FINAL SETTLEMENT CLAUSES IN TREATY SETTLEMENT LEGISLATION

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Table of Contents

I. Introduction

> [A]ll claims (current and future) in respect of, or directly or indirectly based on, rights and interest of Māori in commercial fishing are hereby fully and finally settled, satisfied, and discharged.[1]

So reads section 9(c) of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 ("FCSA"). The culmination of 8 years of dispute,[2] this Final Settlement Clause ("FSC") discharges all Crown obligations towards Māori in respect of commercial fishing, precluding future claims over this resource. There are many imperatives at stake when historical grievances are settled, with Treaty settlement legislation generally recognising these imperatives by including an apology, the provision of administrative arrangements and certain compensations. FSCs represent the *quid pro quo* for the Crown in this exchange. This dissertation considers the precise effects of these FSCs and the parts they play in setting the balance between these imperatives. It does this by first studying FSCs in chronological order, from the first FSC above, in 1992, to more recent times. The aim here is to identify *what* they settle; *who* they operate against; *how* they achieve their desired ends; and what, if anything, they leave *outstanding* from settlement. Then, several difficult points and their interpretation are considered, partly by reference to judicial decisions that have considered the matter, and partly by reference to unfolding controversies and hypothetical scenarios to which FSCs could be relevant.

Because FSCs oust the jurisdiction of relevant courts and tribunals they are in essence privative provisions. Private provisions, also called ouster clauses, are statutory provisions

[1] Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, s 9(c).

[2] Treaty of Waitangi (Fisheries Claims) Settlement Act, preamble.

that prevent courts or tribunals from examining specific matters.[3] FSCs do precisely this: they aim to ensure the finality of settlement by ousting the jurisdiction of courts and tribunals in respect of the claims settled. Because FSCs are privative provisions, there is a possibility they will be interpreted strictly as to render them of little or no effect, as the general judicial orthodoxy suggests.[4] This is because the courts are traditionally reluctant to oust access to the courts where other interpretations are available.[5] Conversely, FSCs are a clear expression of parliamentary intent to do precisely that. FSCs are also distinguishable from many other ouster clauses, because they are agreed to by iwi in exchange for the benefits and redress provided by the Crown in settlement of their claims. The Crown in turn benefits from the certainty and finality that the legislative settlement of their claims provides.[6] The analysis in this dissertation aims to provide insight into how FSCs are likely to be interpreted in the courts in the face of competing approaches. Moreover, it aims to glean insight into how Treaty settlements may promote reconciliation between the Crown and Māori.

To do so, the first chapter of this dissertation provides an account of FSCs in the chronological order in which they were enacted. The settlement process will also be expounded, before the form and function of FSCs is further discussed. Certain differences between FSCs will be demonstrated and the reasons for, and effect of, these differences explained. By the end of this chapter the reader should be well versed in their understanding of FSCs and the manner in which they aim to operate.

The second chapter then considers how FSCs may affect the interests of cross-claimants, whose claims were left unresolved by early settlement legislation. Cross-claimants are

[3] See Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 853.

[4] See generally Joseph, above n 3; Josh Pemberton "The Judicial Approach to Privative Provisions in New Zealand" [2015] NZ L Rev 617; Luke Sizer "Privative Clauses: Parliamentary Intent, Legislative Limits, and Other Works of Fiction" (2014) 20 Auckland U L Rev 148.

[5] Pemberton, above n 4, at 634.

[6] See Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori law* (UBC Press, Vancouver, 2016) at 96.

those who have not reached a settlement with the Crown but are making a claim over the same area or resource that has been the subject of a settlement with another group.[7] The case of *Ngati Apa Ki Te Waipounamu Trust v The Queen*[8] *("Ngati Apa")* will be discussed as an example. In this case, Ngati Apa sought to make a claim over land and resources that were the subject of a previous settlement with another iwi, Ngāi Tahu. Ngāi Tahu then attempted to rely on their FSC in that previous settlement's legislation to preclude Ngati Apa's attempts to advance their claim, arguing, in part, that the Ngāi Tahu FSC evinced a parliamentary intent to reach a settlement that provided Ngāi Tahu with exclusive settlement over the contested area. The response of the court and the Crown to this case will help develop our understanding of how FSCs are likely to be interpreted where the legislation is unclear. Moreover, this case provides insight into the practical realities of reconciliation and partnership between iwi and the Crown in Aotearoa New Zealand.

Chapter three applies our understanding of FSCs to the Government's proposal to create the Kermadec Ocean Sanctuary, and to the reduction of fishing quotas that will result if this proposal is successful. The FSC in the fisheries settlement legislation[9] will be analysed to see whether this Kermadec scenario could give rise to a contemporary claim by Māori against the Crown, or whether that FSC will preclude such a claim. The Kermadec Ocean Sanctuary Bill[10] also contains a "no compensation" clause which may interact with that FSC. The combined effect of these clauses will be examined to discern the extent to which "finality" is provided by FSCs, and what this might mean for reconciliation.

Chapter four looks to the issue of water privatisation. By imagining a scenario where the Crown privatises freshwater, after Māori have been found to have an unextinguished customary property interest in that water, we will see how FSCs operate in another contemporary scenario. It will be shown that current FSCs will not preclude a claim being

[7] See generally ETJ Durie "Will the Settlers Settle? Cultural Conciliation and Law" (1996) 8(4) Otago LR 449; Waitangi Tribunal *The Ngāti Awa Settlement Cross-Claims Report* (Wai 958, 2002).

[8] *Ngati Apa Ki Te Waipounamu Trust v R* [2000] NZCA 45 (hereinafter "*Ngati Apa")*.

[9] Treaty of Waitangi (Fisheries Claims) Settlement Act, s 9.

[10] Kermadec Ocean Sanctuary Bill 2016 (120-2).

made by Māori in this context. Iwi with settlements in respect of their rivers will have equal rights of redress on this matter to iwi with no Treaty settlement to their name. This will help us to understand how reconciliation is provided by ensuring that the Crown cannot avoid ongoing Treaty obligations over new issues regardless of earlier settlements with iwi.

Finally, the conclusions reached on the proper interpretation of these FSCs is related back to the themes of interpretation and reconciliation. How are the courts likely to interpret FSCs? Will they be found to oust the courts' jurisdiction entirely? Or, are they likely to be "read down" in order to preserve the constitutional ideal of the right to justice?[11] What does reconciliation between Crown and Māori, in this respect, require? Does it require some things to be put to rest, in return for certain compensations and acknowledgements? And, does it require some matters to be left open, for future consideration by the Waitangi Tribunal, the courts, and Parliament? Has the right balance been struck in the drafting of these FSCs to achieve these aims? The drafting of these clauses provides a lens through which we can inquire into the aims – and the degree to which they are being achieved – of the Treaty settlement process as a whole.

[11] Although what is meant by the right to justice may seem "uncontroversial" it remains a difficult matter to pin down (see Justice Helen Winkelmann "Access to Justice – Who Needs Lawyers?" (2014) 13 Otago LR 229). A useful articulation of what is meant by "access to justice" is made by Lord Neuberger in: Lord Neuberger "Justice in an Age of Austerity" (Tom Sargant Memorial Lecture, UK Supreme Court, London, 15 October 2013). The right to justice is given legislative weight in New Zealand Bill of Rights Act 1990, s 27.

II. How do final settlement clauses function?

A Introduction

When observing FSCs in Treaty settlement legislation it is easy to notice similarities in form from the earliest modern Treaty settlement in 1992 to the recent Treaty settlements of today. Yet despite the general similarities, there are some specific differences that may affect the way Treaty settlements function. This chapter will demonstrate that, in general, all FSCs answer four questions. First, they articulate with specificity *whose* claims are being settled. This informs the second question: *what* specifically is being settled? Thirdly, the wording of a FSC demonstrates *how* this settlement is to be achieved. Fourthly, and of equal importance, the question of what is left *outstanding,* or unresolved, by each settlement agreement may be indicated. In some Treaty settlement legislation, certain matters are specifically left outstanding by way of a "carve-out" provision. Mostly, this tends to be left to implication: when one is clear on who the settlement is between and what the settlement covers, one is also clear about what is left outstanding by the settlement.

Although this dissertation only aims to consider FSCs, a small part of any Treaty settlement legislation, no part of an Act should be read in isolation.[12] Accordingly, it is necessary to briefly consider what else this legislation has in common outside of FSCs. All Treaty settlement legislation begins with a historical account, acknowledgements and an apology. Then, there generally follows cultural redress, which is often made up of certain statutory acknowledgements and the implementation of administrative regimes governing specific resources, such as land, fish or water. Other forms of redress are then provided, such as economic redress, listed in the deed of settlement. These aspects are all important mechanisms in fostering reconciliation between the Crown and relevant iwi.

Despite these similarities, FSCs – specifically - have evolved over time and their wording has gradually changed. These small changes may have a substantial impact on their proper

[12] Interpretation Act 1999, s 5.

interpretation. Accordingly, in order to provide a general account of the who, what, how and outstanding questions concerning FSCs, these changes must be identified and discussed. Before this, it is necessary to outline at a general level the Treaty settlement process, as an important backdrop for the subsequent analysis.

B The settlement process

Any general account of the settlement process is limited by the fact the process is not uniform in all settlements, and the fact that the current, more formal, process was introduced after many settlements had already occurred.[13] Notwithstanding this, understanding the settlement process plays an important role in understanding the resultant legislation. Each Act is coloured by the manner through which it settles claims.

For over 150 years, Māori have sought to resolve their grievances with the Crown.[14] Despite this, there was no standing process through which Māori could raise and resolve grievances they had[15] until 1975, when the Waitangi Tribunal ("WT") was established by the Treaty of Waitangi Act.[16] The WT is a permanent commission of inquiry that aims to make non-binding recommendations that relate to the practical application of the Treaty of Waitangi, and to determine if Crown actions are inconsistent with the Treaty's principles.[17]

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[13] Since the introduction of the Waitangi Tribunal, by way of the Treaty of Waitangi Act 1975, the registration of a claim at the Waitangi Tribunal has generally been the first step taken in seeking settlement. The first official guideline to settlement was published in 1999: Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Office of Treaty Settlements, Wellington, 1999).

[14] Office of Treaty Settlements *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (2nd ed, Office of Treaty Settlements, Wellington, 2015) at 18.

[15] Generally, grievances only came to be raised by virtue of commissions of inquiry. See, for example: Sir William Alexander Sim, *Confiscated Native Land and Other Grievances: Royal Commission to inquire into confiscations of native lands and other grievances alleged by natives* (Government Printer, Wellington, 1928).

[16] Treaty of Waitangi Act 1975, s 4.

[17] Treaty of Waitangi Act, preamble.

It gives Māori "a powerful instrument of redress".[18] Although the WT could initially only decide on violations of the Treaty of Waitangi occurring after 1975, reform in 1985 saw the WT given power to judge retrospectively on claims about Crown acts and omissions since 1840.[19]

Government policy recognises a distinction between two types of Māori claims: "historical claims" and "contemporary claims". Historical claims arise by way of Crown acts or omissions that breach the Treaty and its principles, taking place before the 21 September 1992.[20] Contemporary claims concern such acts or omissions occurring after this date. This distinction is important. The 21 September 1992 forms a "cut-off" date for all iwi looking to settle historical claims. This was introduced to ensure that consistent comparisons could be made between iwi and the redress available to them.[21] Where this date is included in a FSC, it generally ensures that the FSC will not preclude a contemporary claim.

The settlement process has a number of defined steps. Prior to any negotiation concerning settlement, the claimant group will usually register their claim with the WT. Negotiations can begin at any time after this, but only if the iwi have ceased actively pursuing their claim in the WT.[22] Claims settlements can be negotiated, therefore, before the claimant group exhausts the WT process. The first step in settlement negotiations is "preparing claims for negotiations". This involves the Crown accepting there is a legitimate grievance and determining that the claimants are the appropriate iwi or customary group with whom to negotiate.[23] The second step is "pre-negotiation" which includes the identification of the areas or sites that are subject to the negotiation and the terms of the negotiation.[24] Third,

[18] Jan Palmowski *A Dictionary of Contemporary World History* (3rd ed, Oxford University Press, Oxford, 2008) at 233.
[19] Palmowski, above n 18.
[20] Office of Treaty Settlements, above n 14, at 28.
[21] Office of Treaty Settlements, above n 14, at 28.
[22] Office of Treaty Settlements, above n 14, at 28.
[23] Office of Treaty Settlements, above n 14, at 35.
[24] Office of Treaty Settlements, above n 14, at 49.

formal "negotiations" begin. These aim to find a mutually agreeable resolution, which leads first to an agreement in principle, and then to a deed of settlement, which is the formal offer by the Crown to the claimant group for the settlement of their grievances.[25] Finally, the settlement is "ratified and implemented".[26] This requires the claimant group to hold some form of ballot to ensure the majority of their group agrees to the terms of the deed of settlement. If a sufficient majority agrees then the Government, through Parliament, passes binding legislation to give effect to the Deed of Settlement.[27] It is the FSCs within such legislation that are considered in this dissertation.

The Crown hopes that through this general process that it will be able to "negotiate settlements of historical Treaty claims that are lasting and acceptable to most New Zealanders", while aiming for a consistent approach that acknowledges the unique nature of each claim.[28] Accordingly, the Crown follows certain guidelines when settling claims:[29]

(a) the Crown aims to explicitly acknowledge historical injustices;
(b) Treaty settlements should not create further injustices;
(c) the Crown has the duty to act in the best interests of all New Zealanders;
(d) in order to be durable, settlements should be fair;
(e) settlements must not affect Māori entitlements as New Zealand citizens nor affect their ongoing rights under the Treaty of Waitangi; and
(f) settlements will take into account the fiscal and economic restraints of the Crown.

It is plain to see the effect of these guidelines manifest in settlement legislation, and in the text of FSCs as they have been enacted over time.

[25] Office of Treaty Settlements, above n 14, at 56.
[26] Office of Treaty Settlements, above n 14, at 65.
[27] Office of Treaty Settlements, above n 14, at 74.
[28] Office of Treaty Settlements, above n 14, at 28.
[29] Office of Treaty Settlements, above n 14, at 28.

C Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 ("FCSA")

The FCSA marks the earliest piece of legislation in the modern Treaty settlement era that contains a FSC. It settles, by declaring, at s 9:

> (a) all claims (current and future) by Māori in respect of commercial fishing—
>
> (i) whether such claims are founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise; and
>
> (ii) whether in respect of sea, coastal, or inland fisheries, including any commercial aspect of traditional fishing; and
>
> (iii) whether or not such claims have been the subject of adjudication by the courts or any recommendation from the Waitangi Tribunal, -
>
> having been acknowledged, and having been satisfied by the benefits provided to Māori by the Crown under the Māori Fisheries Act 1989, this Act, and the Deed of Settlement referred to in the Preamble, are hereby finally settled; and accordingly
>
> (b) the obligations of the Crown to Māori in respect of commercial fishing are hereby fulfilled, satisfied, and discharged; and no court or tribunal shall have jurisdiction to inquire into the validity of such claims, the existence of rights and interests of Māori in commercial fishing, or the quantification thereof, the validity of the Deed of Settlement referred to in the Preamble, or the adequacy of the benefits to Māori referred to in paragraph (a); and
>
> (c) all claims (current and future) in respect of, or directly or indirectly based on, rights and interest of Māori in commercial fishing are hereby fully and finally settled, satisfied, and discharged.

This is a FSC. It is rather different to the FSCs in much legislation to follow, in part because it does not refer to a specific iwi but to "all Māori". It operates to settle the Crown's obligations in respect of "all claims (current and future)" that relate to commercial fishing. Courts and tribunals are prohibited from inquiring into any such claims, and those claims are "fully and finally settled, satisfied, and discharged". In sharp contrast to this section is the subsequent s 10, which explicitly leaves outstanding any claims regarding non-commercial fishing rights and interests. This ensures that "claims by Māori in respect of non-commercial fishing… shall, in accordance with the principles of the Treaty of

Waitangi, continue to give rise to Treaty obligations on the Crown".[30] We see then at this early juncture that the Act makes clear the who, what, how and outstanding elements of the settlement. Unlike the FSCs that follow, and as will be discussed in the third chapter, this settlement aims to settle *all* claims – of a certain kind - that may arise in the future. There is no cut-off date for claims covered by the FSC. On the contrary, even "future" claims are covered.[31] This ensures that contemporary claims too are ousted, in this case. Thus, a future breach of Treaty principles by the Crown relating to commercial fisheries may also be precluded by virtue of this FSC.

D Waikato Raupatu Claims Settlement Act 1995 ("WRCSA")

The next FSC is the earliest in the modern era to settle the claims of a specific iwi (or group of iwi). It is contained in s 9 of the WRCSA. This Act settles the grievances of Waikato-Tainui concerning the radical land confiscations (or raupatu) that occurred in the 1880s and thereafter, in breach of the Treaty.

The WRCSA effectively established the prototype for FSCs in subsequent statutes that cover settlements with iwi (or other specific claimant groups). Its FSC ensures there can be "no further inquiries into Raupatu claims".[32] It "acknowledges that the settlement of Raupatu claims… is final".[33] Then, it states that:[34]

> notwithstanding any other enactment or rule of law, no court or tribunal shall have jurisdiction to inquire or further inquire into, or to make any finding or recommendation in respect of—
>
> (a) any or all of the Raupatu claims; or
>
> (b) the validity of the deed of settlement; or

[30] Section 10(a).
[31] Section 9(a).
[32] Section 9.
[33] Section 9(1).
[34] Section 9(2).

> (c) the adequacy of the benefits provided to Waikato under the deed of settlement or this Act.

This FSC (like all FSCs) is therefore an ouster clause, designed to exclude the jurisdictions of all courts or tribunals in respect of the matters listed. Accordingly, broad language ("any or all", "or") is used to ensure this provision runs a wide gamut. The use of "notwithstanding" ensures that this provision takes priority over other provisions, ranking this ouster clause against other justice enabling statutes. Further inquiry into all and any of the Raupatu claims, as well as their validity and adequacy, is restricted. However, the courts are not restricted from inquiring into matters outside this list: for example, the interpretation of any clauses within the settlement legislation itself.

Section 8 of the WRCSA defines "Raupatu claims" for s 9's purposes. "Raupatu claims" are first defined to mean "all claims arising out of, or relating to, the Raupatu or any aspect of the Raupatu".[35] In addition, specific claims are listed, that were also listed in the deed of settlement prior to the passing of the Act. Although each settlement Act features some listed claims in an equivalent section, each is unique in respect of that list's content. This is because, as explained above, settlement is based on discussion and agreement between the Crown and iwi concerning specific claims, generally conducted by reference to statements of claim put before the WT. Each deed of settlement, and the Act that ratifies it, is therefore unique in respect of what is settled. But, the manner in which the finality of the settlement is defined remains generally the same.

As a part of this inquiry, the WRCSA defines "Raupatu claims" to include:[36]

> all claims specified… whether or not those claims—
>
> (i) are past, current, or future; or

[35] Section 8(1)(a).

[36] Section 8(1)(i).

> (ii) are founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise; or
> (iii) are made or held by, or on behalf of, all of Waikato or 1 or more individuals, marae, or hapu.

This section is designed to limit the possibility of further inquiry into claims of the same kind that are yet to be considered by the WT or the courts. It is very broad and designed to be a "catch all" provision. Reference is made to past, present and future claims, whether based on common law, statute, "or otherwise", in order to restrict any conceivable claim related to the Raupatu.

Finally, certain claims are excluded from this definition and the scope of the settlement. Section 8(2) excludes any claims that relate to the Waikato River, as well as some areas listed in the deed of settlement.[37] This enables them to be addressed in future, or for the courts to inquire into them. The Crown and iwi are thus able to achieve general settlement while leaving certain matters unresolved.

E Ngāi Tahu Claims Settlement Act 1998 ("NTCSA")

The FSC in the NTCSA follows this general structure, with a settlement provision at section 461. Its form is different to the FSC within the WRCSA in a few ways. It specifies that the settlement is final and "the Crown is released and discharged in respect to [the Ngāi Tahu] claims".[38] The courts are excluded from inquiring into those claims as well as into "this Act."[39] It is then specified that this does not limit the jurisdiction of a court or tribunal to inquire into the "interpretation" of the Act.[40]

[37] Waikato Raupatu Claims Settlement Act.
[38] Section 461(1).
[39] Section 461(3).
[40] Section 461(4).

These minor changes seem to be matters of clarification rather than of substance. They are not barring any claims that might have been allowed previously. Releasing and discharging the Crown accentuates finality but does not oust any otherwise possible claim. Likewise, inquiry into "this Act"[41] was not possible under the earlier settlements in any case, in the sense of inquiring into its substance. Nor did earlier settlement legislation limit the courts' jurisdiction regarding its interpretation.

Similarly, the definition of the settled claims is expanded to mean:[42]

> all claims made at any time by any Ngāi Tahu claimant and—
>
> (i) founded on rights arising in or by the Treaty of Waitangi, the principles of the Treaty of Waitangi, statute, common law (including customary law and aboriginal title), fiduciary duty, or otherwise; and
>
> (ii) arising out of or relating to any loss of interests in land, water, rivers, harbours, coastal marine areas, minerals, forests, or any natural and physical resources in the Ngāi Tahu claim area, caused by acts or omissions by or on behalf of the Crown or by or under legislation, being a loss that occurred before 21 September 1992—
>
> whether or not these claims have been researched, registered or notified…

The notable differences are the inclusion of claims based on *fiduciary duty* within the scope of those settled, and the second subsection, particularly the requirement that the *loss* must have been *caused by acts or omissions* of the Crown, or been taken under legislation.

The inclusion of claims based on a fiduciary duty under this definition is likely only serving the purpose of clarification. Yet, it reflects concerns developing at the time around the nature of the Crown's obligations and responsibilities. The obligations of the Crown stemming from the Treaty have often been thought of as akin to fiduciary duties,[43] and jurisprudence developing at the time saw courts in places such as Canada referring to

[41] Section 461.

[42] Section 10(1)(a).

[43] *New Zealand Māori Council v Attorney-General & Ors* [1987] NZCA 60.

fiduciary obligations between the Crown and indigenous peoples.[44] Despite this, fiduciary obligations would likely be founded on rights arising in or by the Treaty of Waitangi, or common law. The addition of fiduciary duties in this definition is thus of little practical difference, but serves to put any ambiguity to rest.

Requiring that any settled claim must also be based on a loss that is caused by an act or omission of or on behalf of the Crown has the express effect of narrowing the ambit of the claims settled from its definition in the WRCSA three years earlier. But there is little practical difference, because it is generally Crown acts or omissions that are called into question in the Treaty claims process, as the Treaty is with the Crown. It is conceivable that a loss caused by a body that is not part of the Crown (for instance, possibly regional authorities) could be included within the scope of claims settled where previous definitions do not have this level of specificity. Although this requirement narrows the ambit of settlement, it better reflects the settlement's purpose, because settlement is with the Crown. At the time of the Ngāi Tahu settlement, there was an emphasis in public life on the notion that the Treaty only bound the Crown, and not regional or local government.[45] This was partly because local and regional governments were excluded from settlement negotiations, about which they complained. The Crown responded by observing that Treaty settlements are based on the Treaty, and the Treaty is with the Crown. The claims thus relate to Crown acts or omissions only. This is further reflected in s 6 of the TOWA.[46] Moreover, it helps to foster a spirit of reconciliation by ensuring that what is settled is limited to things relating only to parties privy to the claims process.

Relatedly, for the first time in settlement legislation, we see a "cut-off date" introduced. This ensures that any losses caused by Crown acts or omissions occurring after 21

[44] See *R v Guerin* [1984] 2 SCR 335.

[45] This is reflected in an amendment inserted into the Treaty of Waitangi Act 1975 by the Treaty of Waitangi Amendment Act 1993 (1993 No 92). This amendment at s 6(4A) prohibits any Waitangi Tribunal recommendations regarding "private land", which is defined to include any land owned by local government.

[46] Section 6(1)(d) refers to actions "done or omitted… or proposed to be done or omitted, by or on behalf of the Crown".

September 1992 may give rise to a contemporary claim, requiring additional settlement. This is consistent with the Crown's intentions that settlements do not affect ongoing rights recognised by the Treaty of Waitangi.

Section 462 of the NTCSA also added the following ouster clause to the TOWA, by stating that:[47]

> (9) the Tribunal does not have jurisdiction to inquire or further inquire into, or to make any finding or recommendation in respect of,—
>
> (a) Any or all of the Ngāi Tahu claims, as defined in section 9 of the Ngāi Tahu Claims Settlement Act 1998; or
>
> (b) The deed of settlement, as defined in section 8 of the Ngāi Tahu Claims Settlement Act 1998; or
>
> (c) The benefits provided to Ngāi Tahu under that deed of settlement or the Ngāi Tahu Claims Settlement Act 1998; or
>
> (d) The Ngāi Tahu Claims Settlement Act 1998.
>
> (10) Subsection (9) does not exclude the jurisdiction of the Tribunal in respect of the interpretation or implementation of the deed of settlement or the Ngāi Tahu Claims Settlement Act 1998.

Though this section has since been repealed, and replaced by provisions of similar effect inserted into the Treaty of Waitangi Act, it reinforced the ousting provisions of s 461 by ensuring again that there was no jurisdiction for the WT to reconsider the settled claims.

We also see in the NTCSA the further addition that the claims settled must stem from a loss of "interests in" in respect of particular resources.[48] It thus leaves open the possibility of future claims based on damage to interests outside this list, such as Ngāi Tahu culture. This clause appears to cover claims to any loss of interests in water and rivers. But, it only applies to loss caused by Crown action or legislation before 21 September 1992. So, it

[47] Ngāi Tahu Claims Settlement Act 1998 (as at 03 September 2007), s 462.

[48] Section 10(1)(a).

would probably not cover loss of interests in water or rivers caused by a privatisation of water rights after that date. This matter will be discussed in the fourth chapter. The Act then excludes from the settlement certain other claims, including any claims that relate to language or culture. These would not, in any case, be claims relating to the listed resources. Finally, the FSCs in the NTCSA relate only to claims made by any "Ngāi Tahu" claimant. This defined the "who" of settlement. This was influential in the Court of Appeal's decision in *Ngati Apa*[49], as the next chapter will show.

One possible reason that this settlement is distinct in form from the WRCSA is the political backdrop prior to this settlement. The Waitangi Tribunal had published its report on Ngāi Tahu's claims with specific reference to fisheries and reserves as well as land purchases.[50] This may have caused the definition of the settled claims to be limited to those related to the specific resources concerning which claims to the WT were made.

F Later settlements

This structure of the FSCs remains largely unchanged in the settlement Acts that follow. There are some minor differences in form and content, however these are likely to have no practical effect.

For example, the Ngati Turangitukua Claims Settlement Act 1999 sees a form of FSC which seems to have matured and become a standard for subsequent claims.[51] It says that the claims are settled finally, and the courts are precluded from inquiring into the claims, the validity of the deed of settlement, the *adequacy of redress,* or the Settlement Act. The inclusion of the phrase "the adequacy of redress" is newly introduced in this Act.[52] Nevertheless, the courts' jurisdiction is expressly continued in respect of interpretation of

[49] *Ngati Apa,* above, n 8.

[50] Waitangi Tribunal *The Ngāi Tahu Report 1991* (Wai 27, 1991).

[51] Section 9.

[52] Compare Ngāi Tahu Claims Settlement Act, s 461.

the settlement Act or other legislation.[53] The description of the claims in question follows the same form as in the Ngāi Tahu legislation.[54]

The additional exclusion of the courts from inquiring into the adequacy of redress, coupled with the express retention of jurisdiction in respect of interpretation, likely stems from a desire to put such matters beyond doubt. Like earlier revisions, these changes add clarity but not content. Any justiciable claim relating to the adequacy of redress must necessarily have some legal foundation, but all legal claims were already excluded; so there does not appear to have been any basis on which claims relating to the adequacy of redress could have proceeded anyway.

From 2000 onward, the "claims" settled are referred to as "historical claims".[55] There is no difference in practice between this definition and earlier definitions of "claims". Nevertheless, the renaming of "claims" as "historical claims" creates a clearer distinction between "historical claims" and "contemporary" claims. This is consistent with the Crown's recognition of such a distinction. The wording "historical claims" is also used in other statutes. Notably, section 6AA of the Treaty of Waitangi Act (as currently amended) prevents iwi from submitting a "historical claim" to the Tribunal that was not submitted prior to 1 September 2008. This is designed to ensure there is a quantifiable, finite number of historical claims for the purposes of future Treaty settlements.[56] If an iwi wishes to make a claim that was not submitted to the Tribunal prior to September 2008, unless that claim is contemporary, they cannot do so.

Another development is found in the Ngati Tama Claims Settlement Act 2003, which adds the since standardised carve out:[57]

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[53] Ngati Turangitukua Claims Settlement Act, s 9(4).

[54] Compare Ngāi Tahu Claims Settlement Act, s 10; Ngati Turangitukua Claims Settlement Act, s 8.

[55] Compare Pouakani Claims Act 2000, s 12; Ngati Turangitukau Claims Settlement Act 1999, s 9.

[56] Office of Treaty Settlements, above n 14, at 23.

[57] Section 11(1)(d). This carve-out is uniform in future Treaty settlement legislation with the obvious difference that different settlement Acts refer to different iwi.

(d) [historical claims] does not include-

(i) a claim that an individual referred to in section 10(1)(b) may have as a result of being descended from an ancestor who is not a Ngati Tama ancestor; or

(ii) any claim that a family, whanau, or group of individuals referred to in section 10(1)(b) may have as a result of being descended from an ancestor who is not a Ngati Tama ancestor

This was likely added following the Court of Appeal's decision in *Ngati Apa*.[58] There, the Court held that a previous settlement by one iwi would not generally preclude cross-claims by another iwi over the same area. This will be discussed in the next chapter. This section recognises and endorses this judicial decision. Accordingly, it does not add content but clarifies. It echoes the Court of Appeal's decision; cross-claims would not usually be barred. It further reinforces the idea that settlement is between the Crown and the iwi mentioned, so it does not preclude claims by different iwi over the same resources. In its clarifying role, the section indicates what a cross-claim consists of. It shows that it consists of basing a claim on rights arising from descent from an ancestor who is not a forebear of the iwi whose claim is being settled. The specificity of language highlighted in the NTCSA makes the same point by mentioning that only claims made by Ngāi Tahu are settled,[59] but the Ngati Tama formulation is more clear.

Another variation is found in the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 ("WTRSA"), in its carve out provision at section 90(1), which adds the following:

Without derogating from section 64(1), nothing in the 2009 deed or this Act—

(a) extinguishes or limits any aboriginal title, or any customary right, that Waikato-Tainui may have:

[58] *Ngati Apa,* above n 8.

[59] *Ngati Apa,* above n 8, at [54].

(b) is, or implies, an acknowledgement by the Crown that any aboriginal title, or any customary right, exists:

(c) affects a right that Waikato-Tainui or the Crown may have, including a right—

(i) according to tikanga or customary law:

(ii) arising from the Treaty of Waitangi or its principles:

(iii) arising under legislation:

(iv) arising at common law (including common law relating to aboriginal title or customary law):

(v) arising from a fiduciary duty:

(vi) arising in some other way:

The FSC within the WTRSA settles claims regarding the Waikato River by the Waikato iwi, concerning Crown actions prior to 1992,[60] and ousts the jurisdiction of courts and tribunals to inquire into these claims.[61] Section 90(1) shows that in doing so it does not extinguish any underlying customary rights in the river. Nor does it acknowledge that such rights exist. So, any such rights continue and could give rise to new claims, concerning Crown actions or omissions after 1992. These claims are left outstanding, for another day. But, no court or tribunal can inquire into the adverse impact on these rights by Crown action (or under legislation), or omission, prior to 1992, as these actions are within the definition of the "Raupatu" claims[62] settled at s 90(2)(i). Claims concerning the adverse impacts of other parties on those rights, that is, not actions of the Crown or under legislation (such as farmers or other private individuals) would not be ousted from the courts' jurisdiction under the common law because these would not be of the kind settled by the WTRSA. So, s 90 has the clarifying effect of ousting the possible implication that the settlement extinguishes underlying customary rights in the Waikato River, without any acknowledgment that those rights exist by the Crown.

[60] Section 88.

[61] Section 90(2).

[62] Section 88(2).

This section clarifies that settlement legislation does not settle *all* claims and nor does it extinguish potential customary rights. Rather, it settles specified, historical claims only. This was probably already the case. The existence of the 21 September 1992 cut-off date ensures that future Crown conduct may give rise to contemporary claims. Settlement is with the Crown, so proceedings against private individuals would not have been ousted anyway. Moreover, it was always possible that Treaty settlement legislation did not extinguish potential customary interests. This settlement therefore leaves open the possibility that contemporary legislation may amount to a Crown-initiated act that adversely effects possible customary property rights, for example in water. This will be discussed further in chapter four. In other words, any matters about customary title with respect to ownership of water are left unresolved, while progress is still made in settling previous Crown grievances.

Interestingly, this section is not emulated in subsequent Acts. Rather, it is only repeated twice more in the following 6 years: in the Ngāti Koroki Kahukura Claims Settlement Act 2014; and the Raukawa Claims Settlement Act 2014. This may be because this section serves only clarity. It only makes it clear that certain rights are not affected. But these rights were not really affected by settling historical claims, in any case.

G Conclusion

The above analysis makes it clear that FSCs are designed in a manner that is substantially the same as privative provisions. The jurisdiction of the courts and the WT is ousted, and what is ousted runs a wide gamut. Each FSC identifies what is settled, how it is settled, who the settlement is between and what is left outstanding from settlement. It appears then that this is what reconciliation, in a sense, requires. Certain matters are settled, while others are deliberately left open for another day. Specificity, and certainty, is thus paramount. The iwi gets the benefit of the settlement, with their claims then put to rest. The aim is that both parties to settlement can "move on" from historical grievances, the Crown with a

desired certainty as to both what is settled and what is left outstanding, and the iwi with the benefit of redress.[63]

Changes over time show a desire to remove ambiguity from these aspects of Treaty settlement legislation. Most changes in the form of FSCs serve only the purpose of clarification, and do not add anything substantial. This is consistent with the goals of ensuring Treaty settlements remain durable and do not create further injustices. It also clarifies that ongoing Treaty obligations persist despite earlier settlement. In particular, the presence of a cut-off date clarifies that contemporary claims are left outstanding.

[63] See Baragwanath, Parata and Williams *Treaty of Waitangi Issues – the last decade and the next century* (New Zealand Law Society, Wellington, 1997); ETJ Durie, Chief Judge of the Māori Land Court "Waitangi: Justice and Reconciliation" (Second David Unaipon Lecture, School of Aboriginal and Islander Administration, University of the South Australia, Adelaide, 10 October 1991); Alan Ward "Historical Claims under the Treaty of Waitangi: Avenue of reconciliation or source of new divisions?" (1993) 28 Journal of Pacific History 181.

III. Overlapping claimants

A Introduction

As seen in the previous chapter, FSCs are designed to oust the jurisdiction of courts and tribunals regarding the specific claims settled. How might a FSC work then, where an iwi as a cross-claimant attempts to make a claim over an area or resources that are the subject of a previous settlement with another iwi? Will the FSC in one iwi's settlement statute preclude claims by *all* other iwi over that land or resource, or will the courts apply a strict interpretation to FSCs so as not to oust the jurisdiction of courts or tribunals over claims extrinsic to the existing settlement? This was the question at the heart of *Ngati Apa*.[64] The Court of Appeal's conclusions in this case provide insight into the proper interpretation of FSCs, and the extent to which the "full and final" nature of a FSC may oust access to the WT by a competing cross-claimant. The legislature's subsequent response provides insight into how reconciliation may be promoted between the Crown and Māori in the realm of Treaty settlements in New Zealand.

B The case

Ngati Apa were seeking judicial review of a decision by the Māori Appellate Court ("MAC") to enable them to bring a claim in the WT. This decision of the MAC, given on reference by the WT, had determined that Ngāi Tahu had sole ownership over certain land on the West Coast of the South Island in 1860.[65] Ngati Apa did not dispute that Ngāi Tahu had an interest in this land, but instead claimed they had an overlapping interest in respect of such land from the Buller River to Kahurangi.[66] Ngati Apa's grounds for judicial review of the MAC were twofold. First, Ngati Apa argued that the MAC decision was wrong to find that Ngāi Tahu had "the sole rights of ownership"[67] in the contested land, because one

[64] *Ngati Apa*, above n 8.
[65] At [3]-[4].
[66] At [4].
[67] At [12].

of the Māori signatories to a Crown purchase deed concerning the land was a member of the Ngati Apa iwi (thus showing the Crown recognised Ngati Apa's ownership at the time) (the "Substantive Claim").[68] Secondly, they argued that regardless of that Substantive Claim, the MAC decision was tainted with procedural impropriety because Ngati Apa was not a party to the hearing at which Ngāi Tahu were found to have sole ownership rights (the "Procedural Claim").[69] The Crown, on the basis of the MAC finding, had then reached a settlement of Ngāi Tahu's historical claims in the region and passed the NTCSA to that effect.[70] Ngata Apa did not accept that this eroded their chance of establishing concurrent ownership rights in the contested region. Thus, they sought an order from the general courts setting aside the MAC's decision, and a declaration that the WT retained jurisdiction to consider their claim over this contested area, despite the MAC's findings. Ngāi Tahu attempted to strike out the judicial review proceedings by relying, amongst other things,[71] on their FSC contained at s 461 of the NTCSA.

As outlined in the previous chapter, the NTCSA contains a privative provision in its FSC, declaring that "no court or tribunal has jurisdiction to inquire or further inquire into, or make any finding or recommendation in respect of any or all of the Ngāi Tahu claims".[72] It further ensures that "[t]he settlement of the Ngāi Tahu claims… is final and the Crown

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[68] At [3].

[69] At [5].

[70] At [39]-[80].

[71] Ngāi Tahu argued that other means through which Ngati Apa's overlapping claim might be precluded, regardless of its merits, were:

(1) the original decision of the MAC, if that decision bound Ngati Apa;
(2) the passage of the *Te Runanga o Ngāi Tahu Act* 1996;
(3) by recognition in the Ngāi Tahu Claims Settlement Act 1998 as Ngāi Tahu as "the" indigenous people within those boundaries, implying this conferred on them exclusive tribal authority;
(4) by the actual remedies granted to Ngāi Tahu by the settlement including a right of first refusal over Crown lands in the area, which would prevent Ngati Apa from similar remedies; and
(5) by necessary implication from all of the above and from the Ngāi Tahu Claims Settlement Act taken as a whole, based on Parliament's apparent intention to vest exclusive authority over the takiwa to Ngāi Tahu.

See J Dawson "Remedial Powers of the Waitangi Tribunal" (2001) Public L R 171, at 180.

[72] Section 461(3).

is released and discharged in respect of those claims".[73] Ngāi Tahu contended that this FSC was enacted on the basis of the MAC's finding that Ngāi Tahu's interests over the region were exclusive, and thus indicated that any settlement in this region must be with Ngāi Tahu exclusively. The consequence was that the FSC necessarily precluded cross-claimants such as Ngati Apa from attempting to establish a claim over the same region, in the WT.[74] Thus, Ngāi Tahu attempted to strike out Ngati Apa's proceedings on this basis.

In the High Court, Ellis J agreed with Ngāi Tahu that the legislation was based on Parliament's understandings that Ngāi Tahu's authority over the region was exclusive, and thus settled all historical claims relating to the entire region in contention. Although the legislation did not "expressly exclude claims by other tribes over the same area" this was because "the Act is drawn and the settlement concluded on the understanding that Ngāi Tahu's claims… were exclusive and other valid claims were non-existent".[75] To permit Ngati Apa to raise their claim now would be contrary to Parliament's plain intention. Therefore, he struck out Ngati Apa's application for judicial review. Ngati Apa appealed this decision.

In discussing the finality of Ngāi Tahu's FSC, Elias J, in the Court of Appeal, held that Ngāi Tahu's FSC settles "Ngāi Tahu" claims and does "not in its terms purport to affect or settle the claims of any other tribal groups".[76] Justice Elias did not believe that the legislation necessarily endorsed the MAC's finding, considering instead that the legislature's intention had been to only settle the claims of Ngāi Tahu in the region, and not those of cross-claimants. "It would have been easy", suggested Elias J, "for the legislation to provide that no claim by any tribal group might be brought in respect of the breaches of the Treaty arising out of that tribe's use or occupation or ownership of land within the takiwa of Ngāi Tahu, if that had been intended."[77] But, there was "no necessary

[73] Section 461(1).

[74] *Ngati Apa,* above n 8, at [39].

[75] *Ngati Apa Ki Te Waipounamu Trust v R & Ors* CP115/98 14 June 1999, at [9].

[76] At [47].

[77] At [54].

implication of exclusivity".[78] Accordingly, Elias J, although in dissent on some points, allowed the appeal and set aside the order made by Ellis J striking out Ngati Apa's application for judicial review.

In his judgment, Gault J considered that because Ngati Apa were challenging the MAC's decision that held Ngāi Tahu had "sole ownership" of the contested lands, they were seeking to challenge the ownership of that land by Ngāi Tahu. He considered that it was not open to the Court to set aside the MAC's order because the NTCSA had recognised Ngāi Tahu as "the [exclusive] tangata whenua" over the contested area.[79] He added that if Ngati Apa were seeking to advance a claim on the basis of an interest less than "ownership" the MAC decision would be of no relevance.[80] But, insofar as Ngati Apa aimed to contest findings made by the MAC, judicial review was "inappropriate".[81] Accordingly, Gault J would have dismissed the appeal. Interestingly, he added that it is possible that the NTCSA, which would deny Ngati Apa a claim by his reasoning, might itself constitute a breach of Ngati Apa's Treaty rights.[82] Yet, this was not within his purview, as the courts are "bound to give effect to the statutes of Parliament".[83]

Conversely, Keith J considered that the FSC did not prevent "in any absolute way the presentation of Ngati Apa claims to a court or tribunal."[84] Despite this, he considered that the Substantive Claim must fail. Generally, the Substantive Claim was not precluded by the FSC[85] because the NTCSA in its references to Ngāi Tahu's takiwa "do[es] not incorporate the notion of exclusivity".[86] Despite this, the Substantive Claim attempted to set aside specific boundary determinations which were included in the NTCSA and, due to

[78] At [50].
[79] At [91]—[92].
[80] At [96].
[81] At [96].
[82] At [98].
[83] At [98].
[84] At [115].
[85] At [116].
[86] At [112].

this specificity, it could not succeed. However, Keith J considered that Ngati Apa's statement of claim should not be struck out, allowing Ngati Apa to proceed on their Procedural Claim. The Court of Appeal was not, according to Keith J, "in a position to say… that that part of the claim could not possibly succeed in judicial review proceedings".[87]

Finally, Tipping and Blanchard JJ held that Ngāi Tahu's settlement was formed on the basis of the MAC's decision and represented a Parliamentary intent to provide an exclusive settlement. The MAC decision was an "integral part" of the settlement legislation and an "essential element" of the statutory scheme.[88] Parliament's acceptance of and reliance on that decision gave it legislative weight, so to allow the Substantive Claim to proceed against the MAC decision would "be tantamount to an attack on Parliament", and such conduct would be "close to, if not actually amount to judicial impeachment" of parliamentary proceedings.[89] Despite this finding, Ngati Apa was still allowed to advance their Procedural Claim: that natural justice had been breached in the MAC decision.

In many ways, then, this decision marks a victory for Ngati Apa. The FSC, designed to oust the courts from making "any finding or recommendation in respect of any or all of the Ngāi Tahu claims"[90] was not found to oust Ngati Apa as a cross-claimant from bringing the MAC decision to judicial review. Ngāi Tahu could not rely on their FSC to strike out Ngati Apa's proceedings entirely.

C The approach

Ngati Apa is therefore useful insofar as that it provides insight into how the courts are likely to interpret FSCs when they are applied to difficult areas. This case confirms a continuing orthodoxy in the interpretation of privative clauses, even in the context of a Treaty

[87] At [115].
[88] At [115].
[89] At [155].
[90] Ngāi Tahu Claims Settlement Act, s 461(3).

settlement.[91] When interpreting the potential exclusivity implied by the FSC, and the NTCSA as a whole, the Court of Appeal chose to construe the FSC narrowly.[92]

To understand the significance of this, it is necessary to briefly depart from an analysis of *Ngati Apa* and examine instead the judicial orthodoxy towards privative provisions. A lot has been said about privative provisions, their history, and the courts' general approach towards them.[93] In New Zealand, a major development was made in *Bulk Gas Users Group v Attorney-General*.[94] Here, Cooke J, in the lead judgment, introduced the idea that a decision that fell within the category of "error of law" would not be ousted from judicial review by a privative provision.[95] He held that an ouster clause will not apply "if the decision results from an error on a question of law which the authority is not empowered to decide conclusively".[96] Plus, there is a presumption against such empowerment.[97] The courts are reluctant to read legislation in a manner that impairs their ability or mandate to review an erroneous decision.[98] The implication is that privative clauses that are general in nature are, for the most part, read down to have little, if any, effect.[99] Put another way, most privative clauses are not sufficiently express to function, meaning that, except in the exceptional case, they are of no effect.[100]

Nevertheless, in more recent times there has been a resurgence of privative provisions in New Zealand legislation.[101] This is partly due to an increase in the operation of tribunals or alternate dispute resolution processes in many sectors. Privative clauses are enacted to

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[91] Dawson, above n 71, at 180.

[92] Dawson, above n 71, at 180.

[93] See Pemberton, above n 4; Joseph, above n 3; Sizer, above n 4.

[94] *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA).

[95] At [133] and [138].

[96] At [133].

[97] At [133]—[136].

[98] *Tannadyce Investments Limited v Commissioner of Inland Revenue* [2011] NZSC 158 at [4].

[99] Sizer, above n 4.

[100] Sizer, above n 4; JA Smillie "The Foundation and Scope of Judicial Review: A Comment on *Bulk Gas Users Group v Attorney-General"* (1984) 5 Otago LR 552 at 557.

[101] Pemberton, above n 4.

confer "exclusive jurisdiction" on these tribunals on the basis that this will create greater efficiencies - preventing further appeals on reviews might see disputes settled rapidly. Accordingly, the courts are precluded from inquiring into the relevant areas. This has increased the efficacy of privative clauses because they function in contexts where alternative mechanisms for dispute resolution are available. Though a reading down of privative provisions remains the norm, the courts are more likely to give effect to them where a parallel system of dispute resolution or arbitration applies.[102] Where such an alternative mechanism does not exist, on the other hand, the courts will generally read down a privative provision so it does not limit the right to justice.[103]

FSCs are unique insofar as they are *agreed* to by iwi – via a deed - as a part of their Treaty settlement, rather than simply *imposed* by the passage of legislation. Thus, FSCs are *sui generis*, and this may affect their interpretation.[104] It might mean that the courts are more willing to recognise an FSC's ousting effect, on basis that this effect has been agreed. Despite this, where there is controversy as to the extent of a FSC, or, as in this case, where the claimant was not party to the settlement, it cannot be said that the relevant parties agreed about the FSC in this way. The courts are therefore still likely to read down the ousting effect of FSCs, consistent with the orthodox approach to ouster clauses, where such ambiguity exists.

Where Parliament intends to exclude the courts entirely from embarking on an inquiry, it may still do so. Parliament is New Zealand's supreme law maker and has the "full power to make laws".[105] But it must do so with sufficient clarity to leave no doubt that that was its wish.[106] In other words, ouster clauses are only likely to be effective where there is no

[102] Pemberton, above n 4; *Tannadyce Investments Limited v Commissioner of Inland Revenue*, above n 98, at [15]; *Bulk Gas Users-Group v Attorney-General* above n 94, at [136]; *Fraser v Robertson* [1991] 3 NZLR 257 (CA) at 260; *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA) at 123 per Cooke J.

[103] Pemberton, above n 4; Sizer, above n 4; New Zealand Bill of Rights Act, s 27.

[104] See generally *Tannadyce Investments Limited v Commissioner of Inland Revenue,* above n 98; *O'Regan v Louisch* [1995] 2 NZLR 620 (HC).

[105] Constitution Act 1986, s 15(1).

[106] See *O'Regan v Louisch,* above n 104.

room for ambiguity; there is a clear legislative intention; and there is an alternative avenue available for resolution of disputes.

Reading the judgment of Elias J in *Ngati Apa* against this backdrop provides insight into the preferred approach to the interpretation of FSCs. Although Elias J was in dissent regarding her statements on Parliament's intention regarding Ngāi Tahu's settlement legislation, her judgment remains persuasive. The judgment also marks the (now) Chief Justice's first at length discussion of Māori-related issues.[107] Instead of reading the FSC in accordance with a Parliamentary intent that was manifest to the remainder of the Court of Appeal and Ellis J below, Elias J cautioned such a conclusion. She stated plainly that she was "unable to discern any such intent from the language Parliament has chosen to use."[108] She cited with approval Griffiths CJ, in *Richardson v Austen,*[109] which stated:

> … there is nothing more dangerous and fallacious in interpreting a Statute than first of all to assume that the legislature had a particular intention, and then, having made up one's mind what that intention was, to conclude that that intention must necessarily be expressed in the Statute, and then proceed to find it.

Going further, Elias J notes that it is perhaps even "more dangerous" to presume Parliament has enacted some provision on the basis of an assumption.[110] For even if such an assumption was a catalyst for legislation, that does not mean the assumption is manifest in the legislation. Rather, the correct approach is to interpret the FSC based on the words it contains, within the context of the Act in which it exists. Where the Act is workable without any assumptions about its purpose, then that interpretation is preferred.[111]

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[107] Dawson, above n 71, at 179.

[108] At [78].

[109] *Richardson v Austen* [1911] ArgusLawRp 46 at 470.

[110] At [80].

[111] At [81].

Elias J's comments on the intent of the NTCSA are justified: the plain wording of the statute does not exclude cross-claimants, rather it refers only to Ngāi Tahu's claims being settled. It is dangerous to ascribe an intent to Parliament that is not manifest in the Act. When these concerns are relevant to the interpretation of a FSC, it is unsurprising that the provision will be read so as not to exclude cross-claimants. This is consistent with the orthodoxy toward ouster clauses expounded above.

Although Blanchard and Tipping JJ believed that Parliament's intention was formed on the understanding of Ngāi Tahu's exclusivity, they did not read the FSC so as to preclude Ngati Apa's Procedural Claim. This is important, because their interpretation of Parliament's intent only excluded the Substantive Claim over the same resource. If the phrase "Ngāi Tahu claims" was interpreted to include claims by cross-claimants, it would have been open to the court to exclude Ngati Apa's Procedural Claim under the phrase "any and all claims", as evinced by Ellis J's decision below.[112] This was not done: the FSC was interpreted narrowly so as to allow Ngati Apa continued access to the courts and Tribunal despite the FSC's partial ousting effect.

This again represents an application of the general orthodoxy towards ouster clauses. Where an interpretation is available that will be consistent with a perceived intention, and that interpretation does not limit a party's access to justice, this will be preferred. Ngāi Tahu were in a different position than Ngati Apa insofar as Ngāi Tahu had received the *quid pro quo* of their settlement for the FSC. Natural justice indeed would have been breached if Ngati Apa's right to be heard was not recognised throughout negotiations for a settlement affecting them, as well as at the MAC, as they contended. Moreover, because the FSC precludes inquiry by not just the courts, but also the WT, it is unsurprising that the court interpreted this FSC to ensure Ngati Apa's right to justice was preserved. Although the WT is not a true equivalent for dispute resolution in this context, it is the only legal

[112] Ngāi Tahu Claims Settlement Act, s 10.

alternative to the courts in relation to Treaty issues of these flavours. By ousting the WT's jurisdiction as well, the right to justice would be impeded.

The issue of cross-claimants thus demonstrates that the courts are likely to approach FSCs as they do privative provisions in general: narrowly. However, it is possible that this insight is limited in application. Would the interpretation be the same if it was Ngāi Tahu seeking to re-access the WT despite the FSC? Where the party seeking to avoid the FSC's effect has agreed to its imposition, a different approach might be taken, as the needs of "justice" may be different.

D Legislative response

As seen in the previous chapter, in 2003, after the *Ngati Apa* decision, the general form of settlement legislation was amended to include an additional clause in the FSC that left cross-claims outstanding from settlement. From that point on, all Treaty settlement legislation has been limited in application to the particular iwi that is settling, and does not exclude any claims over the same area or resource that is a product of whakapapa to any other iwi. It is not difficult to infer that this is a legislative response to *Ngati Apa* and the cross-claimant issue. This response may be seen as an endorsement by Parliament of the decision in *Ngati Apa*.

When the NTCSA was passed, reconciliation was one of its key priorities. The Act included an apology, which Ngāi Tahu considered to be a "fundamental" aspect of the settlement because it recognised the validity of Ngāi Tahu's claims.[113] It is only after this that the healing process could begin.[114] Therefore, although compensation was multifaceted, it is reconciliation that lies at the heart of settlement. Economic redress, for example, is best considered as an instrumental good.[115] More important perhaps is cultural

[113] Nicola Carrell "Innovation in Reconciliation – The Ngāi Tahu Claims Settlement Act 1998" (1999) 3 NZJEL 179.
[114] Carrell, above n 113.
[115] Carrell, above n 113.

redress, such as the renaming of Mt Cook to Aoraki, and the apology which paves the way for reconciliation.

The later *Attorney-General v Ngati Apa*[116] decision, in respect of the foreshore and seabed, reminds us that, even in the realm of Treaty settlements, Parliament is supreme and a judicial decision in favour of Māori interests can still be overruled by legislation. In the changes adopted to the drafting of FSCs, we see instead a Parliamentary endorsement of the Court of Appeal's reading of this FSC. The legislature's response ensures that, where valid claims exist, other iwi are not excluded from obtaining certain arrangements – such as co-management regimes over the same land or resources, as a part of their later settlement. Moreover, this response is an early articulation of the Crown's current approach in negotiating settlement. It ensures that no further injustices are created by a Treaty settlement and that Treaty settlements will not affect ongoing rights afforded to Māori under the Treaty.[117]

The legislative response to *Ngati Apa* thus demonstrates that reconciliation between the Crown and Māori, as envisaged by Treaty settlements, requires the Crown to ensure that other interests are protected despite the existence of a FSC. This may be manifest by leaving out certain things from settlement, such as claims over the same resource by other iwi, so these claims may also be brought before the courts and WT when required.

[116] *Attorney-General v Ngati Apa* [2003] 3 NZCA 117.

[117] Office of Treaty Settlements, above n 14, at 28.

IV. What was the settled claim "about"?

A Introduction

The Kermadec Islands are situated in the South Pacific Ocean, northeast of the North Island. Historically, the seas around the Kermadec Islands were a valuable fishery for pelagic fish, but due to depletion these stocks have not been fished in recent years.[118] Because the marine area in the region is unique, and because the New Zealand Government has an obligation to protect and preserve the marine environment,[119] the New Zealand Government aims to pass a bill turning this region into an ocean sanctuary.[120] The Kermadec Ocean Sanctuary Bill 2016[121] ("KOSB") aims to "establish a 620,000 square kilometre fully protected marine sanctuary" in which "fishing… [and] the disturbance or removal of living or non-living material" would be prohibited.[122] At the time of writing, the KOSB has been set down for its second reading. With support from the majority of the House it may pass into law with a commencement date of 1 November 2016.[123] Alternatively, some other political settlement might be reached.

The KOSB has met some opposition from iwi claiming that it will erode or extinguish their fishing rights promised under the FCSA.[124] They maintain that it undermines both that settlement and the principles of the Treaty of Waitangi.[125] Iwi are also concerned with the Crown's failure to consult prior to and throughout this policy process.[126]

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[118] Te Runanga o Ngāi Tahu "Kermadec Ocean Sanctuary Bill" at [6.1].

[119] United Nation Convention on the Law of the Sea, art 192.

[120] An ocean sanctuary is distinguishable from a marine reserve because it allows for the passage of certain vessels and for scientific research.

[121] Kermadec Ocean Sanctuary Bill 2016 (120-2).

[122] Kermadec Ocean Sanctuary Bill 2016 (120-2), cl 3.

[123] Kermadec Ocean Sanctuary Bill 2016 (120-2), cl 2.

[124] See Ngati Kuri Trust Board Incorporated "Submissions on the Kermadec Ocean Sanctuary Bill"; Waikato-Tainui "Submission: The Kermadec Ocean Sanctuary Bill"; Te Runanga o Ngāi Tahu, above n 118.

[125] See Te Runanga o Ngāi Tahu, above n 118; *Te Ohu Kai Moana Trustee Ltd v Her Majesty's Attorney-General* [2016] NZHC 1798.

[126] See Waikato-Tainui, above n 124.

As mentioned in the first chapter, the FCSA was passed to settle all claims by Māori in respect of commercial fishing.[127] This Act was the culmination of a long history of dispute between Māori and the Crown as to the nature and extent of Māori fishing rights in the modern context.[128] It paid Māori economic redress of $150 million and guaranteed them 20% of all quota for all species henceforth brought within the quota management system.[129] The Crown and Te Ohu Kaimoana ("TOK") (who assist in the allocation of the quota amongst Māori)[130] hold quota for 66 species in Quota Management Area 10 ("QMA10").[131] Quota in QMA10 can only be caught within the boundaries of Fisheries Management Area 10 ("FMA10").[132] FMA10 corresponds to the area of the proposed sanctuary, effectively reducing this quota to zero.[133] It is for this reason that iwi organisations named in the Māori Fisheries Act[134] have pledged unanimous support for legal action to be taken by TOK against this proposal.[135]

Legal action in this respect is difficult and controversial. As previously outlined, the FCSA contains a privative provision ousting the jurisdiction of courts and tribunals over all claims in respect of commercial fishing.[136] Moreover, the KOSB provides that no compensation is payable by the Crown for adverse effects on interests resultant from this bill.[137] This controversy therefore provides another test case concerning the full effect of a FSC, that FSC being s 9 FCSA. It also shows how such a clause may come to operate in tandem with

[127] Section 9.

[128] Treaty of Waitangi (Fisheries Claims) Settlement Act, preamble.

[129] Treaty of Waitangi (Fisheries Claims) Settlement Act, preamble.

[130] Te Ohu Kaimoana "Strategic Plan 2011 – 2016" Te Ohu Kaimoana <www.teohu.Māori.nz>.

[131] Kermadec Ocean Sanctuary Bill 2016 (120-2) (select committee report) at 6–7.

[132] Kermadec Ocean Sanctuary Bill 2016 (120-2) (select committee report) at 7.

[133] Kermadec Ocean Sanctuary Bill 2016 (120-2) (select committee report) at 6–7.

[134] Māori Fisheries Act 2004, sch 3.

[135] Te Ohu Kaimoana "Iwi unanimous in supporting legal action against the Crown" (1 April 2016) Te Ohu Kaimoana <teohukaimoana.createsend1.com>.

[136] Section 9.

[137] Kermadec Ocean Sanctuary Bill 2016 (120-2), sch 1, cl 1.

other provisions enacted later, such as the no compensation clause in the KOSB.[138] This chapter will analyse the likely effect of these provisions on potential proceedings. It will argue that the ouster clause in the FCSA may be circumvented by a careful framing of the proceedings, though this will depend on the interpretive approach preferred by the courts. It will then consider the effect of the KOSB's no compensation provision, and discuss what these conclusions indicate about our general themes concerning the interpretation of FSCs, and reconciliation.

B Section 9 FCSA

Section 9 of the FCSA provides that "all claims" by "Māori" in respect of "commercial fishing" have been "fully and finally satisfied" by the "benefits" provided to Māori by the Crown under the fisheries settlement. Accordingly, "no court or tribunal" shall have jurisdiction into the "validity of such claims", or the "existence of rights and interests of Māori in commercial fishing", as well as other matters.[139] There is no "cut-off date" distinguishing between historical and contemporary claims. On the contrary, this ouster of the jurisdiction of the courts and tribunals applies to "all claims (current and future)" in respect of commercial fishing.[140] This means that, although the KOSB is being enacted some 24 years after the FCSA, proceedings in response to its passing might still be considered a "[future] claim… by Māori in respect of commercial fishing", barred by this FSC.[141] Section 9 FCSA is thus the first obstacle facing TOK. There are two factors that will greatly influence the likely effect of s 9 on any such proceedings: the interpretive approach favoured by the courts; and the framing of proceedings by the applicants.

In the previous chapter, it was shown that a purposive approach may guide the interpretation of FSCs in litigation. This approach is endorsed by the Interpretation Act

[138] Kermadec Ocean Sanctuary Bill 2016 (120-2), sch 1, cl 1.
[139] Section 9.
[140] Section 9(a).
[141] Section 9.

1999[142] and the FCSA itself, which states that the Act shall be interpreted in a manner that "best furthers the agreements expressed in the deed of settlement".[143] The purpose of the deed of settlement, and accordingly the Crown's intention in passing the FCSA, was primarily to provide for final settlement of Māori claims regarding commercial fishing rights.[144] Claims that were already before the WT and the courts were discontinued expressly, indicating that the main purpose of the Act was to settle any proceedings that had already arisen, or might arise, prior to the Act's passing.[145] Nevertheless, the reference to "current and future" claims indicates that further claims are also to be captured by this settlement.[146] Māori received "benefits" from this settlement in "satisfaction" of any claims "in respect of commercial fishing".[147] It seems likely then that the FSC was designed to prevent further inquiry into and assertion of such claims.

Conversely, it was unlikely the FCSA was intended to prevent claims being made by Māori about other things. For instance, it is unlikely this FSC was designed to oust the courts from inquiring into the interpretation or implementation of the FCSA itself. Chapter one demonstrated that since 1998 FSCs have included a carve-out to this effect. The FCSA does not expressly refer to the courts' jurisdiction in relation to interpretation of the FCSA, yet the fact that extensive litigation regarding exactly the matter of interpretation proceeded through the courts in the late 1990s shows this was not precluded by the FSC.[148] Relatedly, the courts have not been precluded from inquiring into the interpretation of the Fisheries Act 1996, which relates to "commercial fishing rights" given rise by "statute".[149] If s 9 was interpreted widely it would be likely that these matters of interpretation would have been

[142] Section 5.

[143] Section 3.

[144] Treaty of Waitangi (Fisheries Claims) Settlement Act, preamble.

[145] Treaty of Waitangi (Fisheries Claims) Settlement Act, s 11.

[146] Treaty of Waitangi (Fisheries Claims) Settlement Act, s 9.

[147] Treaty of Waitangi (Fisheries Claims) Settlement Act, s 9.

[148] See *Te Runanga o Muriwhenua v Te Runanganui o Te Upoko o Te Ika* [1995] 3 NZLR 10; *Runanga Ki Muapoko v The Treaty of Waitangi Fisheries Commission* [1997] NZHC 860.

[149] *Te Waka Hi Aka O Te Arawa v Treaty of Waitangi Fisheries Commission* [1997] NZHC 830; Ousted by Treaty of Waitangi (Fisheries Claims) Settlement Act, s 9.

ousted. Ultimately, it appears that the purpose of s 9 is simply to prevent further inquiry into the claims settled by the FCSA, and not inquiry into other issues that may arise.

On the other hand, *Ngati Apa*[150] also indicated that the courts generally give substantial weight to the plain meaning of a statute. A textual approach might find that by referring to "all claims (current or future)… by Māori in respect of commercial fishing"[151] the Crown intended to settle even claims in respect of commercial fishing based on subsequent legislation such as the KOSB. Thus, these claim would also be ousted.

The manner in which a challenge to the KOSB is articulated might have substantial bearing on the viability of such an approach to this ouster clause. For instance, if the challenge is not deemed to be a "[future] claim" of the relevant kind it will not be ousted. The same can be said if the claim is not "by Māori" or is not "in respect of commercial fishing".[152] So, if TOK were to seek a declaration of inconsistency from the courts, claiming that the KOSB (when passed) was inconsistent with the FCSA, this proceeding might not be ousted.[153] This inconsistency might be based on the fact that the KOSB, by effectively reducing an allocated quota to zero, extinguishes aspects of the FCSA, thus undermining the integrity of a "full and final" Treaty settlement.[154] Such a claim might not succeed: the Crown maintains that reducing the fishing quota to zero does not extinguish the existence of the quota *per se*.[155] Despite this, by pitching proceedings this way it is possible that the ousting effect of s 9 FCSA may be avoided because this might not be a "[future] claim.. by Māori in respect of commercial fishing".[156] Instead, it would be about the subversion of a Treaty settlement by virtue of potentially inconsistent legislation – a different kind of claim.

[150] *Ngati Apa*, above n 8.
[151] Treaty of Waitangi (Fisheries Claims) Settlement Act, s 9.
[152] Treaty of Waitangi (Fisheries Claims) Settlement Act, s 9.
[153] The courts' jurisdiction to make such a declaration is recognised in Declaratory Judgments Act 1908, s 3.
[154] Treaty of Waitangi (Fisheries Claims) Settlement Act, s 9.
[155] Kermadec Ocean Sanctuary Bill 2016 (120-2) (select committee report) at 7.
[156] Treaty of Waitangi (Fisheries Claims) Settlement Act, s 9.

Moreover, the reference to "future" claims in s 9 FCSA may mean only historical claims concerning actions of the Crown before the passing of the FCSA, but identified in the future. For instance, if new evidence demonstrated that there were additional Māori commercial fishing rights that had been breached prior to settlement, or new evidence came to light of Crown actions that impeded Māori fishing efforts prior to 1992, they too would be settled by the FCSA. In the last chapter, it was suggested that perhaps assisting Ngati Apa's claim was the fact that, had their claim been ousted, they would have been subject to the ousting effect of settlement without any *quid pro quo* - whereas Ngāi Tahu received extensive redress. It is possible that a claim based on Crown conduct before 1992, that is only discovered in the future, would also be ousted because there has been some *quid pro quo* given. But, this would mean that new Crown breaches of the Treaty, via conduct after 1992, would not be ousted, ensuring the Crown is accountable for future Treaty breaches.

It is also possible that in seeking a declaration from the courts TOK would not be making a "claim" of the kind ousted by this FSC. Declaratory judgments differ from other judgments of the courts insofar as they do not seek execution or performance from the opposing party.[157] Rather, "the declaration stands by itself",[158] and pronounces on an already existing state of legal affairs.[159] It is thus possible to distinguish applications for declaratory judgments from "claims" seeking other forms of relief against an opposing party.[160] Such proceedings might not be a "claim" for the purposes of this FSC, because they are not seeking any compensation or remedy *against* anybody. Instead, they are seeking judicial clarity on a state of law that exists regardless and independent of the proceedings. Put another way, declaratory judgments confer no new right; they "only declare what was the pursuer's right before".[161] Given the purpose of the FCSA described

[157] *Encyclopaedia of the Laws of Scotland* (1st ed, 1928) vol 5, Declaratory Judgments at [450].

[158] *Kariher's Petition (No 1)* 284 Pa. 455 (Pa. 1925) in Herbert Smith "Progress of the declaratory judgment (1926) 35 Yale L. J 473 at 475.

[159] I Zamir and Lord Woolf *The Declaratory Judgment* (2nd ed, Sweet & Maxwell, London, 2002) at 1.

[160] Edwin Borchard "Declaratory Judgments" (1934) 12 Can.Bar Rev. 531.

[161] PW Young *Declaratory Orders* (2nd ed, Butterworths, Canberra, 1984) at 3; *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84 at 85 per McCarthy P; John Erskine *Principles of the*

above, it is possible that a declaration would not be a "claim" of the kind that the FCSA aimed to settle. This would mean it is not ousted by s 9 FCSA.

It is also possible that in seeking such a declaration this proceeding would not be "by Māori", as s 9 FCSA requires. If the challenge is based on the fact that the KOSB effectively extinguishes fishing quotas, this framing is absent of any reference to Māori. Although the litigation may be *led* by Māori, the fishing quotas reduced to zero are not held by Māori *qua* Māori. These are not *Māori* fishing quota. Rather, these fishing quotas were delegated to Māori in a manner instrumental to the settlement of their claims. Accordingly, in such litigation this might not be a claim "by Māori" in the sense intended by the FCSA. It would simply be a claim by substantial quota holders, that happens to affect Māori particularly, because they hold much of the quota in FMA10.

Finally, such proceedings may not be "in respect of commercial fishing". Arguably, this proceeding would instead relate to the subversion of a Treaty settlement. Although that Treaty settlement related to commercial fishing, the new proceeding – it could be said - does not. The proceeding instead relates to the manner in which the Crown has unilaterally and without consultation or agreement effectively extinguished aspects of this Treaty settlement. The interest subverted exists independently of commercial fishing; it is an interest in the integrity of the Treaty settlement that has been curtailed by the passing of subsequent legislation.

Conversely, a strict textual meaning may still see such proceedings ousted by this FSC. It is possible to interpret the notion of a "claim" widely so as to include proceedings seeking a declaration. Declaratory judgments, after all, still have the effect of making a matter *res judicata*, as with any other order of the court.[162] Moreover, a "claim… by Māori"[163] may

Law of Scotland (21st ed, Green & Sons, Edinburgh, 1911) at 543; *Kleinwort Benson Ltd v Lincoln City Council* [1998] UKHL 38.

[162] Young, above, n 161; Declaratory Judgments Act 1908, ss 2 and 4.

[163] Treaty of Waitangi (Fisheries Claims) Settlement Act, s 9.

be interpreted to cover such an action because it relates to fishing rights by Māori, regardless of the capacity in which these rights are held. Finally, it may be considered that proceedings related to the FCSA (which guarantees commercial fishing quota) are indeed "in respect of commercial fishing" even if they also relate to the integrity of a Treaty settlement.[164] In short, this would be a "[future] claim… by Māori in respect of commercial fishing… founded on rights arising by…. statute".[165] This would depend on the interpretive approach favoured by the courts.

If proceedings were instead commenced in the WT, s 9 FCSA would still be an obstacle because the jurisdiction of all tribunals is also ousted by this provision. If such proceedings argued that the KOSB breached the principles of the Treaty of Waitangi by extinguishing Māori quota rights,[166] such a pitch might be difficult, as Māori do not hold the quota *qua* Māori. On the other hand, the action may be successful if it is based, as above, on the fact that the KOSB undermines a Treaty settlement and is thus a breach of Treaty principles.

The above examples illustrate the fact that the likely success of proceedings will be markedly influenced by the manner in which they are framed. Nevertheless, even carefully framed proceedings may still be ousted where a strict textual meaning is preferred. On the other hand, if the courts were to interpret s 9 FCSA with a view to giving effect to its main purpose, proceedings for a declaration of inconsistency might not be ousted.

On balance, it is likely a purposive meaning that does not restrict all claims would be preferred by the courts. This would mean that a careful framed proceeding would not be ousted by the FSC at s 9 FCSA. It is the orthodoxy of the courts to read down privative provisions so as to enable access to justice. In this instance, there are no alternate mechanisms to resolve legal disputes available, because the WT's jurisdiction is also

[164] Section 9.

[165] Treaty of Waitangi (Fisheries Claims) Settlement Act, s 9.

[166] Treaty of Waitangi Act, s 6. This section requires proceedings brought before the Waitangi Tribunal to be based on an act or omission that "was or is inconsistent with the principles of the Treaty".

ousted. Moreover, the matter is of constitutional significance. Both of these factors suggest that the court will be reluctant to give effect to a privative provision if the claim is carefully worded.[167]

C No compensation clause

Successful proceedings in the WT or the courts by TOK may be of little financial benefit immediately. This is because the KOSB contains a no compensation clause that reads:[168]

> **No compensation payable**
>
> (1) No compensation is payable by the Crown for any loss or damage, or any adverse effect on a right or interest, (including, without limitation, to or on the value of quota or a right to fish) arising from the enactment or operation of this Act.
>
> (2) If there is any inconsistency between this clause and any other enactment or rule of law, this clause prevails over that enactment or rule of law.

All proceedings for compensation, regardless of whether they are brought prior to the passing of this bill, are subject to this provision.[169] Although it does not expressly oust all access to the courts or tribunals, it may be considered a partial ouster clause because it limits the courts' ability to award compensation. This clause is carefully worded: because it applies to any right or interest, compensation will not be payable for an adverse effect on *any* interest, including a Treaty interest, instead of just in relation to commercial fishing. Accordingly, s 9 FCSA is given extra weight: this "no compensation" clause acts as a safety net for the Crown. There is no risk that it will have to provide additional compensation from passing the KOSB, accentuating the finality of the FCSA. This clause may also have other implications. For instance, the Crown may refuse to enter into discussions about compensation, even in the face of successful litigation for a declaration by TOK. The

[167] See generally Matthew Palmer "Judicial Review" in MR Russell and M Barber (eds) *The Supreme Court of New Zealand 2004 – 2013* (Thomson Reuters, Wellington, 2015) 158; Sizer, above n 4.

[168] Kermadec Ocean Sanctuary Bill 2016 (120-2), sch 1, cl 1.

[169] Kermadec Ocean Sanctuary Bill 2016 (120-2), sch 1, cl 1A.

Crown may say it is bound by this clause, so cannot enter into such discussions. Nevertheless, a declaration of inconsistency may have useful ramifications for TOK in the future. It may provide political leverage, and where there is no mechanism for a resolution of this dispute, constitute a breach of international obligations.[170]

D Conclusion

This discussion again demonstrates that different interpretative approaches to FSCs may herald different results. But it is likely that the courts will prefer the approach that best enables access to justice. This would be consistent with the orthodox approach toward privative provisions. Access in the face of such provisions must not be taken for granted, however: a careful framing of proceedings is necessary to enable the courts to avoid a FSC.

Additionally, FSCs do not exist in isolation - they can be supplemented by later Acts. In this case, the no compensation clause adds further certainty to the position that compensation paid to Māori under the FCSA was final. But it is not only potential claimants who are affected by FSCs; the Crown must also abide by statute if it is not prepared to set in motion its repeal. In this instance, this may mean that successful proceedings will not give rise even to discussions between Crown and Māori, as the Crown may state that they are precluded from discussing compensation by virtue of the no compensation clause.

The Crown did not consult with Māori prior to the passing of the KOSB, despite the existence of Treaty principles such as "good faith" and "partnership".[171] Instead, the KOSB will establish a conservation board consisting of 7 members, two of whom would be appointed by nomination of certain iwi, another by nomination of the Minister responsible for Māori Development.[172] In this respect, it seems that reconciliation, although a concern,

[170] For example, this may be a breach of the United Nations Convention on the Rights of Indigenous Peoples, art 8.

[171] *New Zealand Māori Council v Attorney-General & Ors,* above n 43.

[172] Kermadec Ocean Sanctuary Bill 2016 (120-2), cl 24.

is only given the weight deemed appropriate by the Crown. There is presumably no legal duty, enforceable in the courts, to consult with Māori in the preparation of legislation, even if the resulting law would have a direct effect on Māori interests recognised by Treaty settlement.[173] Consultation, and the provision of compensation for possible Treaty breaches, have been directly avoided by the Crown when initiating the KOSB. Yet, reconciliation has been partly taken into account in the makeup of the conservation board. This shows that reconciliation may be a concern for the Crown, but it is not a paramount concern.

Finally, this issue raises questions about the finality of settlements. First, finality is not likely to be provided by a FSC insofar as the courts may employ interpretive techniques which, in conjunction with a clever framing of proceedings, may avoid the ousting effects of a privative provision. Second, we are reminded that Parliament is supreme. New Acts can be passed which alter, for better or worse, the effects of earlier Treaty settlements. These Acts can be passed in any manner, including a manner which limits the rights of Māori who may wish to make a claim opposing such Acts. In this sense, then, finality is relatively unilateral: a supreme law-maker is not bound in law by earlier settlement Acts if it wishes to pass new, conflicting legislation. As much as Treaty settlements can be analogised with a settlement contract intended to bind both parties, this analogy falls short where it attempts to show the Crown is truly bound by its earlier agreements. The Crown can override the consequences of the contract by securing the passage of new legislation, provided it controls a majority in the House.

[173] See *Milroy v Attorney-General* [2005] NZAR 562.

V. Claims intentionally left unsettled

A Introduction

In the previous chapters, FSCs have been examined in areas where their precise effect has been contentious. It is not always the case, however, that the proper interpretation of FSCs will be contentious, even where parties bound by them are seeking to access the courts or WT. This is because FSCs are generally clear about the who, what, how and outstanding questions of settlement.

This chapter will imagine that customary Māori property rights in freshwater were found to exist by the courts, and that those rights in freshwater were subsequently expropriated via legislation. It will examine the possibility that claims made in response to this will be ousted by FSCs in some iwi's settlement legislation, and compare this to a situation where there has been no Treaty settlement with a claimant group. It will be demonstrated that no current FSC will make a difference in this context. From this, conclusions will be drawn about how FSCs, by having the right level of specificity, may promote reconciliation and uncontroversial interpretation.

In the first chapter a range of settlements was examined, in particular, the Waikato Raupatu Claims Settlement Act 1992 ("WRCSA"), the Ngāi Tahu Claims Settlement Act 1998 ("NTCSA") and the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 ("WTRSA"). The WRCSA was designed to settle claims related to land confiscations in the Waikato district. It did this, but at s 8 excluded "any claims by Waikato to the rivers and harbours within the Waikato rohe." Thus, claims related to the Waikato River were carved-out for settlement at a later date. The NTCSA settled Ngāi Tahu claims over the vast majority of the South Island. These Ngāi Tahu claims included claims arising out of "water, rivers… or any natural and physical resource in the Ngāi Tahu claims area".[174]

[174] Ngāi Tahu Claims Settlement Act, s 10(1)(a)(ii).

However, this did not constitute a Crown acknowledgement of Māori property rights in freshwater. Rather, it was reflective of the settlement's goal to comprehensively settle claims related to Crown action prior to 1992.[175] Part of that settlement was to set up certain co-management regimes over certain rivers in the South Island, giving Ngāi Tahu special input into decisions in relation to certain freshwater resources.[176] The WTRSA then settled the claims in relation to the Waikato River that had been left outstanding by the WRCSA. In doing so, it established certain co-management regimes,[177] created processes to deal with environmental risks in relation to the Waikato River,[178] and even vested authority in a governing body to make certain bylaws where they are consistent with the goals of settlement.[179] Although all of these Settlement Acts relate to freshwater, they do not recognise any customary property rights in freshwater by the respective iwi. The WTRSA even goes so far as to specify it does not extinguish any such right, without acknowledging that such rights may exist.[180] Moreover, the NTCSA and the WTRSA only settle claims based on Crown acts or omissions that occurred prior to 21 September 1992.[181]

Whether or not Māori have customary rights in freshwater is a contentious question. The New Zealand Government maintains that nobody owns freshwater.[182] Despite this, In *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*[183] the Court of Appeal appeared to leave open the possibility of customary interests in the flow of rivers. It is thus possible that the common law may recognise indigenous customary interests in freshwater, as the court in *Ngati Apa v Attorney-General* did regarding customary interests in the

[175] Ngāi Tahu Claims Settlement Act, s 10(1)(a)(ii).

[176] See Ngāi Tahu Claims Settlement Act, pts 2 and 11, which provide acknowledgments and limited ownership rights respectively.

[177] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act, s 80.

[178] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act, s 61.

[179] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act, s 93.

[180] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act, s 90.

[181] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act s 89; Ngāi Tahu Claims Settlement Act, s 10.

[182] Rosanna Price "Will Māori and Govt ever agree on freshwater rights in New Zealand?" (23 Feb 2016) Stuff <www.stuff.co.nz>.

[183] *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR.

foreshore and seabed.[184] Māori interests in freshwater have also been found to exist by the WT,[185] although because the WT is not a court of law these findings are only manifest as non-binding recommendations.[186] Thus, potential Māori rights in freshwater might be based on the Treaty of Waitangi, or they might be based on common law principles of aboriginal rights. Or, as maintained by the Crown, they might not exist at all.

B The hypothetical

Imagine that the New Zealand courts find that Māori have an unextinguished customary property right in freshwater. Next, imagine that the Crown initiates legislation that expropriates that interest. This may be done, for example, by the complete privatisation via statute of rights in freshwater.[187] Such legislation would undoubtedly be considered a Treaty breach. To understand the effect of FSCs here, it is necessary to first consider the potential claim of an iwi without any relevant Treaty settlement. Then we can consider potential claims by Ngāi Tahu, and Waikato-Tainui, who, in contrast, have already entered settlements that have significant freshwater dimensions.

C Analysis

An iwi who has not settled any water issues would have little trouble taking this claim to the WT. They would argue that the privatisation of freshwater by such statute extinguishes their rights, identified by the courts. Their claim might then be settled via the process outlined in chapter one, if the Crown was prepared to negotiate.

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[184] *Attorney-General v Ngati Apa,* above n 116.

[185] See Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012); Waitangi Tribunal *Te Ika Whenua Rivers Report* (Wai 22, 1998); Waitangi Tribunal, *Whanganui River Report* (Wai 167, 1999).

[186] Treaty of Waitangi Act, s 5, states that the function of the Waitangi Tribunal shall be to make "recommendations".

[187] This privatisation must be complete because a partial privatisation may not be a Treaty breach: see *The New Zealand Māori Council & Ors v Attorney-General* [2013] NZSC 6. This is not the only way that such rights can be extinguished, however. Indeed, it is possible that such rights have already been fully extinguished: see Rachel Kennard "The Potential for Māori Customary Claims to Freshwater" (LLB(Hons) Dissertation, University of Otago, 2006).

If Ngāi Tahu attempted to do the same, even though the settled Ngāi Tahu claims have freshwater elements, the NTCSA would not have any ousting affect. This is because the NTCSA ousts only the "Ngāi Tahu claims",[188] which only include any loss[189] that occurred before 21 September 1992.[190] Since the freshwater claim would relate to losses *after* that cut-off date, it would not be a "Ngāi Tahu claim" attracting the ousting effect of the NTCSA's FSC.[191] The same applies to Waikato-Tainui. Indeed, this cut-off date is present in all subsequent Treaty settlement legislation following the NTCSA in 1998, meaning this would be the same regardless of which iwi's FSC we examine. Although the WRCSA does not include this cut-off date, it left claims relating to the Waikato River outstanding from its settlement and these claims were subsequently settled by the WTRSA. This river-specific statute, which was passed to settle claims in relation to the Waikato River,[192] only settles claims about Crown action before 21 September 1992.[193] Thus, in this context, there is no contrast between an iwi with limited access to the courts and WT due to a FSC, and an iwi without one.

D Conclusion

This scenario demonstrates that FSCs operate in a manner consistent with the goals of Treaty settlement. Claims regarding freshwater, based on acts or omissions after 21 September 1992 are not subject to the ousting effect of any iwi's respective FSC. FSCs therefore can and do operate in a manner that assists reconciliation. Real legislative weight is given to the distinction between historical and contemporary claims, and that distinction has a demonstrable effect. It recognises that the Treaty gives rise to *ongoing* obligations, and the Crown is not exempt from these obligations once historic claims have been settled.

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[188] Section 461.

[189] Section 10. A "loss" includes an "extinguishment" pursuant to this section.

[190] Section 10.

[191] Section 9.

[192] Section 4.

[193] Section 4.

The importance of clarity in respect of the who, what, how and outstanding questions of Treaty settlement is also demonstrated. By being specific in what is settled, controversy is avoided. This is particularly so in Waikato-Tainui's case. The WRCSA left claims relating to the river outstanding from its scope. Then, the WTRSA settled aspects of the administrative arrangements concerning the river. But even that Act did not settle potential claims to property rights in the water. Rather, this Act specifically left this matter outstanding while making no concession that such an interest might exist.[194] Claims relating to property rights in freshwater thus remain unsettled. This kind of specificity is important where FSCs are to function in a manner that will not create further injustices.

Although Treaty settlements often provide statutory acknowledgments in relation to lakes or rivers,[195] or the vesting of certain ownerships (e.g. of lake beds),[196] these rights are not so exhaustive as to cover the full range of interests asserted by Māori in freshwater.[197] They only refer to interests that were considered within the scope of the relevant deed of settlement. To settle an interest that the Crown maintains does not exist would be counterintuitive: it would serve to indicate that it is *possible* that that interest might exist. If the interest does not exist, then the Crown would have no cause to settle it. Provisions like the WTRSA's s 90 make this express: they clarify that settlement does not cover such interests, whilst maintaining that nothing in that clarification "is, or implies, an acknowledgement by the Crown that any aboriginal title, or any customary right, exists".[198] It is this clarity about what is *not* settled that allows for greater understanding about what *is* settled. There is less potential for confusion about the scope of FSCs where this is made clear.

[194] Waikato Raupatu Claims Settlement Act, s 8.

[195] See Ngāi Tahu Claims Settlement Act, pt 2.

[196] See Ngāi Tahu Claims Settlement Act, pt 11.

[197] For example, the Ngāi Tahu Claims Settlement Act 1998, s 193(1)(a) provides that "Ownership of the bed of Lake Mihinapua… does not itself confer any rights or impose any obligations on Te Runanga o Ngāi Tahu of ownership, management or control of the waters of Lake Mahinapua".

[198] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act, s 90(1)(b).

The matter of property interests by Māori in freshwater therefore still remains at large despite the settlement of certain interests in the surrounding areas. If such property interests are found to exist, the Crown will be subject to Treaty principles in relation to those interests. One must recall, however, that a supreme Parliament can always legislate away the potential for such proceedings, in spite of these obligations, as they did regarding the foreshore and seabed following *Ngati Apa*.[199] One can but hope that in the area of freshwater, this does not occur.

[199] *Attorney-General v Ngati Apa,* above n 116.

VI. Conclusion

FSCs have changed in form since the first modern FSC within the FCSA. Yet, despite this lack of complete uniformity, they are very similar in their effect. All FSCs indicate that the settlement is final and that the Crown is released and discharged in respect of that settlement's claims. Moreover, all FSCs oust the jurisdiction of courts and tribunals to inquire into these claims. The gamut of what is ousted is elucidated by the who, what, how and outstanding aspects of settlement. This clarity ensures that some matters may be resolved at a later date, while progress is made towards the general settlement of historical claims.

Although FSCs do not limit Parliament's law making power, they are still likely to impact some branches of the Government. For instance, by releasing and discharging the Crown, they may constrain the Crown from reopening discussions about settled matters. Primarily though, they limit the jurisdiction of the courts and tribunals. Thus, they are privative provisions, so it is unsurprising that they are likely to receive an orthodox, narrow interpretation by the courts in most cases. However, they differ from most ouster clauses in an important respect: they follow from an explicit agreement that is recorded in a deed of settlement between the parties subject to them. They are *agreed* to, not *imposed*. This might affect their interpretation. But, the agreement is only relevant to claims made about the matters that are settled. When FSCs are considered in a context relevant to matters outside the scope of settlement, such as other claims by the same group; claims by other groups with no settlement; or claims about matters left outstanding, they are likely to receive an orthodox approach to their interpretation.

Because FSCs cannot limit future legislative action, they may be supplemented by later legislation that is read in tandem with them, thus altering or supplementing their affect. For instance, the no compensation clause in the KOSB accentuates finality in the face of

the courts' likely approach to the earlier FSC, despite the KOSB and its effects not being considered when the relevant deed of settlement was signed.

Generally, reconciliation must occur *between* parties. In the case of Treaty settlements, it must occur between the respective iwi and the Crown. Both parties must be satisfied with the arrangements. This is why both parties sign the deed of settlement agreeing to its terms. FSCs exist to give real weight to that deed of settlement and to represent the *quid pro quo* for the Crown in exchange for the benefits provided by settlement. They enable the settlement to be final, and they release and discharge the Crown.

By approaching the interpretation of FSCs narrowly, the courts assist such reconciliation. No reconciliation would be achieved by ousting cross-claimants who have not yet settled; by ousting contemporary claims; or by ousting claims of a different kind to those settled. By interpreting FSCs in this light reconciliation is promoted. FSCs can settle claims agreed to whilst ensuring that the Treaty continues to give rise to obligations as a living document.[200] Assisting reconciliation in this way appears to be the overriding purpose of the Treaty settlement process.

Despite this, there ultimately remains an imbalance between the parties because the Crown, through its usual control over the majority in Parliament, can generally secure the passage of new legislation of its choice, if it is determined to do so. It can place amending, or new, legislation before Parliament "unsettling" settlements despite their intended finality. Moreover, it can do so with a clause that expressly precludes compensation or redress for this, and do so without consultation. This is shown by the KOSB.

Generally, however, in a legal sense, reconciliation is achieved by Treaty settlements, and FSCs are instrumental to this. FSCs are designed to be *final*. Nevertheless, because there are no apparent legal limits on legislative power in New Zealand, and subsequent statutes

[200] See Waitangi Tribunal *He Whakaputangi me te Tiriti: The Declaration and the Treaty* (Wai 1040, 2014).

can undermine the finality of FSCs, the finality of settlement is somewhat of a misnomer. However, no agreement or legislation is necessarily final in a changing world. New policies may always be legislated. But this does not mean that FSCs cannot provide sufficient certainty or finality in order to "quieten" or resolve to a substantial degree the claims made by an iwi concerning the Crown's historical conduct. Thus, enough finality and certainty is provided to allow for progress to be made towards reconciliation, in an ever changing world.