TE MANUTUKUTUKU

Te Roopu Whakamana i te Tiriti o Waitangi Te Tari Ture

Waitangi Tribunal Division Department of Justice Newsletter

Tuarua Noema 1989

Number 2 November 1989

INTRODUCTION

The response from our first issue of Te Manutukutuku has been extraordinarily positive as recipients have sought additional copies for distribution to other agencies and to key people within their own organisations.

It is clear that decision-makers at all levels have been starved of information about the Waitangi Tribunal duties, responsibilities and schedule of activities.

Therefore, Te Manutukutuku's role as a messenger, presenting the facts without embellishment, will continue.

There is no Director's column this month because the Director, Wira Gardiner, left the Waitangi Tribunal at the end of September to take up the position of General Manager of the Iwi Transition Agency. Applications for the position of Director have closed and a new appointment will be made in November.

Legal Aid for Claimants

As a result of its agreement with the New Zealand Maori Council about State Owned Enterprises, the Crown, in 1988, amended the Legal Aid Act of 1969 to provide legal aid for those submitting a claim to the Waitangi Tribunal.

The scheme was intended to operate so that claimants could apply to the District Legal Aid Committee in the same way as any other applicant for legal aid.

Unfortunately, the law has not worked as well as it was intended. The main problem is that when a District Legal Aid Committee decides whether or not to grant legal aid, it has to determine how much the claimants themselves should contribute towards the cost. This means that claimants need to provide information about their financial situation. The difficulty here is that the claimants are usually an iwi, hapu or trust board, or other authority with perhaps hundreds of members.

The law does not make it clear to what extent these people must provide financial information to the District Legal Aid Committee. Consequently, most applications for legal aid would have to be turned down.

For claims that are currently in hearing, the Tribunal has appointed counsel to assist claimants; with the Department of Justice paying the costs involved.

The Government is working to remedy these difficulties. In October, the Legal Services Bill was introduced. This makes slight changes to the part of the Legal Aid Act dealing with claimants' legal aid and it is hoped that these changes will solve the problem.

Salient Features of the Treaty of Waitangi Act 1975 (and subsequent amendments)

1 Claimants must be Maori or of Maori descent. Claims must be brought by an individual who may in turn claim on behalf of a group.

2 The Waitangi Tribunal can only hear claims against the Crown.

3 The claim must explain how the Maori or group of Maori people have been or are likely to be prejudicially affected:

- by any ordinance or Act passed on or after 6 February 1840; or
- by any regulations or other statutory instrument made on or after 6 February 1840; or
- any policy or practice adopted or proposed to be adopted by or on behalf of the Crown; or
- any act done or omitted, or proposed to be done or omitted, by or on behalf of the Crown on or after 6 February 1840.

4 The Act says that the Tribunal is a Commission of Inquiry. This means it can:

- order witnesses to come before it;
- order material or documents to be produced before it;
- actively search out material and facts to help it decide on a claim. (Courts are much more limited in doing this.)

5 The Tribunal must send copies of its findings and recommendations (if any) to the claimant, the Minister of Maori Affairs, other Ministers of the Crown that the Tribunal sees as having an interest in the claim and other persons as the Tribunal sees fit.

6 The Tribunal has the right to refuse to inquire into a claim if it considers it too trivial, or if there is a more appropriate means by which the grievance can be solved.

7 The Tribunal may receive as evidence any statement, document, or information which it feels may assist it to deal effectively with the matter before it.

THE WAITANGI TRIBUNAL, Databank House, 175 The Terrace, PO Box 10-044, Wellington Telephone (04) 721 709 Fax (04) 711 263

POUAKANI CLAIM

This claim concerns a region north of Lake Taupo which is bound in the north east by the Waikato River and in the south west by Titiraupenga and Pureora Mountains.

The specific grievance which initiated this claim, brought by John Hanita Paki, the Titiraupenga Trusts and the Pouakani B9B Trust, was that the beneficial owners of Pouakani B9B were unable to obtain a certificate of title to their blocks, as no complete survey had ever been done up to the standards required by the District Land Registrar. The claimants filed applications with the Maori Land Court seeking a review of the 1887 and 1891 Native Land Court orders for the purpose of obtaining a clearly surveyed boundary.

The Waitangi Tribunal examined the tribal boundary established by a Royal Commission in 1889 between Ngati Maniapoto and Ngati Tuwharetoa. The original Pouakani block (133,500 acres) was a subdivision of the three-and-a-half million acre Taupo-Nui-a-Tia Rohe (Region).

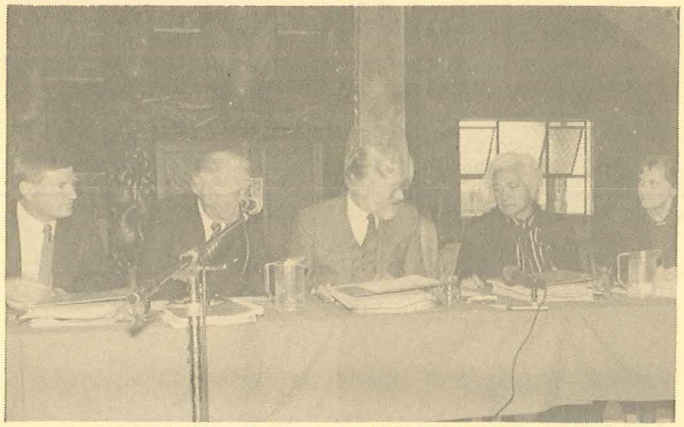
Three sittings were convened. The first was held in the wharenui, Te Matapihi o te Rangi, at Papa o te Aroha Marae, Tokoroa (May 15-19, 1989). The Tribunal was welcomed through the gates and four intensive days followed. Although over 100 people were in the wharenui, the agenda for this hearing flowed smoothly with opening korero from kaumatua. This was followed by presentation of preliminary reports, opening submissions of counsel, expert witnesses, and kaumatua again rising to comment.

The second sitting was held at the Timberlands conference room in Tokoroa. As with all Tribunal sittings, karakia was followed by formal mihimihi with Tribunal member Mr Te Kani setting the scene for what proved to be an efficient three days. The Crown's evidence was translated into te reo Maori. Comment after the hearing, from claimant elders, was that it had been excellent to hear a definite Crown response and it was empowering to Maori to hear it in te reo.

The third and final sitting was reconvened at Papa o te Aroha Marae (9-10 October 1989) commencing with kaumatua, followed by closing submissions of claimants' counsel (Messrs P Heath and R Boast) and closing submissions of Crown counsel (Mr C Young), with a summary translated into te reo Maori.

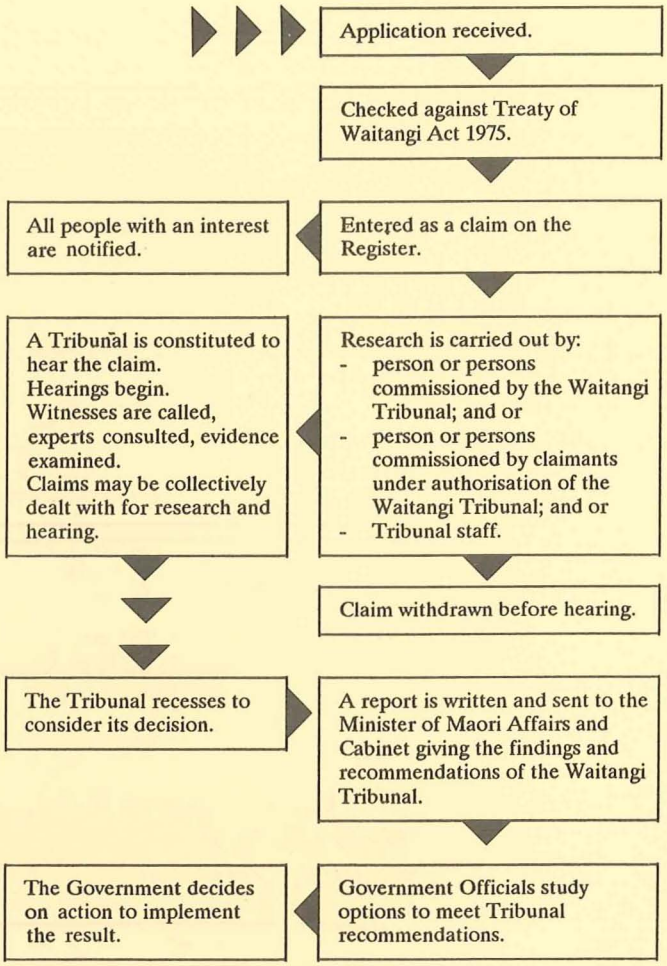
During the course of the hearing, representatives from Raukawa, Tainui, Tuwharetoa, Maniapoto and Kahungunu ki Pouakani attended at various times.

The Tribunal now has the task of preparing a written report about its findings on the B9B boundary and other alleged breeches (i.e. hapu rights to the river, lands transferred as payment for survey costs) presented in this claim.



Judge Ross Russell (centre); members of the Waitangi Tribunal – from left: Bill Wilson, Turirangi Te Kani, Emarina Manuel, and Evelyn Stokes

The Claim Process



THE QUENTIN-BAXTER ANNUAL WRITING PRIZE

The trustees of the Quentin-Baxter Memorial Scholarship Fund are pleased to announce an annual writing prize for the best unpublished work on a topic of Constitutional or International Law relevant to New Zealand or the Pacific. Specific topics will be announced annually together with the value of the prize.

The prize winning essays will become the property of the trustees, and will be published in the Victoria University of Wellington Law Review and as part of a monograph series.

For 1990 the topic will be:

The Treaty of Waitangi as a Constitutional Standard in New Zealand

The value of the prize will be $2000.00.

Contributions should not exceed 20,000 words and must be in the hands of the Secretary, The Quentin-Baxter Memorial Scholarship Fund, c/o Law Faculty, Victoria University, PO Box 600, Wellington, by **1 August 1990.**

Intending authors should contact the Secretary for a copy of the Faculty Style Guide and for information on the format the essay should be presented in.

Kaikoura site visit by Kati Kuri claimants and Tribunal, 24 September, 1987: Ngai Tahu claim.

NGAI TAHU CLAIM

The hearings for the Ngai Tahu claim were completed on 11 October 1989 after twenty-five weeks of hearing, spread over more than two years. That the claim took this long to hear is not surprising when one considers that the complaints presented to the Tribunal cover grievances which originate from the end of 1848, and relate to much of the South Island.

The Tribunal will now prepare a report which will examine the issues that have been raised and which will define the principles of the Treaty of Waitangi which govern the relationship between Ngai Tahu and the Crown.

It is the hope of all parties that a negotiated settlement will be reached after the parties have had an opportunity to examine the Tribunal's findings. If a settlement cannot be achieved at this stage, the Tribunal may need to convene further hearings and then report on remedies.

The number of different issues that the Tribunal will have to consider when making its Ngai Tahu report are many: the Otakou Tenths; the 'hole in the middle'; the sale of Fiordland; mahinga kai and fisheries; and others.

Occasionally, the Tribunal sees the need to communicate with the Government before its final report has been made. For example, following the Crown's final address in September, which included a response to the claimants' submissions on pounamu, the Tribunal wrote to the Ministers of Conservation and Energy requesting that no licences for mining pounamu be issued until the Government has had the opportunity to consider the Tribunal's Ngai Tahu report.

Judge McHugh, the Presiding Officer for the claim, made it clear in his final statement that remedies would require the return of some Crown land and he expressed the hope that the Crown would not attempt to dispose of surplus land until the claim has been settled. The Judge also said:

'... it is clear indeed that underlying the whole of the Crown dealings with Ngai Tahu in the South Island there was a failure of the Crown to provide adequate reserves for the present and future needs of the Ngai Tahu people when the various purchases took place.'

'This failure of the Crown to ensure Ngai Tahu were left with a sufficient endowment for their own present and future needs has impacted detrimentally on the economic circumstances of Ngai Tahu. It also has resulted in the denial of access to traditional food resources.'

'The Tribunal will deal fully with breach of Treaty principles in its report but the evidence presented to this Tribunal throughout this inquiry and acknowledged by the Crown is so cogent and clear that the Tribunal would be remiss in its duty if it failed to comment on it at this point.'

'When Mr Temm opened his case for the Claimants he explained that although it was a single claim it nevertheless covered nine separate grievances which he referred to as "the Nine Tall Trees of Ngai Tahu". We have heard this expression many times over the past two years. We have also found as the hearing progressed that on each of the nine tall trees there were a varying number of branches each of which represented a claim within the claim. So that we are not facing nine separate claims, but in fact a total of 73 grievances arising out of the eight Ngai Tahu Crown purchase Deeds and mahinga kai. Each of these grievances requires comprehensive research and inquiry. But that is not all. Underneath the nine tall trees lie considerable undergrowth – representing over another one hundred smaller grievances mainly raised by the people as the Tribunal moved through the different districts to hear the main claims.'

This will give some indication of the huge task that now confronts this Tribunal as it commences to assess the merits of each of the claims and to determine the issues.'

MURIWHENUA LAND

The Muriwhenua claim had its fishing aspects heard between December 1986 and April 1988. The land aspects of that claim are due to begin hearing in the first half of 1990.

The land in question, which is traditionally possessed by the claimant tribes (Ngati Kuri, Te Aupouri, Te Rarawa, Ngai Takoto, Ngati Kahu), commences at the Whangape Harbour on the West Coast and includes all land to the north including the Aupouri Peninsula, the Manawatawhi (Three Kings Islands); and areas on the East Coast extending as far south as the Mangonui River and the area known as the Mangonui County.

Claimants are seeking recognition and enforcement of their customary rights; and compensation for a variety of alleged breeches of these rights.

Tribunal research staff are working on a preliminary historical report which is designed to raise the major issues. Material is being collected and analysed on the following:

- Early history of Maori/Pakeha contact to 1830
- The impact of the Church Missionary Society
- Land sales in the 1830s
- The operation of the Old Land Claims Commission to 1865
- The signing of the Treaty at Kaitaia
- The Mangonui purchase and Oruru dispute
- The demographic and economic context 1848-1865
- Crown land purchases 1850-1865
- Muriwhenua as a model 'Native District' 1860-1865.

Crown, claimant and Tribunal researchers met in October 1989 to discuss common research and mapping issues.

Court of Appeal Judgement CA 126/89, 3 October 1989

Robert Mahuta and the Tainui Trust Board v Attorney-General, Coal Corporation and Others

Background to the Case

The Crown, in 1988, made an agreement with Coalcorp which provided that:

- the Crown's coal mining rights were to go to Coalcorp;
- Coalcorp was to manage some 550 surplus properties of the old state coal mines and sell or otherwise dispose of these.

Tainui were concerned that this agreement would mean that valuable coal rights and lands would be sold off into private hands with no mechanism to ensure that the Crown could, if necessary, take them back to satisfy Tainui's claim concerning confiscations (or raupatu) before the Waitangi Tribunal. Tainui therefore went to the High Court to prevent the agreement being put into effect. Tainui argued that the provisions of the Treaty of Waitangi (State Enterprises) Act 1988 and the decision of the Court of Appeal preceding this legislation, NZ Maori Council v Attorney-General, should cover these mining rights and land so that the raupatu claims could be satisfied. By an order of the High Court, the proceedings were moved to the Court of Appeal.

Tainui Claim to Waitangi Tribunal

There is a claim before the Waitangi Tribunal by Robert Mahuta on behalf of himself, Waikato/Tainui and others, that they have been affected by confiscation and the removal of Waikato/Tainui lands by the Crown.

Decision and Observations of the Court of Appeal

The essence of the Court of Appeal decision is that coal mining rights and properties held or managed by Coalcorp cannot be passed to private ownership until the mechanism provided in the Treaty of Waitangi (State Enterprises) Act 1988 is put in place to allow for the return of those lands or rights to Waikato/Tainui in the event that the claim before the Tribunal is successful.

We record some of the observations made by the Court of Appeal in its reported judgment.

Firstly, Bisson J notes that 'the Crown has admitted for the purposes of these proceedings that Crown confiscations of Tainui land were in breach of the principles of the Treaty of Waitangi ... a final determination as to whether that was in fact so, and if it was so, as to what should be done about it is for the Waitangi Tribunal.'

Then the President, Cooke P, observes:

'It is obvious that from the point of view of the future of our country, non-Maori have to adjust to an understanding that does not come easily to all: reparation has to be made to the Maori people for past and continuing breaches of the Treaty by which they agreed to yield government ...'

'On the Maori side it has to be understood that the Treaty gave the Queen government, Kawanatanga, and foresaw continuing immigration. The development of New Zealand as a nation has been largely due to that immigration. Maori must recognise that it flowed from the Treaty and that both the history and the economy of the nation rule out extravagant claims in the democracy now shared. Both partners should know that a narrow focus on the past is useless. The principles of the Treaty have to be applied to give fair results in today's world.'

Referring specifically to the Waitangi Tribunal's role, Cooke J doubts that a 'further and long inquiry' by the Tribunal on the Tainui question will necessarily assist in reaching a 'practical solution in the foreseeable future either to the coal problem or to Tainui problems generally.'

He adds that:

'Preferably – and I am confident that the Waitangi Tribunal would agree with this – the Treaty partners should work out their own agreement.'

HEARING DATES

October-November 1989

Note: The dates of hearings not completed are subject to change.

WAI 27 NGAI TAHU

Monday 9 October-Wednesday 11 October
Tuahiwi Marae, Rangiora
Claimants' final response
The Ngai Tahu claim was heard by: Judge Ashley McHugh, Georgina Te Heuheu, Monita Delamere, Manuhuia Bennett, Hugh Kawharu, Desmond Sullivan, Gordon Orr

WAI 38 MAUNGANUI-WAIPOUA

Monday 16 October-Friday 20 October, Tuesday 24 October
Matatina Marae, Waipoua
Submissions by claimants on Waipoua aspects of the claim

Monday 13 November-Friday 17 November
ADJOURNED UNTIL FEBRUARY 1990
The Maunganui-Waipoua claim is being heard by:
Judge Andrew Spencer, Ngapare Hopa, Turirangi Te Kani, Mary Boyd, John Kneebone

WAI 33 POUAKANI

Monday 9 October-Wednesday 11 October
Papa o te Aroha Marae, Tokoroa
Final submissions by claimants and Crown
The Pouakani claim was heard by: Judge Ross Russell, Turirangi Te Kani, Emarina Manuel, Evelyn Stokes, Bill Wilson

WAI 32 TE NGAE

Monday 6 November-Friday 10 November
The venue and Tribunal members are yet to be confirmed.

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