Address by Hon Christopher Finlayson at the Law Faculty, Victoria University, Wellington on Wednesday 17 April, 2019.

The Post Settlement World: threats to the durability of Treaty Settlements.

Introduction

1. Thank you for giving me the opportunity to speak tonight in my old law faculty. I became the Attorney-General and Minister for Treaty of Waitangi Negotiations in early November 2008 and ceased to be a Minister on 23 October 2017. During my 9 years as Minister for Treaty of Waitangi Negotiations I signed or initialled over 60 deeds of settlement. In most instances the signing ceremonies were joyful occasions but, so far as I was concerned, always tinged with apprehension that the grand promises made on the Marae by the Crown would be honoured in the future.

2. I was always haunted by what had happened to Ngai Tuhoe. It could be summarised as - promises made, legislation passed and then betrayal by the Crown. In 1896 then Premier Dick Seddon met Tuhoe, first at Lake Waikaremoana then in Wellington. Following those meetings, agreements were made about the governance of Te Urewera. Legislation was passed recognising the special role of Ngai Tuhoe in their homeland. A commission was set up comprising a majority of Tuhoe. This commission was to make decisions about future utilisation of land. The legislation was passed and yet within 25 years had been undermined by the Crown and was repealed in the 1920's. Thereafter Tuhoe were locked out of any say in the running of Te Urewera. To add insult to injury the Crown in 1954 declared Te Urewera to be a national park. There was no consultation with Ngai Tuhoe. Little wonder then that there was such ill feeling between Ngai Tuhoe and the Crown, exacerbated in recent years by the monumentally stupid decision in 2007 to raid Ruatoki and charge people under the Terrorism Suppression Act. To this day I have never been able to ascertain who gave that dreadful advice to the Crown. All I know is that Annette King, then Minister of Police, suffered for the faults of officials.

3. I say all this to remind the audience that this sort of calamity is not an atypical occurrence in our country's history. It happened so often and I, as Minister for Treaty of Waitangi Negotiations, acknowledged many of these actions, apologised for them, and promised a new relationship between the Crown and Maori. Toward the end of my term, I was conscious that at least 7,000 commitments had been entered into by the Crown in various deeds of settlement and it was important to establish a central register of commitments so that all parts of the Crown, and local and regional government, could know what those undertakings were. Treaty settlements are made on behalf of the Crown and undertakings for relationships between the settling iwi and particular government departments are obligations on the Crown even if the departmental structure alters over time. Work progressed on the central register and the Post Settlement Commitments Unit was established. The new Government formalised those arrangements by establishing Te Arawhiti and Kelvin Davis is the Minister responsible for the Crown Maori relationship. I applaud those moves which follow on inevitably from the work I did between 2014-2017.

4. So far so good. The appropriate structures have been put in place, a Minister appointed but have departmental attitudes changed? In my time as Minister there were a number of troubling developments and I outline a few of them now. So that you know where I am coming from, let me summarise the essential theme of this speech right now: Settlements will endure and be successful if the Crown recognises the following three key points:
    a. Agreements must be honoured.
    b. Property rights must be honoured.
    c. Due process must be observed.

    They will fail if these basic principles are not observed.

    Let me illustrate some recent examples of things going wrong.

    <u>Ngati Apa</u>

5. Ngati Apa in the North Island is an iwi based in Bulls. When Michael Cullen was Minister for Treaty of Waitangi Negotiations, Ngati Apa representatives expressed an interest in purchasing the farm known as Flock House. OTS made inquiries of Ag Research which owned the farm and were told it was unavailable because it was "a strategic asset". This was conveyed to Ngati Apa who accepted the position. A deed of settlement was signed, legislation enacted, and Ngati Apa got on with post-settlement business. A few years later the so-called 'strategic asset' was put on the market. Ngati Apa were appalled and approached me. I was disgusted that they had been misled by a Crown agency and complained to the then Deputy Prime Minister Bill English who was furious and said that this was the kind of behaviour which seriously harms the honour of the Crown.

6. It was made very clear to Ag Research that they needed to sort this matter but, even though Ministers were anxious to see the matter resolved satisfactorily, Ag Research representatives screwed the scrum on questions relating to the valuation of the property. They only started to behave properly when it was made very clear to them by Steven Joyce, then their Minister, that they needed to sort the matter out fast otherwise there would be a land occupation.

7. In the end the result was satisfactory. Ngati Apa purchased the property and are developing it with a well-known Rangitikei farming family. I looked at the land about 18 months ago. What had been a run-down underperforming farm, hardly a strategic asset, was being turned into a very impressive agribusiness operation. One of the Ngati Apa people expressed his thanks to me that Ministers English, Joyce and I had managed to resolve the matter but said that this sort of thing should never have happened in the first place. He was right. There had been a failure on the part of a Crown agency to act honourably at the time of the Ngati Apa negotiations and to follow due process. As a consequence, the honour of the Crown was imperilled.

The Fisheries Settlements

8. The second case study I want to examine is the Kermadecs issue which blew up big time in 2016. But first some background. A useful starting point is the Fisheries Amendment Act 1986, which substantially amended the Fisheries Act 1983 to bring into operation the Quota Management ("QMS") system. I understand the 1986 Act was a reaction against the former regime of open slather and government subsidy, which had led to a massive expansion of the fishing industry. At the same time the inshore fishery dramatically declined as a result of overfishing.

9. The 1986 amendment moved away from the older regulated system which contained no conservation incentives toward the creation of valuable and transferrable property rights in the resource.

10. The legislation is based around the concept of a quota, a fraction of a particular "total allowable commercial catch" for a particular fish stock defined by a reference to species and particular quota management areas, these latter being divisions of the New Zealand territorial sea and the Exclusive Economic Zone. Quota is allocated in perpetuity, and the holders acquire a harvesting right, measured as a specific tonnage for a specific quota management area for a fixed time (1 year). Quota can be thought of as a slice of variable pie – the shape and relative size of one's slice stays the same, depending on the quota one has accumulated, but the pie itself expands or contracts year to year depending on the size of the total annual commercial catch, fixed by the Ministry each October. Quota give rise to an "annual catch entitlement" in accordance with specific formulae set out in the Fisheries Act 1996.

11. The QMS was introduced on 1 October 1986. In response, Maori obtained an injunction against the Government to prevent further fishstocks being introduced into the QMS until the issue of ownership had been resolved.

12. As a result of the action taken by Maori, the courts confirmed that Maori customary fishing rights were controlled by "hapu and tribes" and that those customary rights contained both commercial and non-commercial elements.

13. To resolve claims and litigation involving fisheries, an interim settlement of fishing claims acknowledging the full spectrum of Maori interests in fisheries was entered into between Maori and the Crown in 1989 and provided 10% of all fisheries then in the QMS – along with some funding for administration. The Fisheries Deed of Settlement, implemented through the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, was the final settlement of all Maori claims to customary fishing rights. Under the settlement, the Crown additionally:
    - gave Maori funds to buy a 50% ownership stake in Sealords Products Ltd;
    - undertook to provide Maori with 20% of the quota for all new species brought within the QMS after that time;
    - gave Maori positions on statutory fisheries management bodies;

- restructured the then Maori Fisheries Commission into the Treaty of Waitangi Fisheries Commission (TOWFC) to enhance its accountability to Maori; and
- agreed to make regulations to allow self-management of Maori fishing for subsistence and cultural purposes.

14. In return, Maori agreed:
    - that the settlement settled all Maori commercial fishing rights and intersts;
    - to accept regulations for customary non-commercial fishing;
    - to stop litigation (including any Tribunal claims) relating to Maori commercial fisheries;
    - to support legislation to give effect to the settlement; and
    - to endorse the QMS.

15. It was clearly understood by Maori that they were not only receiving existing rights but that there was also a right of development. So, for example, there could be an undeveloped fisheries management area that with the passage of time and improved fishing techniques could be worked up into a commercially valuable settlement. This right of development is very relevant when I come to talk about the development of a marine reserve in the Kermadecs.

16. TOWFC was required to develop proposals for allocating the various assets and benefits deriving from the settlement in respect of commercial fisheries. For some years I was one of the lawyers acting for the Commission. It was, as the Privy Council in London noted, "an extremely challenging process". Litigation needed to resolve the issue of whether allocation to Maori meant allocation to iwi or everyone who happened to be Maori. Then there were arguments about whether allocation should be determined on the basis of coastline or population. This litigation continued for many years until finally (and some would say, unsatisfactorily) resolved by the Maori Fisheries Act 2004.

17. So resolution of all issues related to fishing was something of a Homeric epic concluded after many years litigation in the courts and tribunals of New Zealand.

<u>The Kermadecs</u>

18. Some years ago, the Government of which I was a member, announced the establishment of the Kermadecs Sanctuary to be created in the Kermadec region of the South Pacific Ocean about 1000 kilometres northeast of New Zealand.

19. At 620,000 square kilometres, it would be one of the world's largest and most significant fully protected areas. It would be 35 times larger than the combined area of New Zealand's existing 44 marine reserves. The sanctuary would mean 15 percent of New Zealand's ocean environment will be sealed off from fishing.

20. The sanctuary would cover an area of New Zealand's Exclusive Economic Zone (EEZ) from 12 to 200 nautical miles from the five Kermadec Islands of Raoul, Macauley,

Cheeseman, Curtis and L'Esperance which lie halfway between New Zealand and Tonga.

21. The Government introduced legislation to Parliament to enact the new sanctuary but it is stalled because of objections of Maori.

22. The proposed sanctuary follows the establishment in 1990 of the Kermadec Marine Reserve which consists of 7500 square kilometres. That marine reserve extends 12 nautical miles from the cliffs and boulder beaches of the various Kermadec Islands and rocks, out to the edge of the territorial sea.

23. The Kermadec area is said to be one of the most pristine and unique places on Earth. It includes the world's longest chain of underwater volcanoes and the world's second deepest ocean trench at over 10 kilometres - deeper than Mount Everest is tall. Its waters are home to:
    - over six million seabirds of 39 different species
    - over 150 species of fish
    - 35 species of whales and dolphins
    - three species of sea turtles - all endangered
    - many other marine species unique to this area such as corals, shellfish and crabs.

24. New Zealand has sovereign rights in its territorial sea with very few limitations. Its rights and obligations in the EEZ are different but include the rights to manage fishing and minerals resources. These rights (eg, over navigation and submarine cables) must be exercised with due regard for those of other states.

25. Rights and limitations are:
    - no fishing or mining applies to both the sanctuary and marine reserve
    - ships will be allowed to exchange ballast water in the sanctuary (subject to regulation) but not in the marine reserve
    - marine discharges from ships and yachts (subject to regulation) will be allowed in the sanctuary but not in the marine reserve
    - submarine cables will be allowed in the sanctuary but are not permitted in the marine reserve.

26. All fishing and mining is prohibited in the marine reserve (the territorial sea out to 12 nautical miles around the Kermadec Islands). This is unchanged by the sanctuary.

27. Currently the 620,000 square kilometre area where the sanctuary will be created is a benthic protection area (BPA). This was put in place in 2007 under the Fisheries Act 1996 and prohibits bottom trawling and dredging. The area is also subject to the EEZ Act and the Crown Minerals Act 1991. This means any applications for prospecting, exploration or mining are subject to these laws.

28. When the sanctuary is created, <u>all</u> fishing, prospecting, exploration and mining activities will be prohibited.

29. Other countries have also announced the establishment of protected areas, including the United States, Australia and the United Kingdom. For myself, and it is not directly related to the theme of the speech, I wonder whether a better way of protecting the oceans is to work with other nations to address the scourge of plastic in the Pacific. It could almost be called the Henderson Island Project. Henderson Island is part of the Pitcairn group. It should be one of the most pristine places on Earth but it is covered in plastic disgorged into the Pacific and driven there by the ocean currents. It is simply an environmental disgrace. Massive marine reserves on the other hand could be said to be environmental emoting – it looks good, makes one feel good, but does it achieve all that much?

30. The Kermadecs area is one of 10 New Zealand fisheries management areas and is known as FMA10. A total of about 20 tonnes of fish are caught there every year with a value of about $165,000. The species caught are highly migratory and include swordfish (11 tonnes), bigeye and albacore tuna (three tonnes) and blue shark (2.8 tonnes). This is where the problem starts.

31. The quota for these highly migratory species is for New Zealand's entire EEZ and is not specific to FMA10. As the catch can be caught in other parts of New Zealand's EEZ, fishing interests will not be significantly impacted by the establishment of the sanctuary.

32. As all mining, exploration and prospecting activities will be prohibited in the sanctuary, there will be an opportunity cost for New Zealand but this is obviously very difficult to quantify. The logistics of mining in these very deep, remote waters is difficult and expensive.

The Maori Response

33. After the announcement, there was an immediate response from the negotiators of the Treaty Settlement and from TOWFC. They alleged first that there had been inadequate consultation with Maori, and secondly that the proposed reserve undermined the fisheries settlements. Let us carefully examine those complaints.

34. On consultation they are correct. Consultation with Maori on most issues is invariably rushed and superficial. Many government officials think consultation with Maori is some kind of box ticking exercise designed to bomb-proof a decision. Certainly that is what happened here where the then Minister for the Environment made a few rushed calls to the iwi he thought would be interested (without consulting me I might add). It was a very poor effort on his part. Good process was the first victim.

35. The undermining of the settlement is a very serious matter. Let us look closely at that charge. Earlier I mentioned the right to develop. The settlements reached were not just about existing opportunities but future opportunities as well. FMA10 may not have much fishing in it now but in years to come, with climate change and different fishing methods, the situation may be completely different. There could be

valuable commercial opportunities. One of the things that really disturbed me after the storm broke was the complete lack of understanding by Crown officials of the fisheries settlements reached in 1989 and 1992. When I asked some officials to explain their understanding of the 1992 settlement, they looked at me much as the cows on the summit of Mt Kaukau look at me when I get to the top and walk past them to the trig station – a mixture of passive aggression and confusion. They didn't know what I was talking about. Little wonder then that TOWFC mounted a public relations campaign which asked the question what's the difference between Maori property rights and Pakeha property rights? Maori property rights can be interfered with at will by the Crown and are not as valuable as other property rights.

36. TOWFC said that when Maori entered into the Treaty Fisheries Settlements, they accepted the QMS, which included defined QMAs, as the basis of a Treaty Settlement. It was a core condition on the Crown side agreed to by Maori. If the Crown wants to change the QMS, it cannot do it unilaterally without being in breach of the Treaty Settlement. Such change requires Maori agreement. I have already noted that the Inshore Kermadec (12 mile) Zone currently has the highest possible international level of marine protection. This was imposed with the agreement of Maori.

37. The point made by Maori is that if the Crown can unilaterally alter the system it entered into as a condition of the Fisheries Settlements of 1989 and 1992 it has the capacity to alter any Treaty Settlements on its own political whim. What price a Treaty, what price the honour of The Crown?

38. In the Kermadec Zone there is no evidence of fish-stock depletion in any species. The only fishery of any current scale is in fact migratory tuna which can by definition be harvested either to the North or the South of proposed sanctuary in any case. It has been argued that the case for the sanctuary cannot on any evidence be made on any presently observable danger to Bio-diversity or Ecology. Rather it is political ideology inspired by groups like Pew which is known to have funded Forest & Bird and the Environmental Defence Society. They are very well connected in Washington. I think these arguments have merit.

39. The legislation giving effect to the sanctuary is now in limbo because the issues have not been resolved. It was put on the back burner when I was a Minister because a coalition partner threatened to pull out of the coalition if the Government proceeded with the proposal.

40. I don't think it will be resolved by further consultation, certainly not the consultation methods employed by Crown officials. Applying a principled approach to the matter, I doubt whether the proposal can proceed as there is an argument that it undermines the rights of Maori established as recently as 1992. In any event, a strong argument can be made that with the QMS, there is in fact no need for such a

large marine reserve. Conservation of fisheries species is an essential ingredient of the QMS.

41. It's easy to say that this could have been resolved if there had been adequate consultation. The Crown seems to think too often that all it needs to do to satisfy its Treaty obligations is to consult with Maori hopefully in a more professional manner then what was done by Environment on this occasion. I acknowledge that it is important to consult one's Treaty partner, and consultation to the standard required by the Court of Appeal in the Wellington Airport case will obviously mean more than a few 11th hour phone calls. But consultation is not the be all and end all and, in the case of the Kermadecs, there is more to consider. The critical thing here is that property rights were created and must be honoured. In my opinion that is a stumbling block for the Kermadecs proposal. It cannot happen if those important property rights finally secured in 1992 are undermined. Durability of Treaty Settlements and the honour of the Crown are more important than a marine reserve.

42. Some in the audience may well be asking – you were a Minister. It's all very well to have a Paul on the road to Damascus type conversion. Why didn't you do something about this shambles? The problem was that by the time I had learnt about it, it was too late. If due process had been observed and the proposal had been through the usual Cabinet committee and Cabinet decision making processes, departmental consultation would have highlighted many of these issues. I think the Prime Minister was very badly let down by the Minister for the Environment and his officials. To his enormous credit John Key parked the proposal when these significant issues emerged. He was very disappointed but that was the appropriate thing to do in the circumstances. He should never have been put in this embarrassing position.

Rights of First Refusal

43. Rights of First Refusal (or RFR's) are a valuable component of a Treaty Settlement. See, for example, the very detailed RFR provisions set out in Part 4 of the Nga Mana Whenua o Tamaki Makerau Collective Redress Act 2014 or Part 3 of the Te Atiawa Claims Settlement Act 2016. With a few exceptions, an RFR landowner must not dispose of RFR land to a person other than the trustees of a settlement trust or their nominee for a defined period. In the case of Te Atiawa, that period is 172 years. It is a commercial mechanism which is worth millions to a settling iwi and is recognition of the fact that the monetary component of a settlement is not restitutio in integrum but that favourable commercial opportunities for iwi can occur over a period.

44. All RFRs have similar features but differ in the detail and it behoves Crown officials who deal with these issues to familiarise themselves with that detail. Attention to detail was not immediately apparent a few years ago when MBIE officials were dealing with land availability issues in Auckland. They seemed to be busily trying to organise protocols with iwi on land use issues when a far more profitable use of their time would have been to read the relevant settlement statutes and pay close attention to the parts dealing with commercial redress.

45. An illustration perhaps of the self-evident proposition that the Crown needs to know what it has agreed to do. In order to honour an agreement to which one is a party, it is useful to know what the agreement provides.

Conclusion

46. What therefore will make for enduring settlements? Once again:
    a. Recognition by the Crown of the fundamental principle that agreements must be honoured.
    b. Recognition by the Crown of the sanctity of Maori property rights.
    c. Recognition by the Crown of the importance of due process.

    Understand and follow these simple principles, even self-evident principles, and the Crown Maori relationship will flourish in the future. Ignore them and run the risk that full and final settlements will not be full and final and that the Crown Maori relationship will suffer.

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