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Mandating Matters: Maori Representation and Crown Policy in the Early Treaty Settlements Processes, 1988 -1998¹

Issues of Maori identity, mandate and representation have been something that Pakeha have grappled with since the time of first contact. While Pakeha scholars and officials regarded, for a large period of post-contact history, Maori society as static and unchanging since interaction with Pakeha began, representivity was complicated by the fact that, as Angela Ballara argues, Maori political and social systems were 'always dynamic [and] continuously modified'.² Moreover, for much of the late 19th and 20th century, Crown policy was driven by an assimilationist approach, an attempt to absorb Maori within mainstream New Zealand culture. One early key aspect of this was the individualisation of communally held land, which helped further complicate tribal structures.

As a result of the 'Maori Renaissance' of the 1970s onwards, there was a shift away from an assimilationist to a bicultural approach.³ Although, as Angela Ballara has argued, the everyday structural driver in Maori society was the hapu,⁴ in the 1980s the Crown selected iwi as the primary Maori representative body – and many policies began to reflect this, including matters of Maori representation and governance issues in the early Treaty settlements process. This is a necessary background for understanding current Crown policy, which seeks to negotiate settlements of all historical claims of a claimant grouping at the same time, particularly with 'large natural groups' of iwi (or larger clusters) rather than with hapu, whanau or individuals.⁵ This is despite the Treaty of Waitangi Act 1975 (which established the Waitangi Tribunal) and its 1985 Amendment (enabling historical enquiries) allowing for individuals to register claims on their own behalf or that of any grouping.

As part of the larger-grouping negotiations processes, however, the Crown obviously needs to ensure that it is working with authorised representatives of a claimant group. Maori claimant negotiating bodies, therefore, are required to secure a Deed of Mandate authorising them to represent a claimant group and to negotiate all of the historical claims of that group. This paper outlines how policies for comprehensive negotiations with mandated large natural groups developed over time.

When the Treaty of Waitangi Policy Unit (TOWPU) in the Department of Justice was assigned responsibility for undertaking some pioneering direct negotiations with Maori on behalf of the Crown in

¹ The original version of this paper was presented at the Stout Research Centre, Victoria University of Wellington, on 2 October 2013; this is a revised and condensed version.

² See for example, Joan Metge, *Rautahi The Maoris of New Zealand* (London, 1967; 1976 ed), p.133

³ See G.V. Butterworth and H.R. Young, *Maori Affairs/Nga Take Maori* (Wellington, 1990), pp.117-121

⁴ Angela Ballara, *Iwi* (Wellington, 1989) p.21, p.179

⁵ At different periods of time this aspect of the legislation was under threat, see in particular Office of Treaty Settlements, *Crown Proposals for the Settlement of Treaty of Waitangi Claims: Detailed Proposals* (Wellington, 1994), p.37

1989, there was very little New Zealand precedence on how to approach negotiations with claimants.⁶ Nor was there a clear view of the extent of the number of claims that would eventually need to be negotiated. Reporting in February 1990, TOWPU contemplated that it had the capacity to begin negotiations with up to six groups, and for the Crown to complete two settlements in any one year.⁷ Its successor, the Office of Treaty Settlements, on behalf of its Minister concluded 11 settlements in 2012.⁸ Meanwhile, the process had taken far longer than originally envisaged.

From the beginning of the 1990s claimants were able to bypass Waitangi Tribunal hearings and directly negotiate with the Crown if they wished (subject to certain conditions), with TOWPU taking the lead role on behalf of its Minister. In June 1990, Cabinet approved funding of financial assistance for claimants during the negotiations process, an acknowledgement that successful negotiations were dependent on claimants having sufficient resources. There was particular recognition of the importance for 'claimants' negotiators to be able to fully consult with Iwi and obtain required mandates at all stages of the negotiations'.⁹

Throughout 1990 TOWPU worked on Crown policies for direct negotiations, and the results were published in a booklet entitled *The Direct Negotiation of Maori Claims: An Information Booklet*. This provided the first public insight into the Crown's approach to negotiations between the Crown and claimants, a process based on the Canadian model. The booklet identified criteria for the acceptance of a claim for direct negotiation, including the option for claimants to negotiate only part of their claim, an indication that comprehensivity had not yet become a full priority. The criteria not only provided scope for the negotiation of discrete claims within a larger claim, but also for negotiations with whanau or hapu groupings within a larger claim – neither option is now available. Another of the criteria indicated that mandating requirements had taken shape early in the process: the Crown needed to know that 'the person acting on behalf of the claimants properly represents the areas, iwi, hapu and whanau concerned in the claim'.¹⁰

Prior to the formulation of the process to negotiate directly with Maori to resolve historical grievances – as well as to negotiate those claims on which the Tribunal had reported – the Department of Maori Affairs had been undergoing a great deal of scrutiny, including calls for it to better take into account and partner with the *actual* structures within Maori society. After consultation exercises, the Crown published *Te Urupare Rangapu: Partnership Response*, in November 1988. This proposed a renewed commitment to Maori, especially through the restoration and strengthening of traditional iwi.¹¹

Government policy on such issues culminated in the Runanga Iwi Act 1990, which enabled iwi to establish runanga authorities as their official representatives. The legislation talked of 'essential

⁶ New Zealand Government, CAB (89)941, 4 December 1989

⁷ New Zealand Government, TOW (90)13, 26 June 1990

⁸ www.ots.govt.nz, accessed 13.10.2013, lists 11 deeds of settlement on the website, as well as redress agreements (for Tāmaki Makaurau and Tauranga Moana) not categorised as deeds of settlement.

⁹ New Zealand Government, TOW (90) M 10/3, 27 June 1990

¹⁰ The Treaty of Waitangi Policy Unit for the Crown Task Force on Treaty of Waitangi Issues, *The Direct Negotiation of Maori Claims: An Information Booklet* (Wellington, 1990), p.8

¹¹ Department of Maori Affairs, *Te Urupare Rangapu: Partnership Response* (Wellington, 1988)

characteristics of iwi', and established criteria for a group to be officially recognised as representing an iwi. The legislation's sponsor, Koro Wetere, hailed it as 'a considerable victory for Maori.'¹² Winston Peters, opposition spokesperson on Maori Affairs, argued that the Act was insufficiently flexible to allow for the variations that existed within Maori society, given that 70% of Maori now lived outside their tribal boundaries in urban settings; and that in any case 'it was not the business of government to dictate to Maori how the territory of tribes is to be determined'.¹³ The legislation reflected the Labour government's tendency to focus on seeing iwi as the primary unit within Maori society. The Runanga Iwi Act came into operation on 1 September 1990, the same month TOWPU published *The Direct Negotiation of Maori Claims*, a product of similar policy formation processes.

Such official endorsement of iwi over other kinship groups had not necessarily always been the case in the past, with the state seeking to deal with Maori collectively in different ways at different times: through geographical areas, official committees, trust boards, pre-existing but non-iwi Maori structures, and so on. Such choices had often reflected assimilationist policies, such as the attempt from the 1860s to individualise Maori tenure and break 'the principle of communism' supposedly embedded in Maori society.¹⁴ The 1867 Maori Representation Act had created four Maori electoral districts which did not neatly reflect Maori kin-groups or other tribal boundaries, and were designed to maintain a balance between the number of parliamentary seats in the North and South Islands – 'which would otherwise have been unsettled by the grant of an increased representation to the West Coast goldfields'.¹⁵ 1900 legislation creating Maori Councils also created geographical districts, although there were more of them than electorates so tribal *aukati* could be better taken into account.¹⁶ Later introductions included trust boards, with (for example) the Taranaki Maori Trust Board established under 1928 legislation to negotiate and receive compensation in the wake of the Sim Commission's findings. Initially, at least, the Taranaki board was made up of prominent individuals from Taranaki, rather than based on any tribal representation.¹⁷ Later developments included the committees of the Maori War Effort Organisation, and a system of official committees set up after the war.¹⁸

As noted however, the refinement of bicultural processes in the 1980s led to iwi being recognised as the primary kinship group to represent Maori society, despite the huge post-war urban migration – indeed, sometimes several generations had by now lived away from traditionally occupied land – and the perspective of some Maori that hapu remained (in Ballara's words) the 'common everyday political unit'. All such matters are contestable, and in fact in recent years some have argued that the whanau

¹² *New Zealand Parliamentary Debates (NZPD)*, 1990, vol. 510, p.4037

¹³ *NZPD*, 1990, vol. 511, pp.602-3

¹⁴ *NZPD*, 1870, vol. 9, p.361

¹⁵ Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Auckland, 1995), p.209

¹⁶ Richard Hill, *State Authority, Indigenous Autonomy* (Wellington, 2004), pp 50ff.

¹⁷ Native Land Amendment and Native Land Claims Adjustment Act 1928, section 20 (3b)

¹⁸ Richard Hill, *Maori and the State* (Wellington, 2009), chapters one and two.

is the fundamental unit of Maori society, a debate reflected in Whanau Ora policies.¹⁹ Such examples indicate that the structures of Maori society have been interpreted and reinterpreted over time, within Maoridom as well as by the Crown. It has been argued that such attempts to define, and invariably control, Maori interaction with the Crown can be seen as the impact of ongoing colonialism.²⁰ Whether or not this is the case, it is clear that the dynamic everyday structures of Maori society have not always been incorporated fully, or sometimes even partly, in official policy; the Crown seeks ways of control which maximises its desired outcomes, and obviously a large grouping seems attractive to it on manageability grounds.

During the early 1990s, as more claims were registered with the Waitangi Tribunal and a number of them moved towards direct negotiations, the Crown no longer had the Runanga Iwi Act to assist it, as the incoming National Government had repealed this legislation as a matter of priority. Yet the focus on mandate and representation became sharper as the stakes became higher, with the Crown increasingly prepared to allocate compensation for past breaches of the Treaty – and these needed to be 'final' settlements. Moreover the Crown needed to think beyond which who represented the various Maori groups during the course of their claims; it needed, for example, to be able to ascertain the area of land a particular group was historically linked with. A close reading of the archives from late 1990 reveals an increased official focus on negotiating with the 'right group' for, as a post-election briefing in November 1990 put it, '[h]istory has shown that agreements with indigenous peoples are final only when they work satisfactorily'. It went on to say that '[i]n most cases this has not been the case.'²¹ The corollary was that much greater care now needed to be paid to matters of mandating and representation.

This was boosted by the 'fiscal responsibility' policies spearheaded by Finance Minister Ruth Richardson, supported by the power of the Treasury, which led to a growing focus on both comprehensivity – settlement of all of the claims of a sizeable group at one time. Alongside this lay a policy of containment through controlling expenditure in terms of final outcomes within specified timeframes – and soon the introduction of a total 'Treaty settlements fund' (which became popularly known as the 'fiscal envelope') to settle all historical claims by the year 2000. Much of the policy work and decisions for these occurred through 1992 and 1993, to be eventually embodied in the December 1994 *Crown Proposals for the Settlement of Treaty of Waitangi Claims*.

Meanwhile there had been a pan-tribal development over compensation for historical commercial fisheries grievances, with the signing of a deed of settlement in September 1992 by over 80 tribal representatives.²² The Fisheries Settlement ('Sealord deal') was costed out at \$170 million; Maori would acquire 50 per cent of Sealord Ltd, and (among other things) the Crown would transfer 20 per

¹⁹ Tariana Turia, 'Strong whanau key to tangata whenua development', press release, 10 December 2003, <http://www.beehive.govt.nz/release/strong-whanau-key-tangata-whenua-development>, accessed 16.9.2013

²⁰ See Robert Joseph, 'Unsettling Treaty Settlements: Contemporary Māori Identity and Representation Challenges', in Nicola R. Wheen and Janine Hayward (eds), *Treaty of Waitangi Settlements* (Wellington, 2012), pp.151-165

²¹ Department of Justice, *Post-Election Briefing for Incoming Ministers*, 1990, p.123

²² See New Zealand Government, CSC (93) M 27/1, 28 June 1993

cent of the quota of any new fish species to Maori, protect customary fishing practices and establish the Treaty of Waitangi Fisheries Commission/Te Ohu Kai Moana to allocate quota. 'While the settlement stated that the deal was for 'all Maori', under the Treaty of Waitangi (Fisheries Claims) Settlement Act, passed on 14 December 1992, the quota was to be distributed through iwi'.²³ Handing distribution to Te Ohu Kai Moana did not lead, however, to the neat ending of fisheries grievances which the Crown had sought. Years of dissatisfaction and debate amongst Maori groupings followed, focussed partly on whether iwi were the appropriate body to receive fisheries allocations; in particular some hapu and all urban-based Maori authorities sought alternative or supplementary modes of distribution.

If the rights were to be allocated to iwi, moreover, the question was raised as to who defined an iwi, and who and what mechanism represented it. Further, should allocation be based on a mana moana (area of coast occupied) or population basis, or a mixture of both. With the core argument iwi versus urban Maori, and government policy being to stress recognition of iwi, Te Ohu Kai Moana set about developing a set of criteria to credential iwi. The 'essential characteristic' of an iwi which it adopted were identical to the characteristics identified in the 1990 Runanga Iwi Act. An iwi was required to have shared descent from tipuna, hapu, marae and historically identified takiwa, for example, as well as an existence traditionally acknowledged by other iwi. 'These characteristics, which have been repeated in several Te Ohu Kai Moana publications appear to have gained general acceptance among Maori or, at least, met no overt opposition', according to the Commission.²⁴

As noted, policy development on land-based and other historical claims had led to the release of the *Crown Proposals for the Settlement of Treaty of Waitangi Claims*. These, which became known as 'fiscal envelope proposals' because of their incorporation of the notion of a billion-dollar fiscal cap, emphasised iwi or 'tribe', recognising that pan-tribal agreements were not possible. In June 1993, a Cabinet Committee paper noted that:

when it came to grievances relating to historical dispossession of land and land-based resources, the claims were tribal. For settlements to these claims to be effective in terms of progress from "grievance mode to development mode", the Crown would need to negotiate with individual tribes.²⁵

The inherent 'risks' in establishing a settlement fund were considered and debated, one of these being the issue of claimant representation. There was particular focus on the need to ensure that the Crown was dealing with appropriate representatives of a claimant group, and that the claimant group was the appropriate one for the *rohe* subject to the claim, so that further claims would not be lodged subsequently. Two main ways to limit this risk came to be identified. The first was to utilise Section 30 of the Maori Land Act 1993, which used the Maori Land Court to advise on or determine

²³ Claudia Orange, *The Treaty of Waitangi* (Wellington, 1987, 2011 ed.), p.252

²⁴ Te Ohu Kai Moana: Treaty of Waitangi Fisheries Commission, 'Iwi Recognition', 13 June 1995

²⁵ See New Zealand Government, CSC (93) M 27/1, 28 June 1993

representation of Maori groups. The second option for minimising risk was 'to state the Crown will only settle claims with iwi rather than hapu or individual Maori.'²⁶

This option was identified as being controversial, as it sat uneasily with the legislation establishing the Tribunal, which allowed registering a claim from 'any Maori' either representing themselves or a group.²⁷ On the other hand, the legislation was seen as a potential impediment to achieving timely and comprehensive settlements. Increasingly, too, issues of overlapping claims and disputed representation were seen as factors with the potential to limit the desired fast progress of 'full and final' settlements. Moreover, the need for progress led to moves to negotiate above iwi level. Officials' advice to ministers included suggestions for settlement with wider groups such as waka-based groupings, with pre-existing federations of tribes (such as Te Arawa, or Kingitanga), or with tribes grouped by geographical area (such as the Muriwhenua grouping, or Northern South Island tribes).²⁸ One thing was certain: ascertaining who to deal with and how to do it was crucial to success for resolving historical grievances. On 10 December 1993, a Treaty of Waitangi Policy Unit briefing to the Minister in charge of Treaty of Waitangi Negotiations noted that issues of representation and mandate were of central importance for the following year.²⁹

Throughout 1994, many policy decisions were made on the shape and structure of the government approach to settling claims, leading up to the planned release of an all-inclusive package setting out the government's approach, priorities and financial contribution to settling all historical grievances. As these policies were being formulated, there was repeated reference to issues of comprehensivity and claimant representation. All the same, while in the early stages of development there was acknowledgement of the importance of circulating tentative policies to Maori for feedback, the government approach ended up as the exact opposite: Maori and the public were not officially notified of the details of the Crown proposals until they were announced in early December 1994.

Two out of the eight chapters of the *Crown Proposals for the Settlement of Treaty of Waitangi Claims* were dedicated to issues of claimant representation and governance.³⁰ In pursuit of final and unchallenged settlements, the Crown sought assurances in three main areas:

- That it was dealing with the proper claimant group, that the members of that group had been identified, and that an appeals process was in place to deal with objections to such decisions;
- That the claimant negotiators had a mandate from the claimants to represent them;
- That the claimant group had established a governance structure to administer and manage any proceeds from a settlement, and that there was an appeals process to deal with objections about the rules of governance.³¹

²⁶ 'Treaty of Waitangi Claims Settlement Fund: managing the risks', TOWPU File Note, 12 July 1993,

²⁷ See Treaty of Waitangi Act, 1975, s.6

²⁸ 'Treaty of Waitangi Claims Settlement Fund: managing the risks', TOWPU File Note, 12 July 1993

²⁹ New Zealand Government, CSC (94) 15, 16 March 1994

³⁰ Office of Treaty Settlements, *Crown Proposals for the Settlement of Treaty of Waitangi Claims: Detailed Proposals* (Wellington, 1994), chapters six and seven

It was also proposed that Treaty of Waitangi legislation be further amended to allow the Waitangi Tribunal to decline to hear claims not mandated by iwi or hapu.³²

After releasing the *Crown Proposals* the government invited response from Maori and the public through written submissions and regional hui. As has been well documented, Maori essentially rejected the proposals.³³ Part of that rejection reflected frustration that the Crown had not consulted with Maori, their Treaty partner. The majority of submissions from Maori, however, focused on the fiscal cap and the Crown's deadline for registering claims. There was reportedly a 'mixed response' to the proposed requirement for a deed of mandate. Submitters 'against, argued that the proposal breaches the principles of the Treaty of Waitangi by the Crown unilaterally setting the rules, and defining who the claimants are. Others regarded the requirement for a deed of mandate as bureaucratic'.³⁴

Following the series of regional hui, and as the written submissions were being received, several interdepartmental working groups were established to work through the responses and to report back to government. One of the papers identified claimant organisation and mandating as one of the seven roadblocks to progressing negotiations. It advised:

The ability of claimants to resolve internal differences and mandate negotiators is perhaps the single most significant barrier to commencing negotiations for settlement of further claims....Overcoming the problem of mandating also raises policy issues about the level or nature of mandate the Crown should require before entering negotiations with a group who claim to represent a claim.³⁵

In 1997, well after the consultation process, the Office of Treaty Settlements (successor to TOWPU) published a new booklet on the direct negotiations process. The material on mandated claimant representation was largely unchanged by the submissions process, and the government's strong preference remained to negotiate with iwi groups rather than hapu or whanau.³⁶ However, the proposed change to Treaty of Waitangi legislation, restricting the registering of a claim only to mandated iwi and hapu, had been abandoned. Such a step would have highlighted the issue unnecessarily when such a course could be adopted as a matter of administrative policy.

³¹ Office of Treaty of Settlements, *Crown Proposals for the Settlement of Treaty of Waitangi Claims: Summary* (Wellington, 1994), p.12

³² Office of Treaty of Settlements, *Crown Proposals for the Settlement of Treaty of Waitangi Claims: Detailed Proposals*, p.33

³³ See for example Wira Gardiner, *Return to Sender: What really happened at the fiscal envelope hui* (Auckland, 1996)

³⁴ *Report of Submissions: Crown Proposals for the Treaty of Waitangi Claims* (Wellington, 1995), p.92

³⁵ New Zealand Government, CSC(95)158, 5 September 1995, p.7

³⁶ Office of Treaty Settlements, *Treaty of Waitangi Claims – Direct Negotiations Process* (Wellington, 1997), p.4

By this time, the government had negotiated several settlements, including the significant Waikato-Tainui raupatu claim, which was the first to settle under the fiscal cap umbrella.³⁷ This set a precedent for settlement with a large grouping, and was followed by the Ngai Tahu settlement which covered most of the South Island claims. The government seemed to assume that because groups were engaging and negotiating with the Crown, there was an acceptance of its settlement policies among Maori. Yet Waikato-Tainui were among those groupings which remained strongly opposed to the Crown proposals package, especially to the concept of the Treaty settlement envelope. All the same, no iwi declined to participate in the Treaty resolutions system, and the Crown needed to be more than ever sure that it was dealing with the correct people for the *rohe* involved, and that all the claims of a defined group within a defined geographical area would be addressed in a 'full and final manner'.

This led to potential tension for Maori between retaining identity and fulfilling policy requirements when settling their historical claims. There were additional concerns; a claimant needed in effect to establish a modern tribal governance structure, for example, and some argued that this necessarily tended towards corporatising iwi.³⁸ This would have wider ramifications given that resolution of historical grievances under the Treaty was only a small part of the ongoing relationship between Maori and the Crown, and the independent life of the grouping and its people. There was concern to stress that a mandate provided an iwi, hapu, or larger grouping only with a negotiating entity, and that it did not define traditional (or any other) identity.

Issues around representation and mandating were not easy ones for the Crown to deal with. They have been complicated by the fact that, since the pioneering negotiations, the Crown has strengthened its preference to negotiate with 'large natural' groupings rather than with iwi, let alone hapu or other smaller groupings. Increasingly, the Waitangi Tribunal has been called upon to respond to urgent mandate issues.³⁹ Matters of mandating have surfaced prominently in the Waitangi Tribunal's current Te Raki o te Paparahi inquiry in Northland, where some claimant groupings feel ready to move into direct negotiations with the Crown while others want to finish the hearings before entering into negotiating a settlement; other issues, including the role of hapu, and issues relating to overlapping *rohe*, are also under debate.

There are no simple answers to mandating and comprehensivity questions. The Crown seeks to negotiate reparations for past wrongs it has committed, but in doing so it comes to the table with limitations relating to containment, knowing that large numbers of the Pakeha electorate are not particularly enthusiastic about – and a small but vocal group outrightly hostile to – the negotiation and resolution of historical grievances. Maori come to the table wanting to sit with a Treaty partner that

³⁷ Waikato–Tainui Deed of Settlement, 22 May 1995; for a summary of early settlements, Hill, *Maori and the State*, pp 258-260.

³⁸ Mason Durie, *Te Mana, Te Kāwanatanga: The Politics of Māori Self-Determination* (Auckland, 1998), p.226

³⁹ Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington, 2000); Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report, Wai 1362* (Wellington, 2007); Waitangi Tribunal, *The Port Nicholson Block Urgency Report, Wai 2235* (Wellington, 2012)

shows respect for their approach, philosophy and structure, sometimes coming away frustrated at the parameters established by the Crown – including lumping them with other groups or grievances.

That being said, it should be stressed that the process of settling historical Treaty of Waitangi claims has developed in a scale and size that could not have been predicted when the initial policies were developed in 1989. On an international scale, the whole process has advanced a very long way within a relatively short timeframe. For the most part the issues around mandating and representation have not impeded that progress, and in fact the end of the historical claims resolutions process is within sight. Whether the settlements prove to be (in the aspirational terminology established in the early 1990s) 'durable' is another matter, and issues of representation, identity and governance will play a significant role in the outcomes.

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