Neo-Liberal Settlements

FROM ADAM SMITH TO TREATY SETTLEMENTS

DONNA AWATERE'S SEMINAL WORK *Maori Sovereignty* is prominent in the canon of modern Māori literature. When it was published in the early 1980s, its truths resonated deeply and instinctively with Māori. It was miles away from the other recommended readings in Maori Studies or History, such as Sir Peter Buck's *The Coming of the Māori* or Joan Metge's *The Maoris of New Zealand*. Pictures of adze heads could not compete with Awatere's declaration of sovereignty. But after my third reading of her book it soon became clear that her work was incomplete. When it came to declaring what Māori sovereignty would look like and how we would get there, her response was millennial rather than a political call to action. For Awatere, Māori sovereignty was 'the right of people to dream dreams, believe in them and make them a reality'.[1] Awatere was a secular prophet. Her political analysis allowed her to assess the power system that existed ('the Death Machine') and to create a vision by refashioning the message of our prophets of an earlier generation. She recast old metaphors and spoke to a new generation.

Awatere's arguments were initially developed in a series of articles published in *Broadsheet*, before reaching a broader public in book form in 1984. But in both the essays and the book, her idea of sovereignty was a dream devoid of form and function because she was before her time. By 2015, the landscape is vastly different. Tribal settlements between Māori and the Crown are at a level that I suspect Awatere and few Māori could have imagined in the late 1970s or even early 1984. Yet by 1986, the idea that a kind of sovereignty could be possible – although barely – had been seeded. By 1998, Ngāi Tahu, a tribe that scarcely registered on the national landscape, would have negotiated one of the largest Treaty settlements with the Crown, similar to the settlement with Waikato-Tainui three years previously. In simple terms, Ngāi Tahu had managed to negotiate with the Crown a $170 million cash settlement along with a substantial transfer of capital assets (land) and commercial assurances and cultural redress agreements within the traditional tribal boundary. It is hard to imagine any New Zealand politician or elder from the 1970s and 1980s imagining they would be negotiating a settlement of this magnitude. The simple fact was that not only was there no policy or economic framework to facilitate this type of discussion, but

moreover the idea that tribes were valid social and political entities was barely conceivable.[2] This lack of framework reflected the political priorities that dominated post-war New Zealand. Except for the Labour government of 1957–1960, National governed New Zealand between 1949 and 1972, and it is here that we see a 'dead zone' of any Māori-driven policy in government. When National took power in 1949, it had no Māori members within its cabinet and therefore no leadership to build upon the gains Māori had made under the Labour government.[3]

A century of political dominance by the settler state, which skewed any negotiation in its favour, would have said the opposite. Iwi were a political nonentity. In 1981, the Tauranga Moana Trust Board settled their claim with the Crown for $250,000, an action which the Tribunal later found to be in breach of the Treaty's principles of acting towards each other in good faith.[4] Today, one of the tribal groups, Ngāti Ranginui, has committed to a settlement wherein the financial redress amounts to $38 million, excluding the Crown transfer of commercial properties, fish quota and a cultural redress package to them. Their kin tribes Ngāi Te Rangi and Ngā Potiki – also part of the Tauranga Moana Māori Trust Board – have settled, with financial redress valued at $26.5 and $3 million respectively.[5] In addition to the increased financial value of the settlements, Treaty breaches were now accepted as a frame for inquiry, negotiation and settlement. How this new world was created is the subject of this essay.

The Activist Movement

One argument often advanced as an explanation for the Treaty settlements is that they were a result of the activism of those who participated in the protest movements that started in the late 1960s. Ranginui Walker was the first to make the connection between the settlements and the protest movement in *Nga Tau Tohetohe: Years of Anger*, when he wrote: 'In the 1970s, the Waitangi celebrations became the subject of protest activity by Nga Tamatoa who sought more than symbolic acknowledgement of the treaty. Tamatoa [like others such as Ratana] claimed the treaty should be ratified, otherwise the Waitangi celebrations should become "a day of mourning". The Government made two responses. One was the Waitangi Day Act 1976 which made Waitangi Day a statutory holiday; the other was the Treaty of Waitangi Act 1975 which established the Waitangi Tribunal.'[6]

Similar views have been expressed by other New Zealand commentators.[7] The idea is that the protest movement led to the creation of the Waitangi Tribunal, and with that foundation stone properly cemented in our history, the bridge towards the Treaty settlements was simply a matter of laying

one stepping stone upon another. Yet this is a relatively insular view, and in particular, a view from the University of Auckland.[8] Its endless self-reflection is reminiscent of Jimi Hendrix's 'Room Full of Mirrors' – 'all I could see was me'.[9] While this myth-making is useful as a self-validating argument, it is hardly analytically sufficient. It ignores the fact that New Zealand, like many other Western nations, was undergoing a complete political and social transformation at a national level and that this change rested on the return of a liberal economic policy, recalibrated for the late twentieth century and recast as neo-liberalism. The connection between the introduction of neo-liberalism and the social transformation of New Zealand has been explained by historians ranging from James Belich to Philippa Mein Smith, as well as economists such as Brian Easton.[10] This connection is hardly a new idea. In fact, the change was so significant that as early as 1986 political commentator Colin James referred to the transformation as 'The Quiet Revolution'.[11] Yet the connection between Treaty settlements and neo-liberal economic policy introduced by the fourth Labour government has tended to take a back seat to the idea that the protest movement activated change. The argument has never been convincing. Rawiri Taonui, for example, has written that the legacy of 'radical Māori activists' has been the 'single greatest contribution to the transformation of Māori society in New Zealand today', and furthermore claims that 'Treaty settlements, the revitalization of te reo, the introduction of the principles of the Treaty in legislation and greater mutual tolerance by Pakeha and Māori are the fruits of their revolution'.[12]

These kinds of statements are made often enough, but once they are subjected to some investigation a whole range of inconsistencies, errors of fact and logic tend to emerge. The introduction of Treaty principles can be traced to early Waitangi Tribunal reports such as the Motunui–Waitara, Kaituna and Manukau Harbour reports. These principles were then crystallized in the 1987 *New Zealand Māori Council v Attorney-General* case that the New Zealand Māori Council took to the Court of Appeal. The label 'radical activists' would hardly apply to any of the participants in the court proceedings of that time. The name Graham Latimer, Chair of the New Zealand Māori Council,[13] does not conjure up images of a radical activist and neither do those of any of the lawyers who represented either side of the case, including the tribal authorities such as Ngāi Tahu who lent their weight to the Māori Council.[14] In fact it could easily be argued that the most radical activist of the day was the presiding judge, Lord Cooke, who famously wrote, 'The Treaty signified a partnership between Pakeha and Maori requiring each to act towards the other reasonably and with the utmost good faith'. Likewise, the insertion of section 9 of the State-Owned Enterprises Act, which provided the platform upon which the Court of

Appeal grounded its decision, was the result of solid, long-established Māori leadership and relationships with the Prime Minister David Lange, the Minister of Justice Geoffrey Palmer and the senior public servant Colin Keating.[15]

The on-the-ground acceptance and 'mutual tolerance' that Māori gained from Pākehā New Zealanders and their communities was hardly a result of activism. Tribal leaders gained support for their claims from long-established community relationships with a range of groups, from the unions to the Lions Clubs. At an even more basic level, the mystery for historians to unravel is how iwi financed their claims. Despite modern perceptions, Ngāi Tahu and most other iwi Trust Boards were hardly wealthy. They were certainly not wealthy enough to sustain costly long-term negotiations with the Crown. Sid Ashton, the secretary of the Ngai Tahu Maori Trust Board from 1953 through to 1996, explains that it was because of the tribe's long-established history with the ANZ Bank that the tribe was able to borrow and sustain the Ngāi Tahu Claim. In his typically succinct manner, Ashton noted 'you have to have a banker on your side if you want to get anywhere in business or anything else'.[16] Likewise, most iwi shared common legal advisors and bankers. The Tauranga iwi had a relationship with Edward Morgan of the Tauranga legal firm Cooney, Lees and Morgan, to whom the Tribunal referred as 'a gifted and dedicated advocate for his clients' cause'.[17] The same situation existed with their historian, Evelyn Stokes.[18] In fact mutual tolerance had always existed to some degree throughout New Zealand's history and in many cases iwi had active Pākehā support for their claims before the Crown. Most iwi had enduring community relationships and support and this is something that deserves further research. What had never existed was the platform from which a case could be made. New Zealand moved collectively as a nation towards the settlements because of their trust in established Māori leaders, such as Sir Hepi Te Heuheu and Queen Te Atairangikaahu, rather than the alternative.[19]

The actual limits of the protest movement were self-evident in the Land March of 1975. The Land March, and the imagery that spills out from that event, blinds us to the fact that the Minister of Maori Affairs, Matiu Rata, had already been grinding his way through the parliamentary process for the Waitangi Tribunal since 1972, when the third Labour government took office. Christa Scholtz explains how the new Labour Cabinet quickly approved Rata's request to submit a policy paper that would ratify the Treaty at the start of 1973.[20] The draft legislation was submitted in March of the same year, but as Scholtz establishes, the momentum built up was slowed when Cabinet sought to have the draft legislation submitted to caucus committee for intra-party consideration. The end result was that the legislation for the

Treaty of Waitangi did not appear until October 1974 and by that stage the principle of ratification had been lost. The idea that the courts would have a role in deciding Treaty issues was too challenging for the Labour Party. Instead Rata had settled for a non-binding Tribunal that could investigate 'any act done or omitted or proposed to be done or omitted by or on behalf of the Crown or local authority'.[21] Rata introduced the legislation to parliament in November 1974, and from that year through to the winter of the following year he faced opposition from within his Cabinet, senior officials and influential departments such as Justice, Finance and Treasury. Rata's position was difficult. His draft legislation to ratify the Treaty had been watered down to a level he must have found difficult to accept. All he could bring to his people was an idea of a non-binding Tribunal.

Yet at a time when his own people needed to stand with him, his electorate did just the opposite and led what is now known as 'The Land March'. With the march starting off in September, the Labour Party was, as Scholtz says, galvanized into action and the government passed Rata's Treaty of Waitangi Act on 10 October, three days before the march arrived in Wellington.[22] Within a month Labour was removed from government and National would again hold power for another decade.

The obvious question, then, is what was gained. The answer depends on what was intended. The Land March was not concerned with a Waitangi Tribunal inasmuch as it was a reaction against the 1967 Maori Affairs Amendment Act, the Ratings Act of the same year and the Town and Country Planning Act of 1958.[23] The 1967 Maori Affairs Amendment Act had its most threatening sections removed in 1974, although the damage had already been done. Likewise, the Town and Country Planning Act was later to fall under the Resource Management Act, but it was much too late and little could be changed. Māori land had been rezoned and today many Māori are still unable to build and live upon their family lands despite having clear title. In fact, most kāinga and villages still fall under the zoning regulations that were originally set under the Town and Country Planning Act. One example among many is the Kaiapoi Maori Reserve 873, which had been set aside for Ngāi Tahu descendants to live upon. By 1969, tribal members were prohibited from building upon their land because the reserve was rezoned as rural land under the Town and Country Planning Act and 1967 Maori Affairs Amendment Act. In short, the Crown had prohibited Māori from living upon the very lands it had originally set aside for them to reside upon. While it has been argued that the sections applying to Māori were removed from these Acts in 1974, the actual damage was not removed, and nor was the right of the councils to impose a rural zone on land owned by Māori.[24] The real tragedy of the

legislation mentioned is that the consequences were never reversed. Ever since local Councils rezoned Māori land, the zoning restrictions have stayed in place with perhaps minor concessions to schemes such as papakāinga zones. This was the very platform that the Land March stood on, and the issue is still problematic today. The point here is that the Tribunal came into being as unintended fallout from the march. For Rata it was a negotiated outcome. For the Land March movement, the attempt to address the damage caused by the 1967 Maori Affairs Amendment Act remains unresolved.

The emergence of the Waitangi Tribunal lay with the compromises Rata made. By the end of the 1970s Rata was to disappear from parliament, but what he managed to pull out of the bag a decade later was far more important. The Muriwhenua Fishing Claim and its consequences were far more significant for Māori and the settlements to come.[25] The reason for this is that the decade that followed on from 1984 saw a complete transformation of the New Zealand economy and fishing industry.

It is here that we need to pause and assess the mindset of the day. Scholtz tells us that throughout Rata's push for the Treaty, there was no conceptual framework that allowed an understanding of Māori concerns over the Treaty.[26] Further the idea of 'special rights' for another group deeply challenged the accepted notion articulated by the Prime Minister, Norman Kirk, when he said, 'one nation in which all have equal rights'.[27] Likewise, Geoffrey Palmer makes an interesting observation when he tells us that he did not believe the Ministries of Justice or Maori Affairs had the intellectual capacity to understand the fundamental issues behind the Treaty and to see that it needed to be formulated into policy.[28] What we can see here is a basic New Zealand ideology at work – one that neither Māori nor the State bureaucrats were able to counter because they simply accepted it as a truism. That is, the State owned all assets on behalf of all New Zealanders and the concerns for Māori were a matter of equity, not ownership of State assets. This had been a clear ideology of the Labour Party since it entered parliament in 1935 and this principle drove its attitude to Māori and the Treaty. The best example of this is the negotiations between Ngāi Tahu elders and Frank Langstone, the Acting Minister of Native Affairs, during the 1930s. Ngāi Tahu elders met with the minister in 1938 to discuss the creation of the Ngāi Tahu Māori Trust Board and the payment of £350,000 to the tribe as compensation for the Ngāi Tahu Claim. Earlier in 1925 Ngāi Tahu elders had met to decide how the payment within the tribe would be managed and they had arrived at a formula wherein tribal members would receive a partial 'share' of the £350,000. The tribal decision had been that a third of the amount would be directed towards an investment package, while

a third went to the payment of legal fees and institutional costs and a final third to tribal members as a kind of share.[29] It is important to understand that this decision was made in 1925, when the world economy still adhered to laissez-faire principles. Likewise, Ngāi Tahu were essentially a people of fishermen, small farmers and rural labourers. They understood the relationship between property rights, tribal responsibility and profit and this informed their decision to split the £350,000 into thirds. Labour saw the world differently.

At the meeting Langstone proceeded to explain how Ngāi Tahu would be compensated: 'I do not think there is going to be any money paid to Natives. Money paid over will have to be for the Maori people in regards to their health, education, water services ... and other requirements that they need.'[30] That is, the idea of a 'property right' as a 'share' among tribal members would be wiped. The Labour Party saw the settlement in terms of 'distributive justice' so that it was part of their 'cradle to the grave' ideology. 'Property rights' were not a Labour concern. The telling remark came out when Langstone said: 'I will put the matter up to the Government and as long as the Maori mind is quite clear that it is for a certain period and no longer and that we hope in that period by our combined assistance and cooperation we will have the Maoris just exactly where we want them, equal with the Pakeha and from then on will be able to take their places without any further assistance in this direction'.[31] He then went on to add: 'The Government is considering National Super-annuation, liberalisation of pensions. The Maoris are going to get that ... If it's going to be done, it is no good us double banking. There is a sum of money and the Board can deal with that in a manner that would be of benefit to those people who are not covered by our pension scheme.'[32] In other words, the settlement was to align with and supplement Labour Party policy. It was seen as a means of providing social equity and the Ngai Tahu Trust Board was to be an instrument of distribution to cover those persons not covered by the government. It was not to be a body that would provide any supplementation to the pension, because that would have been seen as 'double-banking'.

This view can only result if wealth is seen as something to be distributed. This was what the Labour Party Manifesto declared in 1935: 'Labour will insist that money becomes an instrument of distribution ... In a sane distributive system, of which a State Bank is the key, lies the way to a golden age.'[33] This was the prevailing ideology that defined how the State and Māori would engage. It was the intellectual prison that prohibited Matiu Rata from advancing the Treaty of Waitangi to the idea of tribal property rights and the bedrock of Māori aspirations, mana motuhake.

From this iron cage of muted thought emerges an obvious question: if Labour lacked the intellectual capacity to run a coherent Treaty argument before caucus and it also lacked the bureaucratic machinery to affect change within the party, what caused the fundamental change in its approach to Māori a decade later? As simple as it sounds, the change came from having a new idea – namely, New Zealand adopting neo-liberal economic policy in 1984 when the fourth Labour government entered parliament.

What is Neo-Liberal Economic Theory?

Before any definition is attempted, it is important to state that this article does not advocate a neo-liberal position. The article simply argues that it would be hard to imagine any settlement or inroads being made towards mana motuhake without a neo-liberal theory. Moreover, neo-liberal economic theory certainly will not survive as a basis for tribal development if it is not adapted for tribal needs because its relevance to Māori was accidental. Its relevance to the future of Māori depends on our capacity to indigenize the theory.

With that said, the most basic definition of liberalism can be traced back to Adam Smith, who outlined his thoughts on the relationship between government, the economy and the individual in *The Wealth of Nations* (1776).[34] Smith believed that the well-being of the individual, and therefore of the community, was best served if we all pursued our own self-interest in a free market where competition was permitted.[35] Smith did not refer to this system as capitalism or free enterprise, but instead wrote about 'a natural system of perfect liberty and justice'. There were qualifying points to this proposal. First among them was the view that under this system of natural liberty, the role of the government needed to be limited because it was foolish to believe that a government could demonstrate any wisdom in the governance of people. With that in mind, a government should concern itself with encouraging free trade and removing obstacles from businesses or private enterprise. That did not mean that government did not have a role 'in the duty of erecting and maintaining certain public works and certain public institutions', but it did recognize the limits of government in relation to the individual.[36]

Smith was also committed to the idea that the role of the government was to protect individual property. Here Smith was influenced by John Locke's theory of property from his *Two Treatises on Government,* wherein he argued that the fundamental role of government was to protect the individual and their property, or as he put it, their 'lives, liberties and estates'.[37] Smith's and Locke's theories of government, free trade, the individual and property

influenced nineteenth-century imperialism to a degree that we would find shocking today. The idea that a corporation could hold a Royal Charter to trade internationally, maintain a standing army to protect property by simple military conquest and then monopolize trade in foreign lands seems like something out of a James Bond movie. Yet this is exactly what the British East India Company did – and was permitted to do by the British government.[38] And in a tragic way, the economic theory of Smith, Locke and others was mercurial enough to provide the intellectual foundations to justify this Faustian pact.[39] The common ground for Māori is the idea of less government and the primacy of property rights, which Māori refer to as a taonga – a treasure.

The Treaty of Waitangi is a classic statement of liberal humanitarian values. Two aspects of liberal economic theory appeal to Māori. For Māori, less government has always been represented in the Treaty of Waitangi wherein the Crown's right to govern was qualified by its right to protect not just the property of Māori but also their tino rangatiratanga, best summarized as their 'chieftainship'. At any basic glance, the Treaty of Waitangi is a statement of liberal policy.

The notion of a people free to trade with a government whose role is to protect those rights and to maintain the basic institutions required for a civilized society is nothing more than a statement of what Māori wanted. There was simply no real basis to imagine any alternative. What Māori would never have imagined is some sort of state ownership of all assets, where national wealth is distributed equally, among all citizens who held no 'take' or rights to the resource or property.[40] The idea of a centralized all-powerful government whose sovereignty superseded their customary chieftainship was beyond their possibility of imagining.[41] In fact, the complete lack of understanding of the concept of a centralized government holding sovereignty was best represented by the Te Rarawa chief, Nopera Panakareao, who signed the Treaty and declared, 'Only the shadow of the land passes to the Queen. The substance stays with us, the Maori people.' When Panakareao said that the 'shadow' of the land would pass to the Queen, he was reaching for a metaphor to explain a concept that had an abstract, undefined quality about it. For Panakareao, sovereignty was a shadow – an undefined idea without substance.[42] For Maori, substance remained with the land, fisheries, forests, estates and other taonga. Panakareao understood property.

The role of the Queen and her government was to protect these rights. And on reading Lord Normanby's instructions to Hobson, you would find it hard to see it as anything but classic liberal humanitarian policy. As Peter Adams outlined in his still masterful *Fatal Necessity*, British policy towards New

Zealand and Māori was underpinned by a strong liberal tradition.[43] Captain Cook's proclamation of sovereignty ran counter to his instructions and was never confirmed by the British government nor followed with occupation. Adams explains how Britain's policy and statutes tended to confirm New Zealand as an independent country and that Māori were the legitimate owners of New Zealand soil.[44] However, as British interests grew throughout the Pacific, the extent to which British law applied to its citizens became an increasing concern. From 1817 to 1828 a series of statutes were declared where Britain took responsibility for punishing crimes committed by British subjects specifically in New Zealand. The natural question that followed was whether British subjects were entitled to the sovereign's protection. The answer was that the sovereign's protection did extend to British communities. However, a qualifying concern was whether or not British jurisdiction applied to Māori.

The dilemma could have been removed by simply evacuating British subjects. With British subjects gone, the interests and obligations of the British empire could have been removed. But as Adams tells us, this was never a real option because it would have undermined the idea of free enterprise and trade, the foundations that the British empire was built upon. The protection of British subjects and enterprise then logically extended to protecting Māori from British criminals. Whichever way one twists and turns, what is being debated is the extent the Crown's sovereignty would hold sway in New Zealand. The engine driver for this debate was commerce, which acted as the chain between Crown sovereignty and tribal property rights.

Neo-Liberal Theory and the Fisheries Sealord Settlement

Just as commerce bridged the discussion between sovereignty and property rights for the Treaty of Waitangi, commerce also drove the State-Owned Enterprises Act and the eventual settlements with iwi. Perhaps the best example and earliest indicator of what was to occur in the later 1990s and 2000s can be seen in the Treaty of Waitangi Fisheries Settlement Act 1992 ('Sealord settlement'). The outcome of this Act was that in 1992 Māori received a 50% share in Sealord Products, which at that time was New Zealand's largest fishing company.[45] The Sealord settlement centred on the claim by Māori to rights in commercial fisheries, and the purchase of shares was seen as the best available solution. Effectively, however, the settlement was triggered by the claims by the Muriwhenua iwi and Ngāi Tahu against the Crown Quota Management system.

The significance of this settlement needs to be fully understood. By 1992, Māori were co-owners of New Zealand's largest fishing company, with

10% of the fishing quota before the Sealord settlement had occurred. The settlement itself meant that Māori were now shareholders in the additional quota that had already been held by Brierley Investment Limited. The Sealord settlement saw the Crown pay $150m to BIL to allow Māori to become equal shareholders. A settlement would have been unimaginable in 1975. In fact, the first hearing held by the Waitangi Tribunal in 1977 was concerned with fisheries. The Tribunal found that the case was not well founded: 'the Tribunal is satisfied that there was no prejudice to be found in the Fisheries (General) Regulations 1950 because there was no evidence to show that the regulation had been interpreted in any prejudicial manner'.[46] Anyone who would suggest in 1977 that the Crown would part with $150 million to settle commercial claims by Māori to the fisheries would have been, in the words of James Belich, 'taken away by men in white coats'.[47] A decade later the idea was possible and could be actualized.

How did we cross over to this new land? It is hard to imagine any New Zealand politician or Māori elder from a decade earlier negotiating a settlement of this magnitude. The settlements were possible because the fourth Labour government of 1984 adopted neo-liberal economic policy. In particular it implemented the State-Owned Enterprises Act in 1986, which restructured large government departments with state-owned assets to operate along the same lines as private corporations with a profit motive. The New Zealand Electricity Department, for example, became the Electricity Corporation of New Zealand. As part of their move to become a business, they would have to on-sell much of their land, which was not essential to their company's operation. In his judgment in the 1987 Lands Case (*NZMC v. Attorney General*), the President of the Court of Appeal, Lord Cooke, outlined what was at stake for Maori: 'it appears that a very large proportion of land – about 10 million hectares out of a total of 14 million – presently owned by the Crown will pass to the various corporations established under the Act. There was concern by Māori people that this could happen without any account being taken of land or water that was or could be the subject of claims before the Tribunal.'[48] Cooke then went on to explain that from the affidavit of Mr. D.K. Hunn, the Deputy Chairman of the State Services Commission, who was tasked with implementing the Act, 'the book value alone of assets to be transferred to the corporations (land being part only of those assets) is much in excess of $11.8 billion. Further, the affidavit records that already (29 April 1987) 54,000 people have transferred to the corporations or the new departments; while nearly 5000 have taken voluntary severance at a total cost to the taxpayer of over $93 million. These figures further underline the significance of the issues in this case for the whole community.'[49]

After outlining his judgement that found in favour of Māori, Lord Cooke then went on to explain the effect of the Court's decision. If there was ever an activist statement in New Zealand history, this was it:

> The prosaic language of the Court's formal orders should not be allowed to obscure the fact that the Maori people have succeeded in this case. Some might speak of a victory, but Courts do not usually use that kind of language. At the outset I mentioned that each member of the Court was writing a separate judgment. It will be seen that approaching the case independently we have all reached two major conclusions. First that the principles of the Treaty of Waitangi override everything else in the State-Owned Enterprises Act. Second that those principles require the Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith. That duty is no light one. It is infinitely more than a formality. If a breach of the duty is demonstrated at any time, the duty of the court will be to insist that it be honoured.[50]

In short, the Court was saying that Māori and the Crown must negotiate. And as explained throughout the judgment, the stakes were high. For the corporations to operate as businesses, certainty and stability were required, and especially so if the Crown wanted market value for its assets. Māori did of course negotiate – and herein lies the pathway to the Treaty settlements and why they are so vast and different. The best examples of this diversity in the scales of what was being negotiated can be seen in the *Te Weehi* decision of 1986 and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (Sealord settlement) which saw Māori become major shareholders within the fishing industry.[51] In simple terms the *Te Weehi* decision was concerned with customary rights. The Sealord settlement was a commercial settlement.

In fact, the scale of the Sealord settlement can only make sense when placed against the *Te Weehi* decision of 1986. At the time, the *Te Weehi* decision was seen as a significant win for Māori when dealing with the issue of Māori fishing rights. The crux of the fisheries argument rested on two planks, the Treaty of Waitangi and section 8 of the Fish Protection Act 1877. The Treaty of Waitangi simply stated that the property rights of Māori would be protected when it came to fisheries. The Fish Protection Act provided that 'Nothing in this Act shall be deemed to repeal, alter, or affect any of the provisions of the Treaty of Waitangi, or to take away, annul, or abridge any of the rights of the aborginal natives to any fishery secured to them thereunder'.[52] The problem with this clause is that Māori fishing rights were undefined. The Waitangi Tribunal best summarized this legislation by saying it was simply 'window dressing, inserted in the face of claims by Māori members that the Treaty should be recognized and fishing rights upheld, while no one really knew or very much cared what section 8 entailed'.[53] This analysis of the section was confirmed in the 1903 amendment to the 1877 Act (The Sea Fisheries Amendment Act), when the Treaty clause was removed, leaving it

to read 'Nothing in this Act shall affect any existing Maori fishing rights''[54] That clause was reconfirmed in section 88 (subsection 2) of the Fisheries Act 1983, where it reads, 'Nothing in this Act shall affect any Māori fishing rights'.[55]

The meaning of these Acts was that in real terms these sections did not create any Māori fishing rights and that any rights that were to be protected had to be provided for in statute. The argument was quite circular, but effective. Māori fishing rights did not exist if they were not created in legislation. No such legislation existed. In short, fishing regulations on the amount that could be taken, the methods of taking the fish, net size, open seasons and catch size were the responsibility of the Crown. The only option Māori had was to protest by way of petitions to Parliamentary Select Committees and various hui. And the record of protest was substantial.[56]

The experience of Maori, right through to the *Te Weehi* decision of 1986, was that Māori were forced to operate under the Crown's fishing regulations and statutes. The *Te Weehi* decision was significant because Justice Williamson ruled that section 88 (subsection 2) of the Fisheries Act 'did not prohibit "customary fishing rights"' and thus, these were exempt from regulations under the terms of that Act. Moreover, Justice Williamson stipulated that 'the customary right claimed is not based on ownership of the foreshore but rather the right to collect … shellfish from land over which no proprietary interest was ever claimed'.[57]

The impact of this judgment should not be underestimated because in a sense it stated what Māori had always wanted, the right to fish in a customary manner without interference from the Crown. For Māori living within the traditional communities where fish were seen as a food, fished seasonally and distributed among community members, the decision was welcomed. And this is really where the emergence of neo-liberalism starts to appear because within two years, the game had changed. Moreover, Matiu Rata, who had been lying dormant at a national level since his departure from the Labour Party in 1979, now returned, and did so in a manner that would change our world. The tipping point for change was the Quota Management System, which was introduced under the Fisheries Amendment Act 1986.[58] The Fisheries Amendment Act was driven by the same economic theory as the State-Owned Enterprises Act. It was simply Adam Smith with a wetsuit.

Between the time when Tom Te Weehi had been charged in 1984 and when the decision was delivered in 1986, Matiu Rata filed a claim before the Waitangi Tribunal on behalf of the Muriwhenua tribes, which originally challenged the proposed marine reserves in their area. However, once the Quota Management System (QMS) was introduced over New Zealand

fisheries, the Muriwhenua tribes extended their claim and contested the right of the Crown to claim a property right over fish. The QMS was rooted in neo-liberal economic theory, although it was cloaked under the guise of fisheries protection.[59] The basic rationale for the QMS was that fisherman were apportioned a quota to catch a species of fish at levels the Crown deemed sustainable. That catch was called a Total Allowable Catch (TAC). The subtext to this quota system was that a property right was created when the quota was made an individual transferable quota (ITQ) which allowed the individual fisher to sell or lease. Overnight, when the Bill became an Act, the Crown created a property right and therefore made fish into a commercial asset. In one clean sweep, customary fishing rights became a sideshow to the larger role of Māori within the fishing industry because the QMS system did not include Maori. Matiu Rata and the Muriwhenua tribes claimed a property right to fish, just as the Treaty of Waitangi had promised. Māori quite naturally responded to the Crown with the question, 'Who said you had a property right to our fisheries?'.

Herein lies the interesting issue for historians and a point where alternate histories are very much a possibility. If the QMS system had not been created the only issue on the table would have been what Māori fishing rights meant under section 88 (subsection 2) of the 1983 *Fisheries Act*. Justice Williamson had defined this question in terms of Aboriginal Title and customary rights as argued by Te Weehi's counsel, who used Paul McHugh's doctoral work on Aboriginal Title. Under this doctrine Aboriginal Title operated in the absence of property rights. The Waitangi Tribunal, however, was compelled to take another view because it specifically states that Māori had a property right. As with the State-Owned Enterprises Act, the stakes were high. As the Waitangi Tribunal noted, the value of the exclusive commercial rights that were apportioned to individual fishermen was over $1 billion on the quota exchange. The annual rental return to the Crown was some $21 million.[60] Just as in the Court of Appeal decision, negotiation was the way forward because the Tribunal found that not only was the QMS contrary to the Treaty, but Muriwhenua iwi (and Māori generally) also had a right to develop within the industry: 'It is the restoration of the tribal base that predominates amongst the Muriwhenua concerns. Any programme would be misdirected if it did not seek to re-establish their ancestral association with the seas, providing for their employment, the development of an industrial capability, the restoration of their communities and the protection of their resource.'[61]

What followed was a settlement where Māori received a 50% share in New Zealand's largest fishing corporation and a substantial role in the fishing industry itself. Within a decade of Matiu Rata standing on the steps of parliament

welcoming his kin who had marched from his homeland in Northland in protest, a new world for Māori had emerged. A quiet revolution was under way, one that would see Māori re-establish themselves within the New Zealand economy in a way he could not have imagined in 1975. The underlying question throughout this essay has been how we can explain that transformation.

In simple terms, the protest movement lacked focus. The split of Te Roopu Matakite, the group that led the march to Wellington, is evidence of that.[62] Likewise, the language of the protest movement could barely agree on whether the Treaty was 'fraud' or whether it was a 'scared covenant'.[63] Furthermore, it is a matter of personal recollection that this same group actively opposed many of the tribal settlements that have passed over the decade. Yet, in the end, none of this really matters. To negotiate the types of settlements that occurred, a framework of basic principles was – and is – required. Without the Labour Party's introduction of neo-liberalism, the intellectual platform that established the State-Owned Enterprises Act, devolution and the QMS system, there simply would have been nothing to negotiate over. The Crown would have retained all assets and the majority would still continue their tyranny over Māori with quick and dirty cash settlements. Equity among all New Zealanders would have trumped the idea of property. Under neo-liberalism property trumped equality, which was really shorthand for the tyranny of a settler majority. Matters of equality could always be defined by the settler majority simply because Maori were demographically smaller. Property was a different matter and for Ngāi Tahu, the South Island purchase deeds were simple matters of contract law and a Treaty signed with the Crown.

The pathway to settlement lay upon an idea, and that idea rested squarely upon the back of Adam Smith and his magnum opus, *The Wealth of Nations*. His own country, Scotland, had been colonized, 'bloodied' and 'mutilated'.[64] As Simon Schama tells us in his *A History of Britain*, the idea of less government and the sanctity of property, combined with faith in the power of progress, allowed Smith to turn away from the idea of Hanoverian state power. For Smith, the colonizer was irrelevant because his idea of the 'invisible hand' allowed another kind of freedom. Hanoverian state power is no different from settler government – or, as Awatere put it, 'the White Death Machine'.[65] The less state power, the better.

The challenge for Māori is to understand that ideas can be taken and adapted. Neo-liberalism is simply an idea. It brings with it institutions and systems (banking systems, financial systems, corporations, companies) that in the end are rooted in the west.

Awatere said that 'it was the right of all peoples to dream dreams for themselves, believe in them and make them a reality'.[66] She was right, but

unable to give form to her dream because she was before her time. She had moved away from radical activism, but was uncertain where the next field would be. To play on Panakareao, Awatere sat in a world of light and shadow, 'all lake, all noon, all time without all aim', waiting for an idea to walk into view.[67]

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NOTES

1 Donna Awatere, *Maori Sovereignty*, Auckland, 1984, p.107. *Broadsheet* was a feminist magazine that ran from 1972 until 1992. Awatere was an advisor and a contributor to *Broadsheet* from 1978 until her resignation in 1983. See Laura Kamau, 'Maori Sovereignty: A Proposal for a Theoretical Revolution', MA thesis, University of Canterbury, 2010.

2 Christa Scholtz, *Negotiating Claims: The Emergence of Indigenous Land Claim Negotiation Policies in Australia, Canada and New Zealand 1944–89*, New York, 2006, pp.86–111.

3 Scholtz, pp.85–90.

4 Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims*, Wellington, 2004.

5 Office of Treaty Settlements, 'Deeds of Settlements': www.ots.govt.nz

6 Ranginui Walker, *Nga Tau Tohetohe: Years of Anger*, Auckland, 1987, p.71.

7 Rawiri Taonui, 'Māori Urban Protest', in Danny Keenan, ed., *Huia Histories of Maori: Nga Tahuhu Korero*, Honolulu, 2010, p.256.

8 See Walker and Taonui. Aroha Harris is more cautious of the role of the activists, and Belich is more dismissive, yet both give more time making connections between the activists and the settlements than is warranted. (James Belich, *Paradise Reforged: A History of New Zealanders from 1880 to the Year 2000*, Auckland, 2001; A. Harris, *Hikoi: Forty Years of Protest*, Wellington, 2004).

9 'I used to live in a room full of mirrors, all I could see was me …', from 'Room Full of Mirrors', *First Rays of the New Rising Sun*, 1997, Experience Hendrix.

10 Belich, pp.394–412.

11 Colin James, *The Quiet Revolution: Turbulence and Transition in Contemporary New Zealand*, Wellington, 1986.

12 Taonui, p.256.

13 See Walker, *Nga Tau Tohetohe,* pp.84–86. Walker outlines just how conservative Latimer's profile was among Māori before the 1987 'Lands Case'.

14 *New Zealand Māori Council v Attorney-General,* ([1987], (1) NZLR 641).

15 Geoffrey Palmer, *Reform: A Memoir*, Wellington, 2013, p.406.

16 'Interview with Mr. Sid Ashton by Jane England', 24 June 2014, Audio No. 026, Ngai Tahu Research Centre.

17 Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Moana Confiscations Claims*, Wellington, 2004, p.382.

18 Ngāi Tahu had worked with Harry Evison since his MA thesis on the Ngāi Tahu Claim in 1952: Harry Evison, 'A History of the Canterbury Maoris (Ngaitahu) with Special Reference to the Land Question', MA thesis, University of Otago, 1952.

19 Palmer, p.406.

20 Scholtz, p.94.

21 Scholtz, p.94.

22 Scholtz, p.96.

23 Michael King, *The Penguin History of New Zealand*, Auckland, 2003, p.482; Ranginui Walker, *Ka Whawhai Tonu Matou: Struggle Without End*,Auckland, 1990, pp.212–15.

24 It has been argued that councils now use the 'papa-kainga' zone scheme as a way to resolve the issue of Māori living upon traditional lands. However, the 1967 Act transferred a substantial area of Māori land into General Title, leaving Māori landowners of General Title.

25 Alan Ward, *An Unsettled History*, Wellington, 1999, pp.43–51; Waitangi Tribunal, *The Muriwhenua Fishing Report*, Wellington, 1988.

26 Scholtz, p.105.

27 Richard S. Hill, *Māori and The State: Crown–Māori Relations in New Zealand/ Aotearoa, 1950–2000*, Wellington, 2009, p.166.

28 Palmer, p.400; Scholtz, p.105.

29 *Ngai Tahu Claims Minute Book,* 30 May 1929, Ngai Tahu Archives, University of Canterbury, unpaginated; Waitangi Tribunal, *Ngai Tahu Report*, Wellington, 1991, pp.1003–20.

30 Frank Langstone in Ngāi Tahu Conference Minutes, 8 March 1938. (MA 26 /2 Pt 1, National Archives). When the Ngāi Tahu elders met with Langstone, the Acting Minister declared at the start of the meeting that he hoped in the future there would be 'no more meetings and talk of illustrious ancestors'. This gives the present reader an insight into what these elders were dealing with.

31 Frank Langstone in Ngāi Tahu Conference Minutes, 8 March 1938. (MA 26 /2 Pt 1, National Archives).

32 Frank Langstone in Ngāi Tahu Conference Minutes, 8 March 1938. (MA 26 /2 Pt 1, National Archives).

33 W. David McIntyre and W.J. Gardner, eds, *Speeches and Documents on New Zealand History*, London, 1971, p.318.

34 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, New York, 1976, p.651.

35 Rachel Turner, *Neo-Liberal Ideology: History, Concepts and Policies*, Edinburgh, 2008, p.23.

36 Turner, p.23.

37 Turner, p.194.

38 See Simon Schama, who explains how Robert Clive of the East India Company ran a 'minor extortion racket' back in England: *A History of Britain: The Wars of the British 1603–1776*, New York, 2001, p.xx.

39 See David K. Fieldhouse, who outlines the connection between Adam Smith and colonization and trade in *Economics and Empire 1830–1914*, New York, 1973, p.28. See also Eric Hobsbawm's *The Age of Capital: 1848–1875*, New York, 1975*,* pp.43–63, and *The Age of Empire: 1875–1914,* New York, 1989, pp.34–55.

40 'Take' refers to the customary 'right' of 'claim' of tribal members to a resource. Ideas such as ancestral rights, the rights of long-term occupation and rights through conquest are part of a larger customary framework that Māori acknowledge as important traditions which allow and permit tribal members to have access to the resource: Norman Smith, *Maori Land Law*, Wellington, 1960.

41 This does not mean that Māori did not understand collective responsibility. They did. However, the idea of wealth distribution as imagined by the Labour Party in 1935 does not have any real basis in custom.

42 Claudia Orange, *An Illustrated History of the Treaty of Waitangi*, Wellington, 2004, p.38.

43 Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830–1847*, Auckland, 1977.

44 Adams.

45 Sealord was owned by Brierley Investment Limited (BIL), which held 26% of the fish quota.

46 Waitangi Tribunal, *Fisheries Regulations (Wai 1)*, Wellington, 1978.

47 Belich, p.466.

48 Belich, p.653.

49 Belich, p.657.

50 Belich, p.668.

51 *Te Weehi v Regional Fisheries Officer*, [1986], NZLR 680.

52 Fish Protection Act 1877, s 8.
53 Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai-22)*, Wellington, 1988, 5.4.6.
54 Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai-22)*, Wellington, 1988, 5.4.11.
55 Fisheries Act 1983, s 88.
56 Orange, pp.89–91.
57 *Te Weehi v Regional Fisheries Officer*, [1986], NZLR 680, p.680.
58 Kelly Lock and Stefan Leslie, 'New Zealand's Quota Management System: A History of the First 20 Years', Motu Working Paper 07-02, Mutu Economic and Public Policy Research, April 2007.
59 P. Ali Memon and Nicolas A. Kirk, 'Māori Commercial Fisheries Governance in Aotearoa/New Zealand Within the Bounds of a Neoliberal Fisheries Management Regime', *Asia Pacific Viewpoin*t, 52, 1 (201)1.
60 Waitangi Tribunal, *Muriwhenua Fishing Claim Report*, 'Summary of Report', s 5.2.
61 Waitangi Tribunal, *Muriwhenua Fishing Claim Report*, 'Summary of Report', s 5.2.
62 Harris, pp.75–76.
63 See Belich, Chapter 16.
64 Schama.
65 Awatere, pp.10–32.
66 Awatere, p.107.