RESPONSES TO THE 'SEALORD DEAL' – FISHING FOR INSIGHTS[1]

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1. Introduction

Aboriginal and Torres Strait Islander peoples of Australia are entering into a more intense period of agreement making with non-Indigenous organisations, companies and governments. Indigenous peoples international experiences of agreement making may provide insights and assistance in developing localised strategies to enhance outcomes for our communities. This paper respectfully looks across the Tasman to *Aotearoa*/New Zealand and to Maori experiences of agreement making processes within a treaty settlement framework. In 1992 the 'Sealord Deal' emerged from Maori challenges to the New Zealand government's proposed Quota Management System (QMS) for *Aotearoa*/New Zealand's commercial fisheries. This contentious pan tribal settlement extinguished the ability of Maori to claim a right of commercial customary fishing, exchanging that right for a bundle of settlement assets. The settlement allocation model was vigorously debated over a ten-year period alongside more recent protests over the recognition of Maori rights to the foreshore and seabed. This discussion provides the background to the Sealord Deal and the nature of the settlement package. The paper then focuses on the responses to the settlement process, exploring insights into issues that potentially influence the workability of settlement processes for Indigenous communities. Although the more recent foreshore and seabed rights protests are tied to the issues under discussion they are not elaborated at length within this paper. However the tail end of this paper touches on some of the important implications of the New Zealand government's stance and the continued marginalisation of Maori rights to the foreshore and seabed.

2. Background

In 1840 the British Crown entered into a treaty agreement with a majority of the Chiefs of Aotearoa/New Zealand. Despite the guiding light of these treaties (*Te Tiriti o Waitangi* being the Maori version and the Treaty of Waitangi the English) the Crown failed to meet its Treaty obligations, losing all honour as a Treaty partner. It would take years of struggle before limited

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recognition of the Treaties took place, as first evidenced in enactment of the Treaty of Waitangi Act 1975. This Act established the Waitangi Tribunal, providing some foundation for development of governmental Treaty principles.[2] Even though the Tribunal and the Court of Appeal have interpreted some of these governmental Treaty principles there official standing still remains unclear.[3] This ambiguity was also reflected in recognition of Maori customary and commercial rights to fish.

2.1 Maori customary fishing rights

The Tribunal describes how New Zealand was born through fishing, a creation story exemplified in the exploits of *Maui*, a culture hero known throughout Polynesia. From creation stories to subsistence, fishing has always played a significant role in Maori society. Historical accounts express surprise at the scale of customary fishing exploits and the nature of the inter-tribal and settler based commercial ventures that existed pre-1840.[4] Fishing nets were larger than European equivalents and strong trade links were established with European traders.[5] Maori have maintained a close relationship with the ocean, developing and merging these intricate and sustainable practices with commercial fishing exploits.[6] Despite Article Two Treaty guarantees, Maori fishing rights would be subordinated and marginalised for decades to come.[7]

3. Breaches of the Treaty of Waitangi

Crown interpretations of Maori customary fishing rights were not in line with Treaty guarantees. Even though Maori fought against these Treaty breaches at many levels, there was a virtual denial of Maori fishing rights throughout the last century.[8] Early fisheries legislation (which included the Sea Fisheries Act 1884, Native Purposes Act 1937, Maori Social and Economic Advancement Act 1945) aimed to limit Maori fishing rights to a non-commercial subsistence interest. In its infancy, fisheries legislation sought to marginalise Maori selling oysters from reserves (Oyster Fisheries Act 1866). Even the Fish Protection Act of 1874, (which included express recognition of

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[2] See De Santolo, J., *Exploring the Treaty settlement process in Aotearoa/New Zealand,* 2003.
[3] See Durie, M., *Te Mana Te Kawanatanga,* 1998, p.205, and *The New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA).
[4] Waitangi Tribunal, *Muriwhenua Fishing Report*, 1988, Department of Justice, Wellington, pp.41-44.
[5] Ibid.
[6] The Tribunal cautions referring to traditional fisheries, noting that *Maori* traditions like Western traditions, are adapting, changing and responding to new needs, ideas and challenges. Ibid, p.31.
[7] Treaty of Waitangi Article II.
[8] For example there were thirty-nine Maori fishing petitions of protest referred to the Native Affairs Committee by 1899. See Waitangi Tribunal at n.4, pp.330 – 333.

Treaty provisions),[9] in effect detailed greater regulation in favour of public exploitation of fish resources.[10] This exploitation developed into a national fishing industry whilst state enforcement regimes continued to deter Maori from fishing activities.

Early case law suggests that the courts were ready to recognise Maori fishing rights. In 1910 the Supreme Court considered whether English statutes could confer rights for whaling in *Aotearoa*/New Zealand. One of the grounds for denying the statute this right was based on the recognition of Maori whaling practises and that the Treaty 'assumed that their [Maori] fishing was not to be interfered with'.[11] The Crown failed to respond to the case and did not make any specific substantial provisions for Maori and so it was that for the period 1900 – 1987 there was no general right of Maori fisheries recognised at law.[12] That is with the exception of the *Te Weehi* case in 1986. In 1986 a break through was made when Te Weehi argued against a conviction for the taking of undersized paua. The courts concluded that Te Weehi was exercising a customary right (recognised under the doctrine of Aboriginal title), a right that continued to exist and was exempt from regulations under the Fisheries Act.[13]

The 1986 amendments to the Fisheries Act (1983) placed Maori fishing rights in a non-commercial category, subservient to the implications of commercial fishing allocation under the new QMS. Section 28 of the Fisheries Amendment Act 1986 detailed the Minister's powers to 'specify the total allowable catch to be available for commercial fishing for each quota management area...' after 'allowing for the Maori, traditional, recreational and other non-commercial interests in the fishery.' These legislative changes did not go unnoticed. In 1986 the Tribunal contributed to the debate, providing a timely caution to the Ministry of Agriculture and Fisheries warning that the new QMS may be inconsistent with the Treaty of Waitangi.[14]

Maori parties took this a step further, successfully filing court proceedings against the Ministry of Fisheries.[15] The cases were successful in seeking injunctions against further implementation of the QMS.[16] Around the same time the Tribunal was prioritising fisheries issues, subsequently reporting

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[9] Section 8 stated that 'Nothing in this Act shall be deemed to repeal, alter or affect any of the provisions of the Treaty of Waitangi, or to take away, annul, or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder'.

[10] Durie at n.3, pp.149-150.

[11] *Baldwick v Jackson* (1910) 30 NZLR 343.

[12] Waitangi Tribunal at n.4, p.99.

[13] Due to the recent amendment, s88 (2) of the Fisheries Act. *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680.

[14] Memorandum from the Waitangi Tribunal 10 December 1986 to the Director General, Minister of Agriculture and Fisheries and Fisheries re Fish quota, 10.12.86, Waitangi Tribunal at n.4, Appendix 3, 3.4.2, p.292.

[15] The parties included the New Zealand Maori Council, Ngai Tahu Maori Trust Board, Te Runanga o Muriwhenua, Raukawa Marae Trustees, Taranaki Maori Trust Board, Taitokerau District Maori Council and Tainui Maori Trust Board.

[16] *Te Runanga o Muriwhenua Inc. v Attorney General and Others,* High Court, Wellington, CP 553/87, October 1987, Greig J. Also see CP 559/87, 610/87, 614/87, HC, Wellington, October 1987, Greig J.

on the *Muriwhenua* claim with a focus on the nature of *Muriwhenua* fisheries and the impact of colonising forces with reference to breached Treaty principles.[17] The Tribunal found that *Muriwhenua* has a development right to offshore fisheries stating that 'had the Treaty been honoured, and had assistance been given to Maori as it was to the Fishing Industry as a whole, there would be a healthy Maori fishing industry that may have been at the forefront of offshore discoveries'.[18]

A joint working group was set up in response to the court ruling and Tribunal reporting. Maori negotiators were given a mandate to seek a 50% share of quota at a *hui* in Wellington. This 50% stance was a consensus view but not unanimous.[19] A partial settlement was negotiated by way of a 10% transfer of quota under the new QMS regime. The negotiations came somewhat short of Maori expectations and matters remained unresolved.

This partial settlement established the Maori Fisheries Commission and expressed statutory affirmation of Maori fishing rights which were included in the long title of the Maori Fisheries Act 1989: (a) To make better provision for the recognition of Maori fishing rights secured by the Treaty of Waitangi; and (b) To facilitate the entry of Maori into, and the development by Maori of, the business and activity of fishing. The Act also had the effect of fuelling the debate throughout the country. The Maori Fisheries Commission sought legislative authority to further its intention to allocate assets to *iwi*[20] and to ensure that no allocation take place before the legal position for pursuit of the complete 50% was secured.[21] These strategies maintained a degree of uncertainty in the industry, and it was agreed that no new species were to enter the QMS until matters were resolved. It would take a number of years for negotiations to turn and for the Sealord Deal to emerge.

4. The Sealord Deal

In 1992, the opportunity to purchase Sealord Products Ltd (Sealords) arose. This was arguably seen as a one off opportunity to secure a major share of quota, around 26%.[22] The discussions moved quickly, the Crown refusing to purchase the company outright, instead seeking an investment partner in the

[17] The claim was brought to the Tribunal by the Muriwhenua tribes of the far north of the North Island and first encompassed a wide range of matters affecting land and waters. Due to the fact that the fisheries debate was of such national importance the Tribunal prioritised the fishing claim aspect.

[18] Waitangi Tribunal at n.4, p.236.

[19] Durie at n.3, p.154.

[20] *Iwi* has a number of meanings and the definition in terms of the Sealord Deal has been the subject of much debate. *Te Tiriti o Waitangi* articles refer to land and fisheries being guaranteed to *hapu*. *Iwi* is described by the Waitangi Tribunal as being the 'sum total of its *hapu*, the *hapu* an aggregation of *whanau*, and the *whanau* an association of close relatives, as for example, several brothers with their wives, children and grandchildren'. Waitangi Tribunal at n.4.

[21] By resolutions adopted at Hui a Tau (Annual General Meeting) July 1992.

[22] This one off opportunity was perhaps heightened to a degree of urgency in that there were overseas interests about to tender for the company.

transnational investment company Brierleys Investment Ltd. By August a Memorandum of Understanding was developed in the form of an agreement in principle. This traveled around 23 marae throughout the country, including national hui (meetings). There were concerns expressed with the mandate of the negotiators and the nature of the deal as it progressed.[23] However, Maori negotiators wrote a 260-page report detailing Maori support for the deal and on that basis the Crown progressed the settlement.[24]

On 23rd September the formal deed was signed by the Crown,[25] eight Maori negotiators, forty-three Maori signatories from seventeen different *iwi* and thirty-two Maori plaintiffs from various fish court actions.[26] Major concerns arose questioning the ability of single signatories being able to sign for an entire tribe and even some signatories expressed concern as to being confused about what was being signed. Durie points out that '[the] actual signing was wrought with ambiguity. At least three thought they were signing an attendance record, an understandable impression given that they were handed a blank sheet of paper. In fact two documents were completed that evening. One was the deed of settlement and the other was an agreement to withdraw court action in respect of fishing claims. The distinction was far from clear. Concern was also expressed about the mandate which some of the signatories presumed to carry. Did the appendage of tribal affiliation after a signature carry with it mandated tribal authority? Several tribes were to protest that the signatures of one or two members who had not been given authority to sign on behalf of the tribe did not mean consent by the tribe. And, more to the point, what was to be the position of tribes who refused outright to sign the deed?'[27] Some of these issues would reach the Waitangi Tribunal and, once again, the courts of law.[28]

4.1 Nature of the deal

The Deed of Settlement (Deed) set out the terms of agreement for Maori and the Crown. This 26-page document outlined a number of conditions so performed or to be fulfilled by Maori,[29] the parties' obligations[30] and settlement agreements.[31] Clause 5.1 of the Deed outlined the full and final nature of the settlement, stating that the settlement 'shall satisfy all claims, current and future, in respect of, and shall discharge and extinguish all commercial fishing rights and interests of Maori whether in respect of sea, coastal or inland

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[23] See Durie at n.3, pp.157-158.
[24] On reading the report the Waitangi Tribunal also agreed that the mandate had been secured. Waitangi Tribunal, *The Fisheries Settlement Report (Wai 307),* Tribunals Division, Department of Justice, Wellington, 1992.
[25] Minister of Justice and Minister of Fisheries acting on the Queen of England's behalf.
[26] See Deed of Settlement, 'Sealord Deal', 23rd September 1992, pp. 31-40.
[27] See Durie at n.3, pp.157-158.
[28] See 'Responses' 5.0 discussion below.
[29] Deed of Settlement at n.26, clause 2.1.
[30] Ibid, clauses 3.0, 4.0.
[31] Ibid, clause 5.0.

fisheries (including any commercial aspect of traditional fishing rights and interests), whether arising by statute, common law (including customary law and Aboriginal title), the Treaty of Waitangi, or otherwise'.[32] The Deed also stipulated that customary fishing rights were to be incorporated into regulations.[33] In return the Crown paid $150 million to promote Maori commercial fishing interests, assisting in the Sealord joint venture[34], transferred Maori a further 20% of new species quota,[35] and placed Maori on fisheries management statutory bodies.[36]

The Treaty of Waitangi (Fisheries Settlement) Act 1992 (Fisheries Settlement Act) gave effect to the Deed, amending the Maori Fisheries Act 1989[37] and reconstituting the Maori Fisheries Commission as the Treaty of Waitangi Fisheries Commission (Commission).[38]

The Fisheries Settlement Act wholly extinguished native title to commercial fisheries and took away the ability to assert customary fishing rights as a defence in criminal proceeding or as an action in civil proceedings.[39] Today, the Commissions extended role involves: securing the growth, development, allocation and transfer of Sealord Deal assets to Maori; facilitating Maori into, and the development by Maori of, the business and activity of fishing; ensuring fisheries are managed consistently with rights guaranteed by the Treaty and; securing proper recognition of Maori Customary Fishing Rights and to promote those rights with *Hapu/Iwi.*[40] The Commission has been successful in developing the settlement package into a major commercial venture within the New Zealand fishing industry.

4.2 The Settlement Package

This package is divided into two, pre-settlement assets (PRESA) and post settlement assets (POSA). PRESA are those assets secured in the partial settlement of 1989, including 10% of all species in the QMS at that that time. Now taking the form of quota, shares (principally Moana Pacific Fisheries Ltd) and cash, they are those assets that have resulted from the use of those assets held by the Commission as at 6 January 1993 and settlements relating to those

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[32] Ibid, Clause 5.1 also discharged and extinguished any Maori rights of interests that were subject to recommendation or adjudication by the courts or the Tribunal. Note that the Treaty of Waitangi Fisheries Commission affirms that the settlement did not settle claims to the Waitangi Tribunal relating to non-commercial fishing rights, or had relevance to sports fish, or freshwater bodies. Treaty of Waitangi Fisheries Commission, *Ahu Whakamua, Report for agreement,* August 2002, p. 39, referring to *Te Arawa Maori Trust Board v Attorney General,* High Court, CP 448CO/99, 5 December 2000.

[33] Ibid, clauses 3.5, 3.6, 5.2.

[34] Ibid, clause 3.1.

[35] Ibid, clause 3.2.

[36] Ibid, clauses 3.3, 3.5.

[37] Maori Fisheries Act 1989, ss 5,6,8,9 as amended.

[38] Treaty of Waitangi (Fisheries Settlement) Act 1992 ss 14,15.

[39] Heremaia, S., *Native Title to Commercial Fisheries in Aotearoa/New Zealand,* v.4, issue 29, 2000, p.15-17.

[40] Ibid and see Treaty of Waitangi Fisheries Commission, Strategic Plan 2001-2002, p.10.

assets.[41] Estimated worth $333.88 million as at 1 October 2002.[42] POSA are assets resulting from the use of the assets from the final settlement. They include quota, shares (in a number of fisheries companies including Sealords) and cash, with a further 20% entitlement to new species quota.[43] The estimated worth of PRESA is $376.07 million, making the total estimated worth $709.95 million as at 1 October 2002.[44] PRESA and POSA are distinguished in the Fisheries Settlement Act. The Commission has the powers to distribute PRESA but is required to develop new legislation to distribute POSA assets.[45] All in all the greatest challenge for the Commission would lie with the development of an allocation model that was acceptable to all Maori interests.

4.3 Allocation issues

The Commission explored a number of allocation proposals and received reports discussing oral traditions and *tikanga* (customs) associated with Maori fishing rights, and the concept of '*mana whenua mana moana*'.[46] There are submissions from *Iwi* on allocation models and many *hui* have been held to discuss allocation.[47] Allocation models proposed, such as the *mana whenua mana moana* model tended to favour certain Maori interests with more coastline and lower population and were strongly contested by groups such as Te Runanga o Muriwhenua Incorporation, Te Waka Hi Ika o Te Arawa and Urban Maori Authorities. A tense litigation saga began that reflected complaints to do with the allocation of settlement benefits, including issues raised in allocating solely to *Iwi*, as traditional tribes and not other Maori entities such as urban Maori authorities.[48]

The Commission released a draft Maori Fisheries Bill proposal in 2002 - *Ahu Whakamua,* a report on the proposed allocation of assets and distribution of benefits of the fisheries settlement.[49] The report is part of the response to important issues raised by Maori concerning the allocation of settlement assets. Tensions continued to focus around which of the proposed allocation models

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[41] Treaty of Waitangi Fisheries Commission, *Ahu Whakamua, Report for agreement,* August 2002, p.17.
[42] Ibid, p.8.
[43] Ibid, p.17
[44] Ibid, p.8 and noting that the Treaty of Waitangi Fisheries Commission estimates the value to be $750 million in 2004, see http://www.tokm.co.nz/allocation/mfa2004.htm.
[45] Maori Fisheries Act 1989 [as amended by Treaty of Waitangi (Fisheries Claims) Settlement Act 1992], s6 (e)(ii).
[46] The Treaty of Waitangi Fisheries Commission describes this briefly as 'mana (authority) over sea adjacent to their lands'. *Ahu Whakamua* at n.40, p.138.
[47] Ibid, pp.138–147.
[48] See *Te Runanga o Muriwhenua Inc. v Treaty of Waitangi Fisheries Commission* [1996] 3 NZLR 10 (CA). *Treaty Tribes Coalition, Te Runanga o Ngati Porou and Tainui Maori Trust Board v Urban Maori Authorities and Others* [1997] 1 NZLR 513. *Manukau Urban Maori Authority & Ors v Treaty of Waitangi Fisheries Commission & Ors* [1999] NZCA 232. *Manukau urban Maori Authority and Ors v Treaty of Waitangi Fisheries Commission and Ors* [2002] 2 NZLR 17.
[49] Ahu Whakamua at n.41, p. 89.

would finally be implemented by the Commission. Other models have been raised as alternatives to *Ahu Whakamua* for example *Te Amorangi Hei Mua,* developed by the Iwi forum.[50] In August 2002 the High Court removed a restraining order which had essentially stopped the Commission from reporting on an allocation model to the Ministry of Fisheries and in 2003 the Commission presented the allocation model *'He Kawai Amokura'* to the former Fisheries Minister Pete Hodgson.[51] Submissions on the Maori Fisheries Bill were considered by the Fisheries and Other Sea-Related Select Committee and the bill received its third and final reading in September 2004. The Chairman Shane Jones explains that the allocation model has sought to provide for the divergent views of Maori interests through a balanced compromise, noting that 'all inshore Quota is allocated to Iwi using a coastline formula, whereas 75% of Deepwater Quota is allocated by Iwi population with 25% allocated on the basis of coastline, [and] 'half the assets are being allocated to Iwi and half are being managed centrally on behalf of Iwi with Income Shares and annual dividends distributed to Iwi.'[52]

5. Responses to the Sealord Deal

There were strong responses to the Sealord Deal and the far-reaching implications of the Deed. Claims were lodged with the Tribunal and the Courts, calling into question the legitimacy of the negotiating process and the Deed itself. The Deed as a political compact may well have been argued to apply only to those who took part in the negotiations. [53] Irrespective of this, the Fisheries Settlement Act gave effect to the Deed and by statutory application purportedly applies to all Maori. It is not surprising then that Maori responses would come from all spheres of the political spectrum.

5.1 The Waitangi Tribunal

The Tribunal has been a significant commentator in regard to the fishing settlement. After cautioning the Ministry in 1986, the Tribunal inquired into various claims involving Maori fishing rights. The Muriwhenua Fishing Report was a landmark report, and a major force behind the first partial settlement. The Tribunal released the 'Ngai Tahu Sea Fisheries Report' and the 'Fisheries Settlement Report' in August and September 1992 respectively.

The Fisheries Settlement Report provides a valuable insight into Maori responses to the Sealord Deal. The main thrust of the complaint read that 'the Deed of Settlement, or the Crown policy that it proposes, is contrary to the Treaty and prejudicial to claimants in that it would diminish their *rangatiratanga* and fishing rights and impose new arrangements that have not

[50] 'The model reflects the principle of tino rangatiratanga. It is about Maori determining their own destiny'. *Te Amorangi Hei Mua,* September 2002, p.1.
[51] Treaty of Waitangi Fisheries Commission , He Kawai Amokura, April 2003.
[52] Ibid, p.14. and for further detailed articulation of the model please refer to pp.71-134.
[53] See *Te Runanga o Wharekauri Rekohu Ltd v Attorney General* [1993] 2 NZLR 301,309.

been adequately agreed'.[54] The Tribunal suggested that the objections in the Maori community reflect a 'desire on the one hand to seize the opportunity, and on the other, to maintain the integrity of the Treaty', a difference in that some would give more emphasis to opportunity while others give more to conserving customary positions.[55]

The Abrogation complaint details how the Deed, (rather than affirming Treaty obligations), extinguished[56]or rendered Maori rights unenforceable.[57] This is in direct conflict with the nature of the Treaty in that it is widely considered to be a living and fluid document. Implications are far reaching in that all historical agreements are also set aside, including agreements provided for in special legislation, orders in council, certificates of title and court orders.[58] The Deed saw the Treaty not as living and ongoing, but as something that can be ended, a view that is contrary to the Tribunal's position and no doubt offensive to many Maori.[59] As the Tribunal points out 'The language of the deed was thus seen as broad and sweeping, at least when it came to taking things away'.[60]

The Deed states that the payout for the fisheries settlement impacts on the Crown's ability to settle claims elsewhere. There was little detail given on what exactly clause 4.6 meant but it stated that 'Maori recognise that the Crown has fiscal constraints and that this settlement will necessarily restrict the Crown's ability to meet, from any fund which the Crown establishes as part of the Crown's overall settlement framework, the settlement of other claims arising from the Treaty of Waitangi'.[61] Kelsey points out that this was the genesis of the government's 'Fiscal Envelope' policy.[62] The Government, (at that stage a National Cabinet), quietly adopted this strategy in 1992, basically with the aim to settle all Treaty claims within a fiscal cap of $1 billion, by the year 2000. This strategy has been strongly rejected by Maori.[63]

Major concerns were raised regarding how the Deed was ratified through a negotiating process that did not gain sufficient consents. The issues of consent necessarily involved questions of what level and/or representative body should the consent have come from.[64] Others described how the Memo was not properly explained and the true ramifications were unknown. Similar concerns were expressed with the assumption that majority rule applied and that, in any event, the majority did not agree.

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[54] Waitangi Tribunal at n.24, 1.0.
[55] Ibid, 2.0.
[56] Deed of Settlement, clause 5.1.
[57] Ibid, clause 5.2.
[58] Ibid, clause 1.3.
[59] Waitangi Tribunal at n.24, 3.0.
[60] Ibid.
[61] Deed of Settlement, Clause 4.6.
[62] Kelsey, J., *Economic Fundamentalism, The New Zealand Experiment,* Pluto Press, London, 1995, p.30.
[63] Please refer to De Santolo J., *'Exploring the Treaty settlement process in Aotearoa/NZ',* 2004.
[64] Waitangi Tribunal, at n.24.

Settlement structure was another concern, with fears that a centralised Maori agency would be subject to the whims of bureaucracy. These issues culminated in the greatest concern; that all Maori were to benefit from the settlement and that allocation models proposed tended to favour certain Maori interests, especially in light of the fact that these models excluded direct allocation to bodies representing urban Maori.

The Tribunal finally recommended that Treaty fishing rights should be legislated, as opposed to extinguished and that the courts should maintain jurisdiction to review the fisheries regime. The Government did not accept the recommendations of the Tribunal and as noted continued with the processes of enacting the Fisheries Settlement Act. The Sealord Deal eventually took away the Tribunal's jurisdiction to make a finding or recommendation in respect of commercial fisheries, the Deed itself, and any enactment relating to commercial fisheries.[65]

Another claim was lodged with the Tribunal complaining that the selection process for Maori Commissioners was questionable and made in haste. By December the Tribunal made recommendations that a national *hui* be held to assist in providing a more transparent selection process.[66] This time the Government conceded and a *hui* was convened, although the potential of the event was marred through an 'invite only' policy and limitations on speaking times.[67]

In the end there was little that could be done to stop or slow down the process of full and final settlement. Select Maori interests would continue to respond to the Sealord Deal, raising the profile and awareness of the objections within the courts and throughout the country. These responses also provide important insights into the 'Sealord Deals' agreement making processes within the treaty framework.

6. Other responses

Graeme Smith describes the Sealord Deal as another aspect of the dangers associated in a process of settlement that commodifies personal rights into property rights. Smith argues that the Crown was actually attempting to settle both property rights (material assets of the fisheries) and personal rights associated with intangibles like protection and '*Tino Rangatiratanga*' contained within the Treaty.[68]

Processes of negotiation are often not balanced. One of the parties usually has greater weight at the negotiating table. Kelsey points out how ironic it is that once the settlement process is underway the government (amongst

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[65] Treaty of Waitangi Act s (6)(vii), as amended by the Treaty of Waitangi (Fisheries Settlement) Act 1992, s40.

[66] Waitangi Tribunal, *Appointments to the Treaty of Waitangi Fisheries Commission Report* (Wai 321), Tribunals Division, Department of Justice, Wellington.

[67] Only sixteen speakers were given speaking rights and a five to ten minute opening on the floor. Durie, 1998, at n.3, p.160.

[68] The Fiscal Envelope, Economics, Politics and Colonisation, v1.
Moko Productions/RUME, 1995, p.39.

other things) sets the procedure to be followed, determines the total monies it is prepared to spend, decides whether grievances have been proven and whether they are of high enough priority to deal with, decides whether the negotiator has proper mandate and decides whether the plan for distributing the outcome is acceptable. Likewise, before the Government releases what claims it will accept and how much it will pay, iwi must: 'prove breaches at their own expense, agree that the settlement covers all the claim and give up all other avenues of redress, and prove the negotiations have mandate through a signed deed of mandate'.[69] Implementation processes have also been raised as important considerations in the post-settlement development phase. Sound planning for effective implementation of 'settlements' is argued to be a critical part of effective Indigenous parties negotiating strategies.[70]

Political action group *Te Kawariki* saw the Sealord deal as establishing how the Crown hoped to deal with Treaty claims and that this involved a process that occurred behind closed doors with selected Maori negotiators. Limited time for consultation was argued to further keep the Maori community ignorant of negotiations, eventually leading to terms of settlement that were dictated by the Crown.[71]

7. Ongoing obligations

A relationship continues between the Crown and Maori, even though the Sealord Deal has had the effect of a full and final settlement. This continuing relationship is, at the very least, subject to *Te Tiriti o Waitangi*, the Treaty and its principles. At a broader level, this ongoing relationship entails shared responsibilities of good faith and on the Crown's side a continued responsibility to actively protect Maori interests. The Tribunal has clearly stated that notwithstanding the effect of extinguishing Treaty fishing interest, (which in itself demonstrated a serious misunderstanding of the Crown's responsibility of active protection of Maori fishing interests for as long a Maori wished to keep them) the Crown's obligation of active protection continues and cannot be extinguished.[72] Crown Minister's have also recognised that '[the] aim of settling a claim is to correct a wrong. Settlements cannot alter in any way the terms of the Treaty of Waitangi itself nor absolve the Crown from its ongoing obligations under it'.[73]

The Commission expressed concerns with the way the Crown is meeting its ongoing obligations under the Deed, noting that poor performance in meeting these obligations impacts on the ability of Maori to access settlement

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[69] Kelsey, J., Ibid, p.22.
[70] Joseph, R., *Implementation Process*, Te Ora Rangahau Conference Proceedings, 1998, p.372.
[71] The Fiscal Envelope at n.66, p.47.
[72] Waitangi Tribunal at n.24, 10.0.
[73] Minister, Office of Treaty Settlements, Doug Graham, Crown Proposals for the settlement of Treaty of Waitangi Claims; Summary. See discussion of fiduciary relationship by McHugh, P., *Constitutional theory and Maori claims*, in *Waitangi* 1989, pp.42-43.

benefits.[74] Hence the relationship between Commission and the Government is one of the defining elements in evaluating the Government's post settlement performance. The Commission has identified three broad ongoing responsibilities of the Crown arising from the Deed, implementation, protection, and consultation.

Implementation of the Deed involves the need for a greater introduction of new commercial species into the QMS and the implementation of a set of customary fishing regulations. The Government has introduced only nine new species into the QMS post settlement and appropriate management arrangements for the species have not been developed.[75]

Protection involves maintaining and operating the QMS is a manner consistent with Maori endorsement of that regime as contained within the Deed.[76] The Commission suggests that Government actions that detrimentally impact on Individual Transfer Quota (ITQ) value are not consistent with a good faith settlement because the ITQ is the currency of the deal. Expropriations, attenuations and taxes on the ITQ favour other sectors yet threaten the integrity of the Deed of Settlement.[77]

Consultation with Maori is an important consideration when any legislative or policy changes are made that have potential to impact on the QMS. The Commission is concerned that improvements are made to the consultation process, ensuring that relationships with all government agencies (including the Ministry of Fisheries and the Ministry of Conservation) are strengthened.[78] Ongoing relationships are therefore a critical element of agreement making, because (amongst other things), they provide parameters for evaluation and monitoring of agreement outcomes.

8. Foreshore and seabed rights

The NZ Court of Appeal made a landmark 'foreshore and seabed' decision on 19th June 2003.[79] The decision allowed for Maori to bring claims (to the Maori Land Court) on the foreshore and seabed of the Marlborough Sounds. The NZ Government responded almost immediately announcing its decision to legislate Crown ownership of the foreshore and seabed with the intention also to remove Maori Land Court jurisdiction over customary title over these areas. The NZ Government's guiding principle's for the development of the Foreshore and Seabed Bill were articulated around access, regulation, protection, and certainty:

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[74] Treaty of Waitangi Fisheries Commission Strategic Plan at n.40, p.11.
[75] Ibid, p.11.
[76] Deed of Settlement, clause 4.2.
[77] Ibid, p.11.
[78] Ibid, p.11.
[79] Ngati Apa and others v Attorney General and others (Unreported, 19 June 2003, Court of Appeal, Wellington, CA173/01.

- The principle of access: there should be open access for all New Zealanders in the public foreshore and seabed;
- The principle of regulation: the Crown is responsible for regulating the use of the foreshore and seabed, on behalf of all present and future generations of New Zealanders;
- The principle of protection: processes should exist to enable customary interests in the foreshore and seabed to be acknowledged, and specific rights to be identified and protected; and
- The principle of certainty: there should be certainty for those who use and administer the foreshore and seabed about the range of rights that are relevant to their actions.[80]

The NZ Government's unilateral public response has severely undermined due process for Maori and the legitimacy of existing treaty rights recognitions. The Fisheries and other sea-related Legislation Committee called for submissions on the Foreshore and Seabed Bill and the government has responded in a report on the Analysis of Submissions.[81] Despite all of the consultation rounds and reporting Aotearoa/NZ now bears witness to huge protests across the country – a reflection of the seriousness of the situation and the groundswell of determined activism that seeks to counter these governmental initiatives.

Moana Jackson has strongly criticised the NZ Government's foreshore and seabed policy because (among other reasons) it 'maintains the assumption that [Maori] rights can be unilaterally extinguished and perpetuates a gross injustice'.[82] Jackson states that the Crown's proposal is unacceptable because it is contrary to '*tikanga*' and the common law situation accepted by the Court of Appeal and that it continues the assumption that the Crown has a right to extinguish any particular Maori interests. The Foreshore and Seabed Bill quite clearly states that it will vest in the Crown 'full legal and beneficial ownership of the public foreshore and seabed, to preserve it in perpetuity for the people of New Zealand'.[83] What the NZ Government means by 'in perpetuity' remains to be seen (due to it's track record with public assets and national resources) given that the explanatory note gives warning that the foreshore and seabed 'is to be held in perpetuity, and is not able to be sold or disposed of, other than by or an act of Parliament.'[84] Of equal note is the NZ Government's referral to 'customary rights' questions and proof of connection elements that ominously resemble onerous native title elements here in Australia.[85] We have seen that

[80] Foreshore and Seabed Bill, Government Bill, Hon Dr Michael Cullen, Explanatory Note, 2004, p.2.
[81] The Foreshore and Seabed of New Zealand, Report on the Analysis of Submissions, December 2003.
[82] Jackson, Moana,. The Crown baselines for legislation on foreshore and seabed – an analysis, 2004.
[83] The Foreshore and Seabed Bill, p.2.
[84] Foreshore and Seabed Bill, ibid, p.3.
[85] Foreshore and Seabed Bill, ibid, Part 3, subpart 2, pp.21-33.

native title developments in Australia have received mixed results and in some instances become the source of ongoing grievances for applicant Aboriginal communities.[86] Whatever the outcomes, it becomes clearer that treaties, deeds of settlement and agreements (and even clear positive judicial direction) do not hold secure the rights of Indigenous peoples when such rights are still subject to the whims of parliament.

9. Relevance to agreement making in Australia

Like Australia, Aotearoa/New Zealand is still grappling with a history of dispossession and bloodshed. The Sealord Deal came about at a time of intense political movements within Maoridom and in mainstream politics. Government pushes for settlement increased the pressures to get positioning in the line up for Tribunal recommendations on specific tribal grievances. The Sealord Deal involved a pan tribal settlement over what are essentially *hapu* (tribal) resources. This fuelled an already volatile treaty settlement environment that will no doubt have direct impact on the workability and legitimacy of the treaty settlement process as a whole. This has proven to be the case with the response to the NZ government's foreshore and seabed policy. We do not have a Treaty based framework in Australia, but it is suggested that comparative insights (in this case relating to pan tribal settlements) can inform Indigenous negotiating strategies. As Dodson has pointed out, secure titles (as in pastoral/mining agreements) and social stability are necessary for workability and certainty, and that 'it is good for business to genuinely recognise and negotiate with Indigenous land interests'.[87]

9.1 Workability of agreements

Genuine negotiations involve community. Community responses are an important consideration in monitoring the workability of agreement making, whether that be a land use negotiation or a grievance settlement process. Workability is an important element in determining the ability of a settlement to meet special community expectations and needs arising from a grievance.

The Sealord Deal is an example of agreement making that has been promoted as involving the settlement of Treaty grievances. In reality it provided an opportunity for some extinguishment of Treaty and Maori fishing rights through a process of commercial exchange. Today Maori are main players in *Aotearoa*/New Zealand's commercial fishing industry. It would be

[86] This is tied closely with discussed limitations of native title recognition and as Jason Behrendt has noted 'inappropriate approaches to determining inconsistency between native title and other interests and the difficulty Australian courts have in translating Aboriginal laws and customs into native title rights and interests'. Behrendt, J., The Wellesley Sea Claim: An Overview, Chalk and Fitzgerald, 2004, p.21. Also refer to Behrendt, J, Thompson, P., The Recognition and Protection of Aboriginal Interests in NSW Rivers, Journal of Indigenous Policy, Indigenous Peoples and their Aquatic Environments, Issue 3, 2004, pp.74-76.

[87] Dodson, M., The Native Title Act, *Human Rights and Workability,* Sharing Country, 1997, pp.116-117.

hard to deny that the Commission has not been successful in building settlement assets and enabling Maori to engage in the fishing industry. However the Commission is still facing the arduous task of allocating settlement assets and benefits to *Iwi* for the benefit of all Maori.[88] As Heremaia points out 'the effect of the Fisheries Settlement has not been confined to fisheries. It has become the template for the management of resources by creating property rights in them that was not based in Maori law. As a result, the question of who originally held the property rights to those resources has not been properly determined.'[89] Recent developments point towards the Commission being able to resolve the major allocation issues and yet are now drawn closer to foreshore and seabed disputes.

9.2 Enhancing workability

Commercial realities often impose time constraints that directly impact on the effectiveness of consultation and the subsequent gaining of mandates and consents. If negotiating parties were able to provide greater flexibility in the timeframes then perhaps ongoing disputes about mandate and consent would be lessened. There should be incentives and/or obligations for negotiating parties to assist in resourcing greater flexibility in the negotiating process because in the end it provides greater certainty in the agreement. Culturally appropriate ratification and consent processes would be an integral part of this negotiated flexibility.[90]

It is important to balance commercial strengths with local autonomy and control over tribal resources. Fears of centralised agencies may be warranted if processes of allocation and dispute resolution prove ineffective. One way of overcoming these complex issues would be to include specific, localised implementation strategies (for post settlement phases) within the negotiations. An example of this is the Commission's 'Dispute Resolution Procedures' developed as an alternative to the courts.[91]

Agreements and settlements may involve the extinguishing of certain rights. Abrogation of rights can have longer-term implications for communities and the ability of review processes to monitor the implementation and effectiveness of the ongoing obligations arising from settlements. Appropriate monitoring and evaluation can enhance settlement outcomes and move towards ensuring that agreements are not compromised by adverse actions. Although fiscal capping has been removed from the Crown's Treaty settlement policy,

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[88] See Durie, at n.3, p.170, and Ward, *An Unsettled History*, Bridget Williams Books, Wellington, 1999, p.51.

[89] Heremaia 2000, at n.39.

[90] For example, in terms of treaty making this could involve an 'incremental' approach to building treaties which may involve negotiating, over time, a series of arrangements or agreements linked to treaties, that can be flexibly implemented before the final treaty is ratified. See discussion 'Improving the Treaty Process', 'Report of the Tripartite working Group', May 2002 at www.bctreaty.net/files/report.

[91] See Treaty of Waitangi Fisheries Commission, Dispute Resolution Procedures, October, 1995.

the benchmarking of settlement redress values may influence future negotiations. Agreement making processes should therefore involve strategies that minimise potential inequity in settlement outcomes for Indigenous communities.

Agreement making may involve the exchanging of commercial assets for personal and property rights. The commodification of culture is a critical aspect of globalisation and has direct impact on Indigenous societies and ongoing survival of the local markets operating within them.[92] A balance should be sought and maintained in both ensuring the viability of commercial ventures and the ongoing survival of Indigenous rights and cultural paradigms.

10. **Concluding remarks**

It is a challenge trying to encapsulate the complexities of Indigenous struggles within a progressive legal rights discourse. Ideally, agreement making will simply enhance and affirm Indigenous rights, not extinguish or subordinate them. At a basic level, long-term strategies must be employed alongside short-term agreement making processes. Behrendt has already warned us that there 'is often an assumption that as time goes on, rights protection will gradually improve. Recent experience in Australia should highlight the fact that rights that have been recognised in the past - native title and heritage protection – can be extinguished. So it is more accurate to view Indigenous rights – and indeed rights in general – as something that has high and low watermarks'.[93] In conclusion, it is suggested that agreement making outcomes may be enhanced in Australia through a greater commitment to flexible processes involving community and strategic negotiations that balance commercial outcomes alongside cultural maintenance and revitalisation.

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[92] See Battiste, M., Youngblood Henderson, J.S., *Protecting Indigenous Knowledge and Heritage,* (no date) Purich Publishing, Saskatchewan, Canada.

[93] Behrendt, L., *Self-determination and Indigenous Policy: the rights Framework and Practical Outcomes*, Journal of Indigenous Policy, 2002, p.58.