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TWENTYTWENTY

## COVER IMAGE

Leafa Wilson/Olga Krause *Ich Heisse Olga Krause, Deutsche Kuenstlerin* 2005  
Poster print (detail). Image reproduced in full below.



The life-long work of performance artist Leafa Wilson/Olga Krause began in 2005. These propagandist poster-styled works are loosely based around the Russian Constructivist design aesthetic adopted by the German band 'Kraftwerk'. With both Samoan and German ancestry, the artist reconciles their past and present by creating utopic race relations in the site of their body: I am Olga Krause, German artist (Ich Heisse Olga Krause, Deutsche Kuenstlerin)

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# **‘IWI’ HISTORIES IN TE TIRITI O WAITANGI SETTLEMENTS: THE IMPACT OF A CROWN FRAMEWORK ON OUR NARRATIVE HISTORIES.**

Renika Siciliano.

The purpose of Treaty settlements in Aotearoa New Zealand is, at its most basic level, to fully resolve historical Tiriti o Waitangi/Treaty of Waitangi claims by providing redress to claimant groups.<sup>1</sup> The need for redress stems from breaches of te Tiriti o Waitangi/Treaty of Waitangi as signed between Māori and the Crown from 1840. Such redress is negotiated between the Crown and iwi within a framework of ever-changing Crown policy and within the political framework of the time. The settlement of those historical grievances necessitates an understanding, by the Crown, of the grievances themselves and of the history of the iwi group with which it is seeking settlement. The Crown’s Treaty settlement process therefore provides a pathway for iwi grievances to be shared and kōrero told — but to what extent does this reflect the history of a settling iwi group? This commentary looks at the practical realities of including historical narratives in our Treaty settlement documents, together with the unintended side effects. It highlights the way in which these Crown processes have the potential to change the historical narratives of iwi and hapū groups, both for the wider public and amongst iwi/hapū themselves.

## **THE TREATY SETTLEMENT PROCESS**

The wider Treaty settlement process is lengthy, encompassing many separate processes. Firstly, it requires specific legal claims to be made against the Crown for historic breaches of te Tiriti o Waitangi/the Treaty of Waitangi. These claims are generally heard by the Waitangi Tribunal as part of a wider inquiry group over a number of years and hearing weeks, with considerable evidence put forward by claimants and the Crown. This process allows the grievances to be aired and parties to hear one another. For historical claims, the Tribunal prepares a comprehensive report to summarise the issues and evidence before it, making findings and recommendations.

A Tribunal report is often useful for groups entering into settlement negotiations, as it will provide a starting point for the information required to

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<sup>1</sup> Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, 2nd edition (Wellington: Office of Treaty Settlements, 2018), pp.24-26, 77.

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demonstrate to the Crown the appropriateness of certain redress.<sup>2</sup> Negotiations can of course occur without the benefit of a Tribunal report and often further work will be required to develop the historical background and evidential basis to meet Crown tests and ultimately satisfy the Crown that it can ‘safely’ provide certain redress to iwi groups.<sup>3</sup>

Once the redress is negotiated between the Crown and the settling iwi group, it ultimately forms part of the Deed of Settlement and the settlement legislation which gives effect to the agreements within the Deed of Settlement.<sup>4</sup> A Deed of Settlement generally includes redress in three parts:

- Apology — which includes the historical account, Crown acknowledgements of its specific breaches of te Tiriti o Waitangi/the Treaty of Waitangi and a formal apology;
- Commercial redress — a financial quantum from which the iwi can purchase various properties and/or utilise post settlement; and
- Cultural redress — which includes transfer of specific properties of cultural significance, acknowledgements of other interests, relationship agreements and other non-exclusive mechanisms to recognise sites of significance for the settling iwi group.

These categories of redress have been adopted across all recent settlements with various additions and packaged to fit the style and approach of iwi, to the extent allowed within the Crown’s existing framework and policies. This is the basic reality which iwi must work within if they wish to reach settlement with the Crown.

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<sup>2</sup> In ‘Old Myths and New Politics’, Sir Tipene O’Regan speaks in part to the different questions asked by the Crown of iwi groups at different stages in the settlement process and the historical narratives produced for those specific purposes. See Tipene O’Regan, ‘Old Myths and New Politics: Some Contemporary uses of Traditional History’ *New Zealand Journal of History*, 26, 1 (2003), pp.5-27.

<sup>3</sup> See for example the commentary on thresholds to be met for exclusive redress in Office of Treaty Settlements, *Healing the Past Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, 2nd edition (Wellington: Office of Treaty Settlements, 2018), p.54.

<sup>4</sup> Negotiations are conducted between Crown representatives (Chief Crown Negotiator appointed by the Minister for Treaty of Waitangi Negotiations and a team from Te Arawhiti, formerly the Office of Treaty Settlements) and negotiators for the iwi group, generally appointed by the entity mandated to represent the settling/claimant group.

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As we know however, the reality is far from simple and the journey which iwi must travel to reach settlement is never smooth sailing — there are after all, over 175 years of grievances which are being addressed. There are many difficulties which arise for iwi when attempting to fit into a Crown framework laden with complicated and ever-changing Crown policy.

Nicola Wheen and Janine Hayward note in *Treaty of Waitangi Settlements*:

While most New Zealanders may have an opinion on Treaty settlements, they may also lack an understanding of why Treaty settlements are required and what the process seeks to achieve.<sup>5</sup>

If this is an accurate assessment, even in part, it follows that some of those who read historical accounts, acknowledgements and other parts of Deeds of Settlement will not appreciate the context within which they are prepared. This, in itself, has the ability to change the wider historical narrative for iwi, hapū and whānau post-settlement.

#### **WHERE DOES THE HISTORICAL NARRATIVE LIE IN A TREATY SETTLEMENT?**

Any Treaty settlement must be underpinned by evidence of whakapapa and connections. It will include a specific historical account to effectively support the redress contained within the Deed of Settlement. This narrative is found most clearly in the historical account included in the Deed of Settlement but will be more widely contributed to by comments included in any preamble, background section, statutory acknowledgements and other parts of the Deed. This paper focuses on the historical account but acknowledges those other aspects which contribute to the historical narrative within the Deed. As the Office of Treaty Settlements has explained,

[t]he historical account provides a basis for Crown acknowledgements and apology. It summarises key facts about the relationship between the claimant group and the Crown that gave rise to a breach or breaches of the Treaty of Waitangi and its principles, as agreed between the Crown and the claimant group. The Crown acknowledgements and apology go

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<sup>5</sup> Nicola R. Wheen and Janine Hayward, 'The Meaning of Treaty Settlements and the Evolution of the Treaty Settlement Process', in *Treaty of Waitangi Settlements* ed. by Nicola R. Wheen and Janine Hayward, 2nd edition (Wellington: Bridget Williams Books, 2015), p.1.

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on to recognise these breaches and the losses, resentment and grief suffered by the claimant group. In turn, the Crown, by expressing its regret and unreserved apology, lays a foundation for settling the historical claims of the claimant group.<sup>6</sup>

Historical accounts outline the history of an iwi group through a very specific lens and with a very specific purpose. Ask any historian tasked with drafting an historical account for inclusion in a Deed of Settlement and they will tell you that their job is not to tell the complete history of the iwi group, but instead the history of the iwi group's grievances with the Crown. As Martin Fisher notes, the 'historical account is meant to be as unbiased, unemotional and neutral as possible'.<sup>7</sup>

Historical accounts are generally silent on the history of an iwi group's interaction with other iwi groups. They do not share overlapping stories or relationships. They do not spend much time on activity prior to 1840, other than to set out whakapapa connections and links to the rohe for the specific iwi group. Those topics are strictly prohibited under Crown policy. In many instances, the Crown's historians will hold the pen on the historical account in the first instance or, where that task is shared, they will be closely involved in the development of the historical account. The historical account must be agreed upon by both parties to the settlement.

Not surprisingly, the account is often hotly debated and will take months, if not years, to finalise. Martin Fisher writes on the Waikato-Tainui Raupatu negotiations specifically and reflects, 'although historical accounts tend to have the most neutral tone and uncontroversial historical positions, the debates that occur between the Crown and claimants are far from lifeless'.<sup>8</sup> In my experience, this is entirely true. Every sentence is closely examined by both parties — the Crown wanting to ensure that it does not commit to the inclusion of something it should not, and iwi wanting to ensure that the narrative is accurate and not entirely devoid of the necessary context.

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<sup>6</sup> Office of Treaty Settlements *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, 2nd edition (Wellington: Office of Treaty Settlements, 2018), p.79.

<sup>7</sup> Martin Fisher, 'The Politics of History and Waikato-Tainui's Raupatu Treaty Settlement', *New Zealand Journal of History*, 50, 2 (2016), p.69.

<sup>8</sup> Fisher, 'The Politics of History and Waikato-Tainui's Raupatu Treaty Settlement', p.85.

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According to the Crown:

The historical account does not need to be complex or long. It should be an accurate summary of the historical background. This gives the text authority and helps the general public to understand the basis for the settlement, because it puts the redress included in the settlement into proper context. In settlement legislation, the historical account or a summary may form the Preamble to the Act.<sup>9</sup>

Given the Crown position, and the sometimes competing objectives of iwi, what version of an iwi history is left in a historical account? Certainly not one which could be considered as a definitive account of any settling iwi group's history. But then again, it is not intended as that. It is, quite simply, a history of the engagement with the Crown; a history which tells only those points relevant to the redress contained within the Deed of Settlement, connections to the role of the settling group and the Crown breaches of Te Tiriti o Waitangi/the Treaty of Waitangi.

### **HISTORIES INTERTWINED AND THE TRIBUNAL'S COMMENTARY**

If we consider the example of the mana whenua iwi of Tāmaki Makaurau, we can see first hand that the Crown policies around Treaty settlements can, and do, have a real impact on the historical accounts included within Deeds of Settlement. The Waitangi Tribunal, in its *Tāmaki Makaurau Settlement Process Report* which addressed claims regarding the Crown approach in relation to the original Ngāti Whātua o Ōrākei proposed settlement, looked closely at this issue. The Tribunal heard the concerns of mana whenua regarding individual historical accounts in Treaty settlements and in particular the impact of the Crown policy not to refer to other iwi groups. The Tribunal found:

The logical consequence of the policy of mentioning only the settling group in its agreed historical account with the Crown is troubling. Why? If we take the present agreed historical account as an example, the applicants before us certainly disagreed with the version of history agreed between Ngāti Whātua o Ōrākei and the Crown. When they come to

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<sup>9</sup> Office of Treaty Settlements *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, 2nd edition (Wellington: Office of Treaty Settlements, 2018), p.79.

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negotiate settlements with the Crown, they will want their agreed historical accounts to say something different. If the agreed historical accounts with all the settling groups reflect their different realities, it raises the spectre of a raft of different histories recorded in many agreed historical accounts. Obviously, they cannot all purport to be authoritative. *It seems to us that the true function of the agreed historical account in each settlement needs to be acknowledged: it is an account that primarily expresses the view of the settling group, but in terms that are not too objectionable to the Crown... Thus, it is more accurately characterised as an accommodation between the parties in the context of a settlement negotiation, rather than a robust history.*<sup>10</sup>

This may be so, but there is no disclaimer or explanatory note in a Deed of Settlement to clearly set out the purpose of the historical account. So how do we ensure that context is clear to third parties post-settlement?

Issues regarding shared interests, the extent of individual iwi rights and other matters are not dealt with in individual historical accounts. Historical accounts may acknowledge that other (generally unspecified) groups also have rights, interests and/or claims in particular areas, but the complex relationships between iwi and hapū — as in Tāmaki Makaurau — mean this is very rarely done with any great detail. This shapes and narrows the iwi history that is able to be told within the Crown’s Treaty settlement framework.

## **UNINTENDED CHANGES TO OUR NARRATIVE HISTORIES**

Outside of the Treaty settlement process, iwi histories are shared in many forms and produced either orally or in writing for many different purposes. Some written versions of iwi histories are considered more authoritative than others and are relied on by the public more heavily, for example Pei Te Hurinui Jones and Bruce Biggs’ *Ngā Iwi o Tainui*.<sup>11</sup> The nature of the Treaty settlement process, including the requirement for historical reports to be presented as formal evidence to the Waitangi Tribunal and the robust negotiation of a historical account, tends to mean that greater weight is placed on the historical narratives prepared in those forums.

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<sup>10</sup> Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), pp.94-5, emphasis added.

<sup>11</sup> Pei Te Hurinui Jones and Bruce Biggs, *Ngā Iwi o Tainui* (Auckland: Auckland University Press, 2004).



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The historical narratives included in Deeds of Settlement will be examined, interpreted and relied on by historians, lawyers, councils, government institutions and Courts for years to come. I suggest that this is where the unintended effects of having such a tailored version of iwi histories will be seen. When arguments are being constructed regarding land interests or related rights which affect whenua, awa and other taonga, those unintended effects have the potential to be significant. The effects will apply not just for any settled iwi group with a Deed of Settlement, but also to other iwi, hapū and whānau who sit outside a particular group's Deed of Settlement.

Many of these consequences are still to be seen. Deeds of Settlement, and the enacting settlement legislation, continue to be negotiated by groups across Aotearoa and for those who have settled, many are still at the early stages of implementation.

## **CONCLUSION**

The reality is that the Crown's current Treaty settlement framework has been around for some time now and seems unlikely to radically change any time soon. If that remains the case, for those who choose to work within that framework and engage with the Crown for the settlement of their claims, a tailored version of part of their history — as agreed with the Crown — will be set in writing in a formal document that will be read and interpreted by many for years to come. For better or for worse, the narratives created through the Crown's Treaty settlement process will shape the wider narrative regarding their iwi, hapū and whānau histories. Those unfamiliar with the context, or unwilling to understand, will only know a portion of the full story.

Perhaps then, the focus must be on the wider education of the public, lawyers, historians, the Courts and those who are reading and interpreting these documents. If achieved, then the historical narratives for iwi, hapū and whānau can simply be added to through the wider apology redress in a Deed of Settlement, as Maureen Hickey suggests:

One long-term value of [the apology, Crown acknowledgements and historical account] may be that the history uncovered in the Treaty

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settlement process is incorporated into general New Zealand history and is understood by more than tangata whenua and specialist New Zealand historians.<sup>12</sup>

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<sup>12</sup> Maureen Hickey, 'Apologies in Settlements', in *Treaty of Waitangi Settlements* ed. by Nicola R. Wheen and Janine Hayward, 2nd edition (Wellington: Bridget Williams Books, 2015), p.74.