

PART III

OPTIONAL STRATEGIES FOR DEALING WITH HISTORICAL TREATY CLAIMS

ptiii.1 Commission

The following chapter is offered in terms of my supplementary commission from the Waitangi Tribunal dated 4 November 1996, which (having regard to new evidence emerging from the Rangahaua Whanui research programme about the nature of historical grievances and Treaty breaches expressed by Maori, and in the light of my historical experience) invites me to suggest in my report 'some optional strategies about how the historical claims might best be dealt with' (see app iii). The discussion that follows derives from my reading of the historical evidence for many of the claims and some of the Tribunal's own statements on approaches to remedy, and it makes some reference to Canadian and Australian experience.

ptiii.2 Role of Rangahaua Whanui

This survey of the main kinds of historical grievance, and their impact upon various regions of New Zealand, is intended to set out a comprehensive historical context against which claims can be appraised. It is hoped that against this context the various factors that might contribute to an assessment of the merits of claims will become clearer and that, consequently, more equitable settlements can be achieved nationally. Given the very recent disclosures of research, it would not be surprising if preconceived pictures of historical injury to Maori shifted somewhat: for example, few in New Zealand, historians included, know very much about twentieth-century Crown policies and their impacts, though they commonly feature in claims. Even though the phrase 'on their merits', used, for example, in the coalition parties' press release of 6 December, probably indicates a desire on the part of the Government to avoid comparing one claim or grievance or area with another, the concept of 'merits' implies inevitably some sense of 'relative merits'. It would seem to be appropriate to take stock of current research findings and look at the total picture.

ptiii.3 Prejudicial Effects

Section 6(3) of the Treaty of Waitangi Act 1975 reads:

If the Tribunal finds that any claims submitted to it under this section is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.

Assuming that the Tribunal will want to exercise its right to make recommendations, or that claimants will want it to, what kinds of prejudicial effects do claimants allege they have experienced as a result of Crown action or have been found by the Tribunal to have experienced?

- (a) The overwhelming majority of claimants complain of the loss of land and other important resources, such as forests and inland and coastal fisheries, and of the consequent loss of tribal and individual mana. They complain of the Crown's failure to leave Maori with enough land either for personal use or for economic development.
- (b) They also refer, at least in general terms, to the means by which land and other resources were acquired without their full foreknowledge, understanding, and consent. These processes included outright confiscation, the passing of laws without their consent, the making of arcane bureaucratic decisions, and the dubious activities of land purchase agents operating under laws that favoured secretive dealing in land held under various forms of pseudo-individualised title.
- (c) They refer also to the social and economic *effects* of the loss of land and other resources, such as loss of opportunity, economic marginalisation, social confusion, and the dispersal of tribal communities.

The claims thus go well beyond property as such. They commonly refer also to the lack of consultation with Maori in the making of policy and to the bypassing of tribal authority in favour of individual dealings. Complaints are commonly made of a lack of respect by the Crown for tikanga or for the tino rangatiratanga guaranteed by the Treaty, and the frustration of Maori aspirations for self determination. Cultural and spiritual values are also frequently mentioned, sometimes in connection with the way educational, health, and social services are delivered.

Care must be taken to try to distinguish how far these outcomes stem from unavoidable effects of the trading and money economy (dating from well before 1840) that are beyond the power of the State to control. The analysis in the Rangahaua Whanui project has striven to keep this in mind, but the research, for the most part, substantiates the truth of the claims. Maori throughout the country have been reduced to near landlessness and have been economically marginalised by the deliberate actions of governments. They have been manipulated by various Government strategies, played off against one another in the land purchase processes, and seen the considered wishes of their leaders ignored and their institutions subverted if they stood in the way of the settlers' hunger for land. The situation of Maori by

the mid-twentieth century was a travesty of their situation at 1840. They retained only vestiges of their former lands and tino rangatiratanga. Their formal legal equality, as individuals, with the settlers was of course extremely important and has provided avenues of advancement and satisfaction for a great many Maori. But it has not provided the basis for the Maori people as a whole, or in their tribal communities, to maintain their balance and engage with the modern economy and the modern state as they had intended in 1840. This realisation became the dominant one for the increasingly educated, increasingly urbanised, but also increasingly unemployed, younger, post-war generation. It was that perception, as well as an awareness of specific injuries, that underlay the explosion of protest from the late 1960s. Maori people were fed up, not only with the sense of being left on the margins of a Pakeha-dominated economy but with still being ignored or patronised while other people were making decisions affecting their property and their lives.

It was these feelings that Mr Koro Wetere was presumably referring to when he introduced the Treaty of Waitangi Act Amendment Bill in 1985 to address ‘the mounting tension in the community’ arising from outstanding grievances.

ptiii.4 How then Should the Prejudice be Removed?

The Waitangi Tribunal addressed the issue of reparation for loss of land in the *Report on the Orakei Claim* of 1987.¹ It noted three possible approaches:

- (a) The making of full restitution in monetary terms based upon assessment of ‘damages for injuries, loss of use and missed development opportunities’.
- (b) The return of land still held in public ownership.
- (c) The ‘restoration’ of the injured community (rather than full restitution) by ensuring ‘the retention of a proper tribal endowment’ (the Tribunal then referred to a fuller explanation of this in chapter 8 of its *Report on the Waiheke Island Claim*²).

It is perhaps appropriate to reconsider each of these in turn.

ptiii.4.1 Full restitution

The monetary value of full restitution is extremely difficult to calculate because of the enormous number of variables that could have affected the land and the people if, for example, the Crown had not purchased the land before 1865, or if it had not been caught in the morass of Native Land Acts subsequently. *Some* settlement would have given added value to the land and brought trade, employment, new commodities, and new experiences; that is why Maori communities wanted it in the first place. Just what might have emerged if Maori and private settlers had arranged

1. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 3rd ed, Wellington, GP Publications, 1996
2. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Waiheke Island Claim*, 2nd ed, Wellington, Government Printing Office, 1989

matters themselves without the Crown's intervention is ultimately unknowable, but as chapter 1 of the historical survey argues (vol ii, ch 1), the indications in the late 1830s are that it would *not* have been altogether satisfactory to Maori. The 'lost opportunities' might in fact sometimes have turned out to be disasters. The dynamic forces at work in the Pacific from the late eighteenth century were not wholly within the control of either Maori or the Crown, and were never likely to be.

Another issue relevant to the full restitution approach is how much the loss should be regarded as being offset by the benefits of participating in the national economy and national infrastructure. It can be argued, with much truth, that the systems of law that allowed for the cheap acquisition of Maori land meant that Maori paid disproportionately for the cost of national development. That development, however, was also created by huge inputs of capital and skills from other sources. The public transport systems, health services, national defence forces, and so on benefit all New Zealanders and, from one point of view at least, can be viewed as part payment for the land. Individual Maori might have benefited from the opportunities even as their communities were suffering. The debate is thus probably about disproportionate contributions from Maori or disproportionate returns to Maori in the building of the nation state. It is about undue pressure brought upon Maori to part with land and the breach of public undertakings by the Crown on behalf of Maori.

But perhaps the main obstacle to a full restitution approach is simply that (assuming Maori would have retained and successfully developed their lands and resources but for Crown interventions) the cost of it is too vast to be supported by the national economy. Claimant leaders indeed often acknowledge this to be so, without resiling from their moral and legal right, in principle, to full restitution. Practicality – the desire not to damage the economy in which they themselves wish to take a much bigger place – suggests that another basis of redress must be found.

ptiii.4.2 The return of land still held in public ownership

The return of land still held in public ownership is another source of redress. It is indeed being used as an element in agreed settlements thus far and in the 'land banks' and 'protection mechanisms' put in place by the Government in recent years. There are difficulties, however, in how far public land can be the basis of redress. Too much constraint on the Crown to realise the capital value of land in the market place impinges on the economy or can lead to a devaluing of the land itself, partly defeating the objective in view. Some public lands – parks and beaches, for example – are too highly valued by the community at large to be available for transfer. Nevertheless, there are numerous situations where the reversioning in Maori communities of title to parts of the conservation estate or parklands and their involvement in management will help satisfy the deep-seated cultural needs of those communities, even if it does not assist their economic needs. There are many models of co-management.

ptiii.4.3 Restoration of a tribal endowment

The Orakei report's third alternative – the restoration of a tribal endowment or economic base – is probably the most practicable alternative. As the Tribunal has noted, if full payment for the past is not possible, providing for the future may be. Reparation for this purpose can, as in recent settlements, involve a mix of land, money, and interests in publicly owned resources. The Tribunal noted that, had the Orakei community been able to retain the freehold of the pool of the reserved land that Paul Tuhaere and the Ngati Whatua leaders of the 1860s intended (before the titles were individualised under the Native Land Acts and acquired piecemeal), the tribe would have been able to become reasonably prosperous from rental income as Auckland city grew – much as had been intended, apparently, in Lord Normanby's instructions to Governor Hobson in 1839. Many other examples comparable to Orakei can be given: all tribes made requests for substantial reserves and were promised them – indeed, sometimes had them marked out and Crown granted. Yet their supposedly inalienable status was subsequently changed, and these reserves were often alienated. Settlements now could aim to recreate, to a reasonable level and in the context of new and modern forms of property as well as land, what unwise policies and laws in the past have destroyed.

ptiii.5 Is the Purpose of Reparation only Economic?

The Tribunal's comments on Orakei refer mainly to economic goals but imply more than that. The goal is the restoration of a tribal community. The community cannot seriously function as such without community-owned resources to manage and deploy. But with a substantial capital base, the community can embark on a variety of business enterprises; develop the tribal estate; preserve tribal knowledge, marae, and other central facilities; and perhaps assist community members with special needs in respect of education or housing.

There is, however, a strongly held view among Maori that matters such as housing, education, and health are article 3 rights due to them as to all other New Zealanders and that Treaty claims settlements should not be eroded for such purposes or be used to reduce the Government's obligations to provide for these needs. Indeed, if additional special needs are identified in Maori communities – needs that are created by having to bridge cultural divides in order to gain the skills necessary to deal with the modern world – these too should arguably be met from regular funding, not from reparation for historical injury.

The question of Maori customary cultural values and needs perhaps touches upon both sources of funding. The preservation of Maori language and culture should presumably be a responsibility of the regular education and media programming budgets; not an optional extra for Maori but part of the heritage of all New Zealanders, acquired in what was clearly a bicultural society in 1840. The neglect of this area in the past, however, is frequently mentioned in Treaty claims, either

directly or as a by-product of the loss of the community land base. In this sense, it may need to be given additional recognition in the costing of reparations.

Decisions about the objectives of Treaty settlements therefore must consider whether the Crown's obligations derive from a view of the Treaty articles as relating essentially to property rights – the 'possession' guaranteed in the English version of article 2 – or whether they derive from a fuller sense of the principles of the Treaty, as elaborated in recent jurisprudence and involving the obligations Treaty partners have towards one another – including, on the part of the Crown, the duty of active protection of Maori rangatiratanga and taonga.

ptiii.6 Tino Rangatiratanga and Appropriate Levels of Ownership and Control

ptiii.6.1 Tino rangatiratanga

As has been noted, the majority of claims refer directly or indirectly to the loss of tino rangatiratanga, which the Crown promised to respect in 1840 but subsequently undermined; nineteenth-century Maori organisations referred to the goal of mana motuhake. The Waitangi Tribunal, and many modern Maori writers, have discussed the content of tino rangatiratanga. A range of meanings in English is given, centring around the concept of self determination or autonomy – one's right to be recognised as entitled to control one's own proper sphere, within the framework of the new nation state, and to be a partner with the Crown in that nation state. The trusteeship role of rangatira over their communities is also noted. How far Treaty settlements will address these concerns and seek to re-establish tino rangatiratanga where it has been undermined in the past is a matter for most serious consideration. The return of money and land obviously provides a necessary economic base from which tino rangatiratanga can be exercised. The right to control the restored resources, with minimal interference from the Government, seems to be an essential part of the process. Tino rangatiratanga, including its trusteeship elements, implies accountability by the tribal leaders to the claimant group rather than to the State, and efforts are obviously being made to form the appropriate legal personalities that would permit that accountability and allow the expression of the group's customary, as well as modern, values.

ptiii.6.2 Levels of society

The Treaty recognises tino rangatiratanga at several levels of society: 'ki nga Rangatira ki nga hapu ki nga tangata katoa'. The English version refers to 'Chiefs and Tribes of New Zealand and to the respective families and individuals thereof'. Arguably, therefore, the matter of payment of reparation should have regard to the proper functioning of each of these levels of Maori society. Clearly, claimant groups have much discussed the issue and, in particular, perhaps, the relationship of constituent hapu to the umbrella organisations, such as trust boards, that have

pressed claims and negotiated with the Government, often very successfully. Maori society always had the capacity to create multi-hapu structures, or iwi, by drawing upon deeper whakapapa links. It is entirely appropriate that they should wish to do so again for specific purposes, such as resourcing and managing Treaty claims and Treaty settlements. Just as the Kingitanga and various runanga emerged in the nineteenth century to try to retain Maori land and rangatiratanga, so they work in the late twentieth century to restore it.

ptiii.6.3 Appropriate structures

The question of which levels of Maori society should negotiate settlements and receive and manage assets is, of course, essentially a matter for Maori to determine. Though it should be noted that, in recognising particular groups or levels as the legal entities with whom they are agreeing settlements, governments will greatly influence the future of those groups and their constituent parts. The laudable desire to press ahead with settlements and restore resources – and hence greater self determination – to Maori communities should be tempered by the need to allow, or indeed to facilitate, Maori communities to come to their own considered decisions about structures, on the basis of wide discussion and consensus.

There remains the difficulty that, despite the best endeavours of Maori leaders and the Government alike, suitable structures for receiving and managing resources simply may not easily emerge on a consensual basis in some cases. Instead, factional divisions and rivalries may intensify, in the first instance at least. That situation may stand in the way of transferring wealth back to various districts of New Zealand that desperately need it to relieve unemployment and social malaise. Funding for these purposes can, and indeed should, be provided as an article 3 right rather than through historical Treaty claims. Nevertheless, the settlement of historical Treaty claims appears to be an important avenue of assistance, not only because of the funds that are made available but also because of the psychological boost that comes from a frank acknowledgement by the Crown of wrongdoing in the past and from the sheer practical necessity imposed upon communities of having to organise to receive and administer funds.

It should be recognised that most of the Maori structures above the level of hapu clusters are post-colonial in any case. This is true even for the select list of major iwi that were identified by early anthropology and early administrative processes and came to be drawn on maps from the mid-nineteenth century on. Modern anthropology shows how entities such as ‘Ngati Kahungunu’ or ‘Ngapuhi’ did not exist as coherent functioning groups (at least with their present boundaries) in the early nineteenth century, although they did have a number of important ancestors and marriage relations which gave them a potential coherence. Groups of relatively non-associated hapu and iwi gained coherence by the creation of trust boards in the 1920s and 1940s specifically to receive recompense or revenue from interim settlements of historical Treaty claims. The various hapu and iwi for whose interests the trust boards were formed have endured all along and have emerged with renewed

vigour in recent years. But a case can still be made that, if wealth is to be delivered to districts such as Hawke's Bay, Wairarapa, Northland, or Poverty Bay, similar structures to trust boards, embracing several hapu or, indeed, several iwi in a given district, should be created under the aegis of a framework statute to get on with the job. Nothing succeeds like success (as Ngai Tahu and Tainui have shown from the mid-nineteenth century to this day) and it may be that some 'temporary' or 'non-traditional' structures could again find themselves playing a creative and lasting role for the wellbeing of their communities.

ptiii.7 Indigenous and Non-indigenous Sources of Value

ptiii.7.1 Regional interests

One of the aspects of the discussion about appropriate levels of society concerns the disposition of interests in Crown assets such as forests or dams. Hapu on whose former lands these assets have been built are inclined to argue that the asset should return to them in particular. The wider iwi group managing the claim, however, hopes or expects that the asset will be available for the benefit of them all. At its worst, the prospect of the return of Crown forests has threatened at times to descend into a greedy competition, benefiting a small section of society. Where the resource is an indigenous resource – a native forest, for example – the specific traditional claim is understandable, although forests were not usually demarcated traditionally into specific hapu holdings. Where the asset has been created since 1840, it is very hard to see why it should be regarded as belonging to the specific group that once held that land. The asset was not traditional wealth, waiting to be developed; it was created by the labour and planning and capital of the national community, and ought therefore to be available to the Government, on behalf of the national community, to use in national strategies of reparation. Certainly, there is an argument, on the basis of restoring the tino rangatiratanga of hapu, that the hapu cluster on whose traditional land the asset now stands should be given special recognition in future benefits and future management, but to give some hapu now the whole of the 'windfall' benefits that flow from the accident of their land being chosen for State developments would carry the risk of creating new inequities in place of old ones.

ptiii.7.2 National interests

The argument can be extended nationally. A good case has been made for recognising specific local and hapu interests in respect of inshore fisheries – a traditional right never fully extinguished or compensated for in most cases, at least before 1992. But the offshore fisheries out to the 200-mile economic zone derive not so much from the development right of adjacent hapu (they never were 'adjacent' to fisheries that far out or that deep) but from the rights of the New Zealand State under international law. They may thus be seen as appropriately available for the

benefit of all New Zealanders, or all Maori, within reparation arrangements such as the Sealord agreement. Similar arguments can be mounted in respect of other national assets, such as geothermal or electric power systems, whose construction and functioning goes far beyond the point at which bores are driven or dams built.

ptiii.7.3 National consultative bodies

In this context, there is a case for national Maori opinion, as well as tribal opinion, to be consulted and mobilised for both policy-making and management roles.

The question of an appropriate vehicle or vehicles whereby this might occur is obviously a matter of ongoing concern to Maori. The New Zealand Maori Council and the Maori Congress are in different ways widely representative, though not completely so. The Maori members of parliament, augmented greatly in number under the mixed-member proportional system, will also represent Maori views in the Legislature and on its policy committees. The Treaty of Waitangi Fisheries Commission has been created to hold and manage particular assets on behalf of the national Maori community. From time to time, the idea of extending the fisheries commission model to hold and manage other assets and to deploy revenue from them for the benefit of local Maori groups has been canvassed.

The Aboriginal and Torres Strait Islander Commission (atsic) in Australia, elected from 11 regional councils by adult franchise, has sometimes been mentioned as having features that could be applied in New Zealand. One of the noticeable features of atsic is that it has enabled dynamic new leaders to emerge in Aboriginal Australia better able than some of the more self-appointed leaders of the past to deal with the vast new tasks required by the Mabo decision and the Native Title Act. Another is that the mechanism for accountability established in the atsic legislation enables Aboriginal communities to call leaders to account for mismanagement – a function that they perform with considerable vigour and that should be interpreted as a sign of health rather than malaise within atsic. In this regard, a structure like that created by the Maori Social and Economic Advancement Act 1945, with local elected ‘native committees’ sending representatives to regional ‘tribal executives’, once functioned well and could conceivably be reviewed as a possible foundation for a national Maori organisation.

The fact that most Maori are now urban people was of importance as early as 1962, when the New Zealand Maori Council Act replaced the 1945 Act; it is now clear that, if that change reflected an assumption that Maori were ceasing to be a tribal people, the assumption was premature if not wholly wrong. The very way in which Treaty claims are brought and negotiated shows how strong is the sense of tribal identity. Moreover, tribal identity reaches into the urban areas. There are, nevertheless, many Maori in the cities and towns who know their whakapapa vaguely and do not seek to activate a tribal affiliation. Although the cultural resurgence is likely to intensify rather than diminish tribal identification, Maori will also organise across tribal lines to meet urban needs or pursue national goals. New urban groups can emerge along the lines of new hapu, which traditionally formed

from segments of existing hapu grouping around strong leaders. Where such groupings persist and exercise the trusteeship functions appropriate to rangatira-tanga, no doubt they will secure recognition among the wider Maori community. A sharp antithesis of rural and tribal versus urban and non-tribal does not seem to be appropriate.

ptiii.8 Treaty Claims Settlements in the Context of Treaty Policy Generally

Efforts at resolving historical Treaty claims are of course taking place in the context of Treaty policy generally. Just how the claims are viewed affects how far the efforts to settle them serve the wider goals of Treaty policy. If claims are seen as essentially property issues, relating to the acquisition of Maori land or other property through confiscation, undue pressure, or neglect to apply even the minimal protective provisions of the statute law, then they can be viewed as specific wrongs. Rectification or reparation for them can also be in property terms – that is, in land or in partial compensation for land loss. That is indeed how claim settlements are currently proceeding, for the most part.

The implications of such an approach involve looking back to the past, identifying the wrong, and, through the compensation paid, closing off that wrong. This leads to a focus on particular claimant groups and to the privileges that formal registration of a claim in the Tribunal can attract – such as the legal aid provisions and funding for research – which in itself is likely to strengthen the group concerned.

There are some risks in such an approach in that one group may be deemed the principal claimant in an area and others ‘cross claimants’ (a situation alarmingly reminiscent of nineteenth-century Native Land Court procedures, where the first applicant became the claimant and the others became ‘objectors’). This risk has of course been apprehended by the Tribunal, which seeks to ensure that all parties with customary interests in an area are heard and the nature of their interests clarified. There are advantages in such a public process being gone through, even if the claimant groups eventually negotiate directly with the Crown. Even so, the need for mediation between overlapping interests is emerging and is likely to have to be addressed more deliberately.

The emphasis of Treaty policy at large, on the other hand, is with evolving future relationships rather than past historical experience. It includes the relationship of Maori with the Crown, with local government, and with various non-Maori groups and organisations. The question of Maori tino rangatiratanga in relation to all those is at issue. As indicated above, a powerful thread running through most claims is that Maori have long resented both being shut out of decision-making affecting their resources and their lives and having their wishes overridden for the convenience of white settlement rather than from some clearly defined national necessity. Removal of the prejudice now would seem therefore to involve more than simply

agreeing on a quantum of monetary reparation. Arguably, regard should also be had to the future involvement of Maori in the decision-making processes (at least in so far as returned property is affected in future) and also their place, by right, on local and regional authorities. The objective is sometimes spoken of as the 'empowerment' of Maori, not just the making of monetary payment for wrongs. The national side of this demand seems to have been significantly advanced through the increased number of Maori representatives in the national parliament, but there too part of the representation of Maori is ensured through the Maori seats and the Maori electoral roll. The place of Maori in local and regional authorities having responsibilities that affect Maori resources seems to require more explicit consideration.

It should be noted in this context that recognition of Maori interests is not addressed to the satisfaction of Maori by the repetition in legislation of clauses about 'having regard to Treaty principles' or general requirements to consult Maori opinion. The legal obligation is all too often discharged simply by posting off a letter or memorandum to some over-worked secretary of some local group – where it might languish amid a hundred other such letters. There is no substitute for direct and appropriate Maori representation on responsible bodies.

On the other hand, it may be thought that this kind of consideration is loading the claims settlement process too heavily – that the important immediate objective is to get substantial wealth promptly transferred back to Maori in part reparation for its wrongful acquisition in the past, but not to confuse that goal with wider Treaty purposes. Moreover, it may be assumed that the very fact of possessing significant economic resources will itself ensure that Maori will eventually be major players in any decisions affecting that property, and wider issues in their region. The matter is one for consideration, but it is perhaps appropriate to raise a warning note that no certain guarantees can be given about the economic future, and safeguards about the best management of property and about alternative strategies to promote ongoing Maori participation in the economy generally may well need to be built into the structures for recovering and administering Treaty settlements.

ptiii.9 Overseas Models

Overseas, notably in Canada, claims settlements involve a whole range of matters, including grants of money and land; shares in resources such as sub-surface minerals, forests, and oil; major roles in the conservation of natural resources; and the devolution (or recognition) of administrative and judicial powers in tribal territories. The totality of such measures is intended to further the claim of indigenous communities to an inherent right of self determination or of 'sovereignty'. These are very large questions, going well beyond reparation for specific historical wrongs in respect of property.

The Canadian experience has been increasingly studied by Maori community leaders and academics; opinion about its relevance to New Zealand appears to be divided. Maori also hold to concepts of inherent right and aboriginal title, both

predating the nation state and with aboriginal title being recognised by common law as well. The progress of Canadian and American ‘first nation’ claims, on the basis of various treaties and the constitutional recognition of inherent right in Canada, suggests possible models to Maori. On the other hand, the peculiar history and geography of North American communities, their isolation in portions of a vast continent, and their particular ethnic and linguistic identities do not compare readily with the relatively small New Zealand islands, where Maori and non-Maori have mixed and intermarried for 200 years. This mixing has created a very distinctive situation in New Zealand. Maori have complained over the years, with much justification, of the heavily assimilationist tendency of British policy in New Zealand. But (in the author’s view) the legal separation of indigenous and immigrant communities in North America, or worse still the absurd creation of a separate group of Métis, contrasts very poorly with the access Maori have had to mainline institutions and the freedom they have to choose their own identification rather than have it imposed upon them. The desire to recover a much greater degree of autonomy to protect Maori society and culture against an assimilationist tide is one thing. To create a system of semi-distinct legal and constitutional polities is another. In this context, it might be noted that the words ‘nation’ and ‘sovereignty’ as used in North America are highly ambiguous, and while they have a certain emotional value and appeal, they have not been particularly useful in the negotiation of practical arrangements for North American First Nations (or for Australian Aboriginals either), in contrast to the advances made by simply negotiating contractual arrangements (which the North Americans call treaties). Moreover, while North American First Nations might have made advances in their distinct rural localities in recent years (previously, most reserves were miserable semi-prisons), the situation of their members in the great cities of North America has scarcely been advanced at all. If anything, the legal-jural situation of many groups of Indian, Inuit, and Métis in, say, Toronto, vis-à-vis one another, as well as vis-à-vis Canadians of British or French origin, is one of real confusion, which can offer little or nothing to New Zealand by way of useful example.

ptiii.10 Timing

In the end, we come back to the Treaty of Waitangi and to the articulation of the Maori–non-Maori relationship around the concepts of *kawanatanga* and *tino rangatiratanga*. The meaning and practical import of these is the central issue for all New Zealanders. It has received and will continue to receive the widest possible discussion. The evolution of a coherent Treaty policy generally must continue to be a primary task of the Government and Maori, both joined in an ongoing process that needs strong Government initiative. How far the more specific objective of the settlement of historical Treaty breaches is made to depend on that discourse (and how far it should be kept distinct) is a matter for immediate consideration. That there should be a relationship is desirable; but it is likely to be thought undesirable

that the working out of that relationship should overly delay the settlement of historical claims and the return of resources into the hands of Maori communities.

In practice, thus far, Maori negotiating groups are signing agreements in respect of specific historical injuries and (except to some extent in the Sealord agreement) saving their aboriginal title rights and Treaty rights in a more general sense. This practice is likely to continue to commend itself. It enables the main historical grievances to be resolved, while not requiring closure on the situation of groups in wider Treaty terms, including the ongoing review of economic and educational or other disadvantages, or the consideration of specific new historical issues, which might emerge more clearly in the light of later evidence.

ptiii.11 Staged Settlements

One aspect of Canadian experience that merits serious consideration is the staging of settlements over a number of years. This does not appeal greatly to most Pakeha, who, after 150 years of relative inactivity, want the historical claims resolved, swiftly and finally. There is the possibility, however, that moving *too* swiftly may jeopardise finality. Treaty settlement processes generally, and this report too, amply demonstrate the complexity both of history and of Maori society. It is not always easy to tell that all the issues have been squarely addressed, the injured parties correctly identified, and the extent of their injury (and hence their share of reparation) correctly gauged. Nor is it possible to guarantee that the damage done in the past will be rectified (even to the limited extent agreed) by a one-off settlement. Canadian settlements define a list of socio-economic goals, rather than a property settlement alone. Their settlements envisage periodic payments, or the progressive transfer of assets, and a review of progress at intervals of five or 10 years. This approach deserves much more serious discussion than has yet been carried out in New Zealand. It is still possible by such means to *agree* on a settlement that resolves the historical grievances, while spreading the *implementation* of it over a number of years. The monitoring of it, perhaps by an authority involving the wider Maori leadership as well as by the Government, would have to guard against anomalies arising in the use of resources transferred – anomalies that, with the best will in the world, cannot always be foreseen in the year of the settlement itself.

In so far as the Canadian method involves social, administrative, and judicial arrangements as well as economic ones, it may be felt, however, that they are more a matter for Treaty policy generally than for Treaty claims policy (especially historical claims settlements), but the two are connected and the relationship deserves serious consideration. In other words, staged settlements of historical grievances can take place within a wider context of evolving Treaty policy.

ptiii.12 Funding for Treaty Settlements

ptiii.12.1 Lack of public debate

There has also been very little serious public debate about the funding for Treaty settlements, both in terms of the overall level or in terms of the appropriate quantum for a particular group of claims.

It is widely acknowledged that the Crown proposals of December 1994 were seriously flawed in that they declared several major matters, including the 'fiscal envelope' of \$1 billion, to be non-negotiable even before they were put to Maori communities. Sheer self-respect, let alone the claim to Treaty partnership and tino rangatiratanga, obliged Maori to reject the proposals and to decline formal discussion of them, even though elements within them were recognised as being not without value to the process. Few in New Zealand would not want to see practical realism brought into the level of funding of settlements; no thoughtful Maori wants to undermine the economy from which they seek more effectively to benefit. But the Crown's 1994 approach was scarcely the way to win their cooperation.

Nor is it clear how the Crown and Maori negotiators are arriving at the levels of settlements agreed thus far. Confidentiality is obviously necessary while the negotiation is in progress, but just why one group is deemed entitled to a settlement of \$170 million and another, of about the same number, to a much lesser settlement remains obscure, although there are no doubt good reasons. Confidentiality in negotiation does not mean that the principles or bases of settlement must remain obscure. Indeed, there is an increasing need for more transparency in the objectives and principles to be realised before other tribes will commit themselves to settlements.

ptiii.12.2 Spreading the load

Pakeha New Zealanders, who form the tax-paying majority that ultimately foots the bill, may admit the justice of the process and believe that reparation is due to Maori for some historical injuries at least, but they are inclined to resent being asked to bear the whole cost in their own generation. Present Government aims of redressing all major historical grievances by the year 2000 put the load on one tax-paying generation over a mere five years since the Tainui settlement (or eight since the Sealord agreement of 1992). This perception is not entirely valid, however, since the provision of redress in the form of improved lands and shares in resources, such as exotic forests, draws upon the inputs of previous generations who have had the use of the land. Moreover, the making of payments to Maori in Treaty settlements generally means a reallocating of resources within the New Zealand economy, a form of regional development, not a loss to the national economy at all. Nevertheless, the costs of settlements are debited to the Government's accounts at the time they are paid over.

Consideration might therefore be given to the advantages of the Canadian system of staged settlements, with levels of funding (adjusted for inflation) projected ahead

for 10 or 15 years, or to the systems of the New South Wales and Australian Federal Governments. The New South Wales Aboriginal Land Rights Act 1983 established a fund by allocating 7.5 percent of the state land tax for a period of 14 years. This fund was calculated to reach a certain level and could be used by Aboriginal groups both to purchase land on the open market and to develop it, together with some Crown lands that were handed over.

The Federal Government's Land Fund Act 1995 works on somewhat similar principles and aims to create a fund of about \$1.5 billion over 10 years. Depending upon the time at which funding was drawn down, it could become self-perpetuating.

These are simply some examples of how the load might be spread, with defined targets for a defined period of years, thereby ensuring that the whole settlement funding process is not undisciplined. Obviously, the allocations would have to be designed to meet New Zealand needs and conditions. It might also be noted that, depending upon which portions of the tax base are drawn upon, Maori taxpayers would also be contributing.

Some queuing for the receipt of settlement moneys will be inevitable, because of the time taken to hear claims and for recipient groups to organise. This, too, should assist in spreading the load across a term of years.

ptiii.13 Broad-brush or Specific Approach to Claims?

ptiii.13.1 Categories of claims

The 650-plus claims lodged with the Waitangi Tribunal can be divided into two broad categories:

- (a) Highly specific claims, perhaps from an individual or a whanau, relating to the taking of a specific piece of land by a specific action of a Government agency.
- (b) Claims by representative bodies, such as trust boards or runanganui, about the cumulative loss of land and rangatiratanga over the tribal rohe by general Crown policies and processes, such as Crown purchases or purchases under the Native Land Court.

The question arises as to whether these should be dealt with in the same way.

Where possible, for the purpose of investigating them expeditiously, claims have been grouped on a district or tribal basis for Tribunal hearings and Government negotiations. The Rangahaua Whanui research programme has proceeded both on the basis of generic 'national themes', which run through a great many of the claims, and by district research to show where the Crown policies made themselves felt. It is evident that certain actions of the Crown (for example, pre-emption purchases or tenure conversion and sale under the Native Land Acts) affected a great number of districts in broadly similar ways, as discussed above. It would be possible to take a generic approach to these, ascertaining by research simply that the great majority of Maori in a given district were affected by some or all of those

policies, and, without further detailed research, allowing a quantum of settlement for that kind of injury. More specific claims in respect of specific blocks could await more detailed research and negotiation. Provided agreement was reached on the level of settlement, the main historical claims could be deemed to be satisfied. That kind of approach would correspond in part to the way in which South Africa currently divides claims into historical issues, which require a policy approach based on certain agreed principles, and claims within living memory, which are dealt with as legal claims involving damages and, possibly, full restitution. It is unlikely that New Zealand would want to go fully down that road; in a sense *all* Treaty claims before 1975, or perhaps before 1985, are seen as historical. Nevertheless, the more recent grievances are capable of being evidenced more precisely as affecting particular families or hapu; the further back one goes, the more general the impacts of Crown action, although there are particular issues and injuries to small groups that can be identified as well.

ptiii.13.2 The broad-brush approach

It is arguably in the interests of all parties to take a broad-brush approach where possible. First, it would ensure that reasonably substantial reparations can be made to Maori communities promptly – before more of the present kaumatua generation die. Secondly, it would save enormously on the costs of litigation and further research. Thirdly, it would minimise the tendency of Maori to compete with Maori and would instead provide an incentive for hapu and iwi to come together to build a future.

In this context, it should be recognised that research about whether or not the Native Land Court or Government commissioners awarded a block to the ‘right owners’ may prove to be ultimately unproductive in most cases. Basically, this is because customary relations between people and land never did involve a single, discrete hapu sitting within neatly defined boundaries. Hapu were dynamic entities with overlapping memberships. Usually, sections of several hapu occupied land in complex, constantly changing ways and with rights scattered through each other’s principal territory. Any definition of hapu territory as a territory discrete from that of the next hapu required mutual concessions on each side (as the 1856 committee of inquiry recognised and as the Urewera commission found in practice at the beginning of this century). Native Land Court determinations involved some rough determinations of this nature, with greater or lesser degrees of consent from the interested parties. Sometimes, the court got it wildly wrong, especially when the judges acted on the assumption that the members of some group were the ‘owners’ and the other groups had no rights at all. On the other hand, where the court allowed Maori to draw up their own lists of owners, those lists probably reflected a better balance of customary right holding (*provided*, that is, that the land purchase agents had not already rigged or skewed the result). Some of the worst injustices were corrected in re-hearings, or by a statutory response to a petition; others were not. To revisit them all now, at the cost of much time and expense, would no doubt improve

the outcome in a number of cases, but in many other cases the evidence is now too thin to permit very much alteration about which one could be confident that better justice was done. Hapu have continued to evolve, intermarry, wax, and wane over the years; it is probably more constructive to encourage that process to continue (in urban areas too) while getting to grips with the future than to revisit the fine details of the past in order to try more exactly to determine the situation as it was then.

An extension of this argument is that it does not even matter much whether Maori lost their land by crudely conducted Crown purchases, by sales under the Native Land Court, or by the authority of the Maori land boards or the Maori Trustee. The important point is that they lost it, most Maori communities being landless or nearly so by 1930 and needing land more than ever to support a burgeoning population. In 1920, the Secretary of Maori Affairs calculated that 19 acres per head remained in Maori title, much of it of poor quality. It might be possible to draw up a scale of heinousness, so to speak, according to the degree of pressure or divide-and-rule tactics brought to bear on Maori to alienate land, and then to seek to allocate settlement moneys according to that scale. The more relevant issue, however, might be how many people were injured by the outcome, and how much, and what kind of land was left, rather than how much land was lost. This is another way of asking how intensively Maori used the land they lost and how they were situated on what was left. For a tribe of, say, 2000, intensively cultivating the river valleys or fishing and bird catching in precious swamps, the loss to them of a thousand acres of such resources might be more serious than the loss of several hundred thousand acres of more remote land that was visited relatively rarely. That is why the loss of relatively small areas of land in the twentieth century was so serious; it was often the land most important to Maori, land held back from earlier sales. That is also why having to concede the freehold or perpetual lease of reserves in the towns, and of the native township sections, was serious; it cost the tribes access to the increased capital value of urban land, which, according to early British policies, was supposed to be the main form of payment to Maori for the loss of their broad acres.

For all these reasons, a case can be made for a broad-brush settlement strategy for the main historical claims. Reparation could be paid in favour of a tribal community or district, based on a quantum allowed for the main modes of land alienation and having regard to the number of people affected and the amount and kinds of land and other resources they had left. A weighting could be given for the loss of especially valuable resources and other exceptional features. Indeed, this process already seems to have been adopted in negotiated settlements, although the principles upon which it is based have not been made clear.

ptiii.13.3 Opportunity should be provided for all claims to be heard

All this being said, however, there is no doubt that most claimant groups will wish to be heard in respect of their claim by the Tribunal or by the Government or by both, and they should be given ample opportunity to be so heard. A broad-brush approach that leaves people with the sense of matters of special concern not having

been voiced and considered would defeat one of the major purposes of the legislation. All issues of serious concern need to be deposited. Many of them are very likely to fit within categories of breach that have already been acknowledged and, once established to the satisfaction of the Tribunal to have occurred, can be grouped together for reparation without further ado. Others, including specific takings of particular lands, may have to be discussed separately. In a sense, this kind of categorisation has already been made, with, for example, the Waikato raupatu claim being the object of settlement and the Waikato River and harbour claims being held over. There appears to be no difficulty in principle about this strategy, but care will be needed not to close off discussion too soon on particular matters of deep concern to a claimant group.

ptiii.14 Criteria for Assessing Seriousness of Injury

An appraisal of historical evidence, such as that provided in the three volumes of this report, shows that some actions of the Crown were more obvious breaches of the Treaty than others, being more swift and sudden in their impact or affecting more people. Some criteria have been suggested in the executive summary as to how these historical injuries might be appraised. The suggested criteria are:

- (a) The extent to which the Crown has resorted to coercion, manipulation, or pressure to achieve its objects, without seriously consulting Maori opinion or in opposition to evident Maori preferences.
- (b) The extent to which the Crown failed to carry out its own plain undertakings or commitments to Maori.
- (c) The number of people affected (demography)
- (d) The quantity and economic potential of the land or other resources lost.

ptiii.14.1 Applying the criteria to the historical evidence

Although inevitably subjective to a degree, an attempt has been made in the executive summary to appraise the historical evidence and to assess and rank the seriousness of Treaty breaches in the light of these criteria (see secs es.4–es.10).

The main general conclusion drawn is that, judged on the basis of which of the Crown's actions were the most deliberate and hurtful of most people, the worst breach has been the destruction of rangatiratanga, or legitimate scope for autonomous Maori action. This has two major aspects:

- (a) The loss of resources underpinning autonomy and self-determination at the individual and tribal level.
- (b) The exclusion of Maori from decision-making processes affecting their lives and their resources.

More specifically, among the most serious causes of injury:

- (a) In respect of the loss of resources and the destruction of the tribal level of rangatiratanga, the purchases under the Native Land Acts can be regarded as

the most serious issue, affecting most people over the longest period of time. In that the Legislature instituted the conversion of customary tenure, with its various checks and balances, into a form of pseudo-individualised title, under which every title-holder's signature became a marketable commodity and the ease of partitioning blocks sidestepped the objections of non-sellers, the Crown instituted, and sustained against the considered wishes of the Maori leadership, a process that led to the landlessness or near landlessness of Maori in most parts of New Zealand and caused great social and economic dislocation for more than a century. The retraction of the self-management machinery instituted under the Maori Land Councils Act 1900 and the purchase of some 3.5 million more acres of Maori land under the Native Land Act 1909, at a time when the Maori population was known to be stable or increasing, were two of the most serious manifestations of this policy.

- (b) Close behind, in terms of quantity of land alienated and effects upon considerable numbers of people and districts, were the purchases in the period of Crown pre-emption, 1840 to 1865. Apart from being manipulative in ways that were eventually to lead to war, the Crown's preoccupation with securing freeholds, to the almost total exclusion of leasehold and joint-venture arrangements, contributed heavily towards the systematic marginalisation of Maori.
- (c) The confiscation, or forced cession, of land under military control drastically affected particular tribes and particular districts.
- (d) The Crown's failure to ensure that adequate reserves of land were left with Maori, inalienable except by fixed-term lease, and to itself take sufficient land under trust to endow Maori health, education, and welfare services, are breaches closely related to the three matters aforementioned.
- (e) For many Maori communities, the loss of ownership or control of rights in foreshores and inland waters is almost as important as the loss of land rights.
- (f) Public works takings disproportionately affected Maori and commonly resulted in lower compensation payments than were made to Pakeha landowners (or, in many instances, no compensation payments).

ptiii.14.2 Some fundamental choices of approach to historical injury

(1) Assessing the process of land alienation or assessing the outcome of the process?

It will be a matter for primary consideration as to whether it is the *means* by which land was lost that constitutes the main basis of a claim or the *outcome* of that process. What may matter to claimants is not that land was lost through manipulative purchases or public works takings or raupatu but that it was lost and that, by 1930 or 1945, very little was left. The choice of approach taken will affect the way in which research and negotiations then unfold. An appraisal of outcomes can

proceed quite swiftly, based on statistical evidence at a chosen date. There would be no need to pursue detailed research on exactly how things happened, if it were accepted that processes of alienation all involved some kind of Treaty breach, to a greater or lesser degree – a judgement that might be able to be made on the basis of Waitangi Tribunal reports to date and the national theme chapters in this report. An approach based on outcomes also implies that the quantity or worth of the land and resources left is a more important consideration than the quantity or worth of the land and resources lost. It is also relevant to consider whether this should be measured on a per capita basis or on an aggregate basis. Given that people matter more than things (even land) in terms of the Crown's duty of active protection, a per capita basis would seem to be the more equitable way of measuring the outcome. As demonstrated in the executive summary, the Rangahaua Whanui district where Maori had the least land on a per capita basis in 1939 was Hauraki, followed by the confiscation-affected districts of Waikato and Taranaki, followed by Auckland (see sec es.11.3).

(2) *The value of what was lost cannot be ignored*

It is unlikely that any group, recalling what lay within its rohe in 1840, will agree to see that wholly discounted in any appraisal of Treaty breaches. Yet the valuation of such resources would be very difficult. Not all acres were of equal worth in the Maori or the Pakeha economy. Remote land, though important in the hunter-gatherer economy, was probably not as precious as land that grew kumara. Good access to the sea or lakes and lagoons (like the waters themselves) was highly valued. With the advent of the Pakeha economy, land that grew wheat quickly became important, then the grasslands where stock could be pastured. Good timber land was always valuable, although a lot of it was burned before it was realised just how valuable. With the growth of the urban economy, land in or near towns gained value, while land distant from towns declined in value, relatively speaking, and supported fewer and fewer of the populace. How to measure these things is extremely complex, and values change for reasons not necessarily inherent in the land itself but because the values of the world around change. Probably it is still true to say that the loss of remote back-block land was less serious than the loss of cultivable land near ports and settlements. Apart from land of spiritual and cultural significance, it may not be possible to say much more than that.

(3) *Broad-brush or detailed research?*

Apart from outcomes, many claimants may still wish to examine closely the way in which the land was transferred. They might even wish to pursue this on a block-by-block basis. It is possible to do this, up to a point, depending upon the extent and quality of the surviving evidence. Dr Michael Belgrave's study of the Auckland district included each block's date of alienation, area, and price. It took nearly a year, with research assistance, and enabled certain correlations with the legal and administrative regimes in force to be made. More detailed histories of alienations, identifying vendors and the degree of consultation with them, would take much

more time and would be fairly expensive. Where there are competing or intersecting claims, there will probably be duplication and legal costs. Because hapu were not discrete entities sitting behind neat boundaries, the outcome of competing or adversarial processes may not be conclusive and is certainly likely to be unsatisfactory to at least some of the parties. There is also the risk that claims (and the associated research, legal, and hearing costs) will become hydra-headed as intersecting hapu, or even whanau, want to pursue their particular view of the history of a land alienation and its prejudicial effect. The imperatives for this can be very strong, especially if the hapu or whanau does not feel that its experience or viewpoint is adequately encompassed in the claim as it is being pursued by a trust board or runanganui. Yet to pursue this process too far will certainly be costly and may delay settlements. How far the research and legal costs of individual and small-group claims should be funded in addition to a large-group claim covering the same land area is a matter for consideration.

(4) *A middle course?*

A possible way through some of the dilemmas is to treat some matters with a broad-brush approach and leave others for more finely detailed inquiry. Such a division could be made by date *or* by theme *or* by a combination of both. It would be feasible, for example, to take a particular date and treat all or most issues arising before that date on the broad-brush basis, leaving matters since that date for more specific inquiry. Alternatively, the outcomes of particular themes, such as Crown purchases or purchases under the Native Land Acts, could be assessed statistically, and negotiations carried out over them on broad-brush terms, leaving other themes (such as rights in rivers and foreshores) for detailed consideration.

(5) *A division at 1940?*

A likely practicable date to use to divide claims between a broad-brush and a detailed approach is 1940. This date suggests itself because by that time (or a few years earlier) the Crown had ceased pursuing policies that led to the systematic alienation of millions of acres of Maori land and, for the most part, had shifted to a policy of assisting Maori to develop remaining land. This is not to say that Maori land was not still being acquired. Indeed it was, largely by public works takings and tenure conversions, which eroded important portions of the remaining Maori estate. But the era of the systematic acquisition of the bulk of Maori land for Pakeha settlement was virtually over. The outcomes are measurable statistically at 1939 or 1940, before Maori urbanisation was well advanced. Other reasons for suggesting 1940 as a dividing point are:

- It marks a round 100 years since the Treaty was signed.
- The advent of welfare policies, land development, urbanisation, and so forth had not yet greatly clouded the issue.
- The year 1940 divides claims fairly well between those within living memory and those that are more truly 'historical'. Of course, there are numerous kaumatua whose living memory goes back well before 1940 and a living oral

tradition that goes back to 1840 and beyond. There is a tendency for claims relating to particular pieces of land to cluster more thickly around postwar events, however, and the people who experienced those events and remember them personally are much more numerous. All such divides are to some extent arbitrary and, if broad-brush strategies are to be pursued at all, there is a good case for a 1940 divide. Alternative candidates for dividing points might be 1934 (marked by the new Native Affairs Act), 1945 (marked by the end of the war and by the Maori Social and Economic Advancement Act), or 1975 (marked by the Treaty of Waitangi Act).

Whichever of these dates is chosen, settlement should proceed quickly, on the basis of existing research and further statistical evidence as to outcomes, and according to nationally agreed guidelines as to the weighting to be given to such factors as isolation and the economic potential of the resources remaining (in addition to their quantity).

More detailed research and Tribunal hearings could continue on more recent matters, although consideration should be given to settling small claims through other agencies, such as the Maori Land Court, leaving the Tribunal free to examine questions of principle having wide application.

(6) *Division according to themes*

The themes or issues that might be included in a 'package' for broad-brush research and negotiation are:

- (a) old land claims and 'surplus land';
- (b) New Zealand Company purchases;
- (c) Crown pre-emption purchases;
- (d) Governor FitzRoy's waiver purchases;
- (e) purchases under the Native Land Acts to 1940;
- (f) alienation of reserves and the failure to maintain restrictions on title;
- (g) land taken for survey costs;
- (h) loss of land in the native townships;
- (i) public works takings to 1940;
- (j) loss of land through consolidation and development schemes;
- (k) inadequate compensation paid for gold-mining and access to other minerals;
- (l) takings of land in lieu of rates; and
- (m) alienations by the Public Trustee and Maori Trustee to 1940.

Themes that might not lend themselves so easily to inclusion in the package (but which should nevertheless be considered for inclusion) are the areas where aboriginal title rights are most likely still to obtain; namely, rights to the foreshore (including the tidal foreshore and inshore seabed) and inland waters.

ptiii.14.3 How should these matters be decided?

The loss of rangatiratanga has been an ongoing theme throughout this report and has been identified as the most serious of Treaty breaches, in respect of both resource loss and exclusion from the decision-making process. The restoration of tino rangatiratanga will be the work not of a year or a decade but of generations. Yet a significant step can be made immediately by involving Maori communities and the Maori leadership much more fully in the shaping of strategies for the resolution of Treaty grievances. There was consultation between the Government and Maori before 1985 about the *principle* of returning the jurisdiction of the Waitangi Tribunal to 1840 but not much consultation about how the outpouring of claims (foreseeable to anyone with a reasonable knowledge of New Zealand history) or the payment of reparation would be managed. There was consultation in 1994 and 1995 over the Crown proposals for Treaty settlements, but it was greatly distorted by the unilateral imposition of a non-negotiable fiscal cap. Genuine consultation and recognition of rangatiratanga can scarcely take place when key matters have been declared non-negotiable in advance. It would not be untimely if the wider Maori leadership were now to be seriously consulted on how to manage the ever-growing number of Treaty claims and the findings of the outpouring of historical research to this point.

The Waitangi Tribunal could play a leading role in such deliberations because of:

- (a) its responsibilities under the Treaty of Waitangi Act;
- (b) its considerable experience to date;
- (c) its ongoing role in hearing issues that have yet to be explored fully in terms of Maori views of what actually happened and in terms of Treaty jurisprudence; and
- (d) the likely increasing importance of its role as mediator between intersecting Maori groups as well as between Maori and the Crown.

Individual Maori, and individual whanau and hapu, have rights under the Treaty and under the Act to depose their claims and be heard. They may or may not wish to include their claims under the umbrella of a wider claim. Yet the pursuit of individual and small-group claims should not unduly delay the settlement of large-group claims, which it could, because of competition for scarce research resources and the time of the Waitangi Tribunal. The Government could reasonably be expected to give priority to the settlement of large-group claims before small-group claims, in the interests of restoring a capital base to as many Maori people as quickly as possible.

That principle would operate as an incentive to individuals and small groups to cluster under the umbrella of large groups. A percentage of the value of any settlement could conceivably be retained for a staged transfer to small groups, if subsequent research determined that they warranted reparation in addition to that made over in the large-group negotiation and payment. These are matters both for discussion with the wider Maori leadership in terms of strategy and for the Maori leaders and communities of a given district when negotiation and settlement in their community or district is at hand.

