwi negotiators, for example, might segue between its various meanings according to context: as well as 'the Crown in right of New Zealand', it could also cover the Queen of England (in 1840 or contemporaneously),

¹³ Sandra Thomas notes that the 'chiefs' were seen as embodying partnership on behalf of the respective constituencies to which they were accountable – the claimant groupings and (via Cabinet and Parliament) the tax-paying population of New Zealand: Thomas to Hill, 11 September 2018.

the New Zealand government and/or its state servants, the Queen of New Zealand (and/or her New Zealand representative as head of state, the Governor General) and so on. And in the final analysis, an entity called the Crown was unquestionably at fault whenever the promises made to Maori in the Treaty document were violated. The claimants did not have to pin down which Ministers, officials or other heads of the Hydra had been involved in these violations, nor even their motivations: the statal Hydra was the sum of its parts, but some of its parts were crucial in the processes of bringing it to account for its past transgressions.

Those heads of the Hydra tasked with Crown-Maori relations were already battle hardened from intra-state arguments about how to operationalise the Treaty in a contemporary context. In the days before the decision to undertake scoping negotiations, some Ministers and officials had tried to wash their hands of Crown liability for reparations: since it had been previous governments which had breached the Treaty, it was not the responsibility of the present Ministry. TOWPU and other officials had countered with arguments centring on the seamlessness of the Crown's responsibilities in New Zealand since 1840. While Ministers came to accept this within a relatively quick timeframe, iwi knew that the new stance would continue to have detractors as well as champions within the bureaucracy. That there were other negotiating stances that were highly contestable within the Crown's machinery became clear enough to the Maori negotiators too. While it was the responsibility of officials to present a united front at any given time, the Crown positions would change according to which line of thought was in the ascendancy. The Ngai Tahu team, for example, could easily see that TOWPU and the Department of Conservation differed on such matters as the conditions for returning pieces of conservation estate or that Te Puni Kokiri/Ministry of Maori Affairs had an opposing stance on some representation issues.

But when the Hydra's heads within each of the relevant bureaucracies all agreed on a single issue, without internal contestability, progress could be rapid. Most Ministers and bureaucrats, for example, agreed that in Crown-Maori relations the honour of the Crown needed to be or upheld or restored. This had a more powerful resonance for both Maori and Crown entities than that of the honour of governments or state. Even Treasury could accept this imperative, despite its self-appointed role of challenging the seriousness of the grievances and keeping compensation low. The fact that there was agreement transcended internal disputes within the Crown as to how that honour should be implemented.

So, under the rubric of the Crown's honour, settlements began to emerge, including large ones: the pan-iwi fisheries settlement in 1992 and the first settlement with a large tribal grouping, Waikato-Tainui, in mid-decade. For the latter, the Crown apology to the iwi was read out by the Queen in Parliament – the first time the British Sovereign, in right of any jurisdiction, had apologised to an indigenous people. Things had moved fast. Only six years before, Ministers of the Crown, while accepting the need for some reparations, had been resistant to an apology because of concerns over legal ramifications in the future.

Given the context of the times, would the New Zealand state not have settled with Maori anyway, whatever it was called – even if, as Prime Minister Jim Bolger wanted in the 1990s, the Realm of New Zealand had become a Republic? The answer is undoubtedly yes. By the late 1980s the Labour government, for both reasons of state and pressure

from its own support base, had little choice but to come to terms with the implications of the great Maori cultural and political assertions which had occurred from the late 1960s onwards. Its National successor from late 1990 quickly came to see that the momentum for Treaty settlements had built up too far to be stopped (however much it might damage Crown-Maori relations in other ways).

But the concept of the Crown had helped shape the evolution and speed of the settlements. The honour of the (continuous) Crown was, in particular, an especially potent tool in persuading Ministers and officials of the correctness or efficacy of reparations, and in their rapid (at least, in international terms) implementation. There were no offers on the table in 1989 but a \$17m offer to Waikato-Tainui came in 1990, and within four years a tenfold increase in that offer led to the signing of an agreement in 1995. Nowadays settlement processes are nearing their completion – a world record for an ex-colonial nation.

It is true, however, that in the early negotiating days the concept of the Crown could create impediments as well as opportunities. For example, the government quickly accepted that tribes which had lost vast tracts of land through Crown purchasing practices, and those that had been invaded and their land confiscated, had the greatest claim to compensation. This was in line with previous negotiations and settlements with iwi carried out between the 1920s and the 1950s. But about one third of 19th century land alienations had come about as the result of the operations of the Native Land Court. Ministers, and some officials, argued in the early years of negotiations that no claims could be validly taken against the Crown for judicial actions, on the ground that courts were independent of the executive and legislature – that they could not be defined as ‘Crown’ entities for these purposes as they were not responsible for policy.

Inside the state bureaucracy, some of the heads of the Hydra – TOWPU and Maori Affairs, especially – needed to argue exceedingly hard in countering this perspective. How could the Native Land Court be independent of the Crown when Ministers had established it specifically to ease the way for taking Maori land and thereby implement Crown policies? How could the Crown absolve itself of responsibility for the consequences of the court’s judgments, which led to the loss of most of the remaining land in Maori ownership? It was especially difficult to persuade Ministers that judicial decisions were not context-free, innocent or sacrosanct – that they were an integral part of the Crown’s policies and operations. While the government did eventually modify its policy on this issue, negotiating progress had meanwhile been delayed and damage to Crown-iwi relations had occurred. What rankled most of all among some affected claimant groupings was the government’s semantic sleight of hand in deploying the term ‘the Crown’ in such a way as to exclude a key mechanism for land-taking from culpability in the very alienation it facilitated. There were similar problems over other issues, such as grievances centring on local government actions which had harmed Maori.

There were other tarnishings of the Crown’s honour, too, partly because of the lack of a level playing field for contestable advice inside the state machinery which led to some counterproductive decisions issued in the name of the Crown. On matters involving expenditure and precedent, for example, Ministers generally took the advice of both Treasury and Crown lawyers rather than that of officials with different views. In 1994, most notably, the government unilaterally established a totalised sum for all Treaty of

Waitangi settlements, capping it at a billion dollars. Both TOWPU and Te Puni Kokiri could see that a totalised sum might be necessary before any tribe were to be persuaded to sign the first agreement, but both institutions assessed this figure produced by Cabinet as far too low.

It is quite possible that the enormous resistance to the unilateral imposition of a 'fiscal cap' which ensued may have been ameliorated had the sum been rather more generous. It is also possible that relationships between claimants and the negotiating heads of the state Hydra may have been damaged by the former not actually knowing what advice had been given by the officials they were dealing with.

The anger prevalent within all sectors of Maoridom against the fiscal cap, moreover, deflected attention from a package of Treaty settlement policies which, following the 1989 model, had been issued as *Crown* proposals to heighten their impact. These policies were as good as could be expected at that period, and some have stood the test of time.¹⁴ But any resonance from issuing the proposals in the name of the Crown was overwhelmed by anger at the fiscal cap, and Ministers' aims of getting buy-in for them were accordingly dashed.

All the same, the momentum was such that the Treaty settlement processes survived even major problems. It was at the very time of the fiscal cap fiasco that the pre-existing \$170m fishing settlement of 1992 was equalled by reparations of the same amount for Waikato-Tainui and, later (in 1998), for Ngai Tahu. In these the honour of the Crown was invoked by the various parties, just as it was in smaller settlements and in policy developments.

Not long ago a former official, Sally Maclean, reminded me about a 1995 incident which had occurred at the beginning of her work at TOWPU (in 1995) and which had therefore made a considerable impact on her. I asked her to email her recollections:

We'd been asked to look at setting up a land bank for [a specific tribal region which had been subjected to *raupatu*/land confiscation]. The Minister held a large meeting of key officials in his office...over more than two hours. [T]owards the end of the meeting, he suddenly put on the table an alternative proposal that massively raised the stakes: all sales of surplus Crown land that had been gained through confiscation [anywhere in New Zealand] should be stopped, and the land held for [possible] use in Treaty settlements. [The Minister] turned to you and asked you what he should do – which proposal to take to Cabinet....You were silent for [what seemed] ages and [then] made the call for stopping sales in all confiscation areas.¹⁵

This email brought back memories of the occasion. I had discussed the issue privately with the Minister beforehand and we had canvassed this more radical option, but he seemed to have abandoned the idea since we were both fairly sure that neither officials from departments such as Treasury and Prime Minister and Cabinet, nor their Ministers, would be inclined to endorse such a sweeping proposal. Up to that point they had

¹⁴ Unlike the fiscal cap, which was soon abandoned as official policy, although the relativities between tribes that were established within its parameters continued on as informal guidelines.

¹⁵ Sally Maclean to Richard Hill, 5 September 2017

preferred a case-by-case approach to managing claims centred on the return of land. This involved the establishment of claim-specific land banks after negotiation with mandated iwi groupings, with a limit on the value of the land which could be held in each.¹⁶ When the question was posed again with a number of officials present, I had to quickly weigh up the risks involved in going for broke.

As TOWPU officials had been discussing internally, approval for a general *raupatu* land bank was urgently needed in order to stop surplus Crown lands which were sought by the affected tribes from leaving the Crown estate. The current rules could be seen to be prejudicial against those of the *raupatu* claimants whose social, economic and political dislocation after confiscation had ramifications which had continued over the generations – and included difficulties in gaining the types of mandates sought by the Crown before it would agree to establish a land bank. The officials agreed that the least the Crown could do was to ‘act in good faith in relation to those iwi who had greater hurdles to surmount before they were ready to negotiate’.¹⁷ The Minister had taken that advice, which essentially amounted to a suggestion that the honour of the Crown was at stake, on board.

But if such a proposal was rejected by the Ministers, as seemed quite possible, this would have left the tribe we had been negotiating with in good faith bereft of a land bank. The processes would have to be recommenced for that iwi alone, leading to frustrating delays. There were other problems too: as a public servant offering advice to the Minister, for example, I was obliged to take into account any potential risks for government and claimants. In the case of specific versus general land banks for *raupatu* tribes, these included the possibility of inflating some claimant groups’ settlement expectations before they were geared up for negotiations, something that would create difficulties on both sides of the negotiating table.

On the other hand, during those few seconds of contemplation I thought also of my discussions with some of the other *raupatu* claimant groups, who had argued strongly that the honour of the Crown required it to hold onto all confiscated land until settlement was achieved. This would allow it to meet long-term demands centred around the principle of *I riro whenua atu, me hoki whenua mai*: since land was taken, land should be given back. It was this claimant call for the Crown to honour its commitment to right the wrongs of the past, combined with recent strong government assertions that the Crown was (finally) behaving honourably on Treaty matters, which clinched my on-the-spot decision. I had been fortified, in effect, by my internalisation of the honour of the Crown, assisted by knowledge that the Minister thought the same way and would fight hard within Cabinet for the new approach. The matter was so urgent that taking a risk seemed justified.

Fortunately, that call was successful, as Sally Maclean noted: The Minister accepted the advice, ‘the Prime Minister was briefed at once, a late Cabinet paper was drafted which was accepted, and the Crown Settlement Portfolio came into being.’¹⁸ Had the idea been rejected by Cabinet, the next time I met the *raupatu* grouping whose claims had prompted the discussion, I would have – rightly, by dint of my personification of

¹⁶ Crocker, ‘Settling Treaty Claims’, pp. 170-1.

¹⁷ Sally Maclean to Richard Hill, 8 August 2018.

¹⁸ Maclean to Hill, 5 September 2017

the Crown on that occasion – faced its wrath over yet another disappointment. Trying to hold the Crown to honour, then, *could* have led to its further dishonour, and that was a factor in my thinking too. The key point to be made here, however, is that my own judgement processes on that occasion reflected the fact that intra-statal debates on Treaty matters in the 1990s were framed to a significant degree in terms of the honour of the Crown, albeit with varying degrees of commitment from the various heads of the Hydra.

Maori officials I discussed these matters with at the time had a heightened consciousness of what the honour of the Crown should mean, schooled as they were in tribal memory about its promises in 1840 and subsequently, and their violations through time. While governments were ephemeral, the Crown was continuous; in their dual capacity as tribal members and officials, they could both assist the Crown to redeem itself and their people to negotiate the terms of that redemption.

This was the strongly expressed view of the chief cultural adviser to Douglas Graham, Tamihana (Tom) Winitana (Tuhoe, Tainui and Ngati Ruapani). His scepticism about the Crown extended back to its motivations for the signing of the Treaty in 1840. Working at a high level of influence within the state, however, provided him with rich opportunities for invoking the Crown's honour in addressing the wrongs it had committed in its long and seamless existence in New Zealand. Like many other Maori leaders, he saw the continued existence of the monarchy in New Zealand as the best way of ensuring the state's accountability to *tangata whenua*. As the Māori Party's co-leaders put it in 2017: 'Removing the Queen as our head of state [would be to rescind] the Treaty of Waitangi and Māori rights in this country guaranteed to us under our nation's founding document'.¹⁹

This paper makes no comment on the continued existence of the monarchy in New Zealand: it merely sets out to provide a snapshot of how the concept was useful at a key point in time in the development of Crown-Maori relations. Now that most Treaty negotiations are either completed or well under way, the next step is for all interested parties to engage in dialogue as to how the relationship between Maori and the state can best work in a post-Treaty settlements environment; what institutional, constitutional or other arrangements can be put in place, and how these can be safeguarded to ensure that they are effective and durable. This includes its relationships with post-settlement governance entities established as a result of each Treaty settlement. In future discussions and debates on Treaty relationships, the role of the Crown will be under intense scrutiny, especially in terms of its capacity as the guarantor of the Treaty's promises.

A few years ago, when I was a Member of the Waitangi Tribunal panel hearing the claims of Ngapuhi and other Northland iwi that had been the first to sign the Treaty, the iwi affirmed the central importance of the Crown while fiercely challenging its effectiveness in addressing Treaty breaches. This duality was framed from the very beginning of the hearings by questions posed by *kaumatua*. 'What is the Crown?' 'Where is the Queen?' 'Why are lawyers from the Crown Law Office purporting to represent her?' 'If the Queen can't attend, why isn't the Governor General fronting up instead?'

¹⁹ 'Labour forgets Treaty and Māori in republic call', Māori Party press release, 12 September 2017.

Such rhetoric had an element of the performativity²⁰ which occurs at all hearings, more especially those held at Waitangi itself. As such, it reflected indigenous worldviews passed on through the generations. As claimant evidence strongly argued, a solemn and personal pact between the chiefs/*rangatira* of Aotearoa and England had been formed at Waitangi and later signings of the Treaty, and decade after decade of the stronger party violating this trust now needed addressing *kanohi ki te kanohi*. This personal bond between monarch and tribes which stretched back to 1840, and indeed before that, needed to be reworked into a reconciliation in which, ultimately, the current Queen should apologise for the multitudinous breaches of the Treaty committed against the Northland iwi in the name of the Crown ever since her predecessor's emissary signed the document.

In 2014 the Tribunal interpreted the Treaty in ways which broadly endorsed the iwi's submissions on the understandings of their ancestors when they signed the Treaty at Waitangi and elsewhere in Northland – sharing power and authority with the Crown.²¹ The relevant Minister was quick to criticise its findings, but this did not overly matter. No conceivable future government in New Zealand could fail to treat the claims of Ngapuhi and other northern tribes seriously: whatever the internal difficulties inside the Northland iwi (manifested as they were during the hearings), non-settlement and the absence of a healthy relationship between the Crown and the iwi was not an option. The issues that remain – the size and shape of the 'settlement package', grievances specific to place, a negotiations structure that is mandated by the majority and accepted by the government, and so on – will be negotiated under the rubric of the Crown and its responsibilities.

Whatever the future of Crown-Maori Treaty relationships, this paper has argued that at an historically crucial point in their evolution, the concept and terminology of the Crown – rather than of 'government' or 'state' – proved extremely useful, although it could also be obfuscatory or lead to delays and difficulties. It is my contention that Treaty settlements were inevitable in view of New Zealand's social and political development since the late 1960s. However, appeals to the honour of the Crown, within and outside the public sector, helped expedite and shape a reparational process which is now, for all its faults, both internationally renowned and nearing completion.

Richard Hill,
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5 November 2018.

²⁰ See Peter Addis, Brigitte Bonisch-Brednich, Richard S Hill and Graeme Whimp, eds., *Reconciliation, Representation and Indigeneity: 'Biculturalism' in Aotearoa New Zealand*, Heidelberg, 2016.

²¹ Waitangi Tribunal, *He Whakaputanga me te Tiriti: The Declaration and the Treaty*, Wellington, 2014. For the purposes of transparency I note that I was a Member of that Waitangi Tribunal panel.