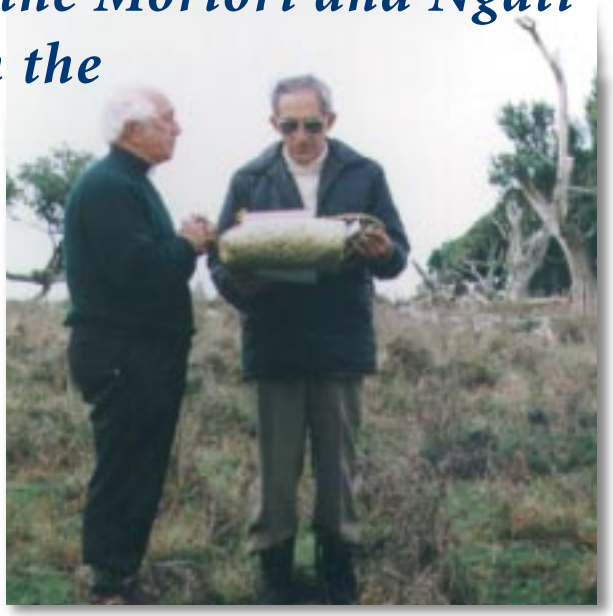
Waitangi Tribunal

Te Rōpū Whakamana i te Tiriti o Waitangi

Te Manutukutuku

Haratua/Pipiri 2001 | 53 | May/June 2001

Rekohu: Report on the Moriori and Ngāti Mutunga Claims in the Chatham Islands



Riwai Preece and Wilford Davis blessing the 1862 petitions and claims by Moriori. These were handed to Chief Judge Durie at the commencement of the Moriori claim at Te Awapatiki in May 1994.

KEY CLAIMS

Moriori claim that the Crown should have intervened to protect their Treaty rights to justice, protection and equal citizenship when they were subjected to slavery after 1840. They were particularly critical of the 1870 Native Land Court determination that treated them as a defeated people and granted 97 percent of Rekohu (the Moriori name for the Chathams) to Ngāti Mutunga and Ngāti Tama, while leaving Moriori with less than 3 percent of the land. Moriori claim that in failing to recognise their land and resource rights the Crown destined them to poverty and powerlessness in their ancestral home.

Ngāti Mutunga claimed that Moriori were not Māori and therefore not covered by the Treaty of Waitangi Act 1975.

Both Ngāti Mutunga and Moriori claimed that the tenure reform under the Native Land Court system was culturally inappropriate and damaging.

The Tribunal also heard a considerable number of claims that related to the Crown's administration of the Chatham Islands.

MAIN FINDINGS

The Tribunal found that:

- Moriori were covered by the Treaty of Waitangi Act 1975.
- Slavery inflicted upon Moriori was contrary to the law and to standards of human rights recognised at the time. It was also a breach of the Treaty.
- Slavery continued on Rekohu long after it had ended elsewhere, and was tolerated by the Crown.
- It was feasible for the Crown to have intervened. Failure to do so cost many Moriori lives, and prejudiced their later land claims.

Continued on page 7

POROPOROAKI

Tihewa mauri mate.

Tuhoe moumou kai, moumou taonga, moumou tangata ki te pō.

E Te Makarini, takoto, takoto mai i raro i ō maunga whakahii, Manawaru, me tō maunga kōrero a Maungapōhatu.
E titiro iho ai koe ki ō uri, ō tamariki, mokopuna, tini kārangaranga.

E tangi ana ki a koe, e tangi ana ki a koutou, kua rūpeke atu ki te pō.

Apiti hono tātai hono, ko te hunga mate ki te hunga mate. Apiti hono tātai hono, ko te hunga ora ki te hunga ora.

Tēnā koutou, tēnā koutou, tēnā tātou katoa.

Chief Judge Williams

Improving the Process

Tēnā koutou katoa kei ngā iwi e anga mai nei ō koutou kanohi ki Te Manutukutuku e hora nei.

In 1996 the Tribunal began its district and casebook method. The method saw all claims within a district being heard together. While substantial savings have resulted from this approach, all original casebook inquiries have taken a long time to complete and most are only now in the final stages of inquiry.

An improvement to the district approach was required because the Tribunal needed to make hearings more efficient, to identify clearly issues of grievance, and to refine arguments surrounding historical evidence relating to grievances. The Tribunal needed to get claimants through the hearings more quickly, and into negotiations with the Crown.

In March 2000 the Tribunal commenced its improved approach in Gisborne. 'The Gisborne Model' requires all parties, claimants and the Crown, to engage in an interlocutory process well before hearings commence. There are five main steps to this process, each marked by judicial conferences.

1. An early conference sets out a district boundary and establishes which claimants are going to be heard. These matters were resolved for Gisborne in May 2000.
2. The research for the casebook is defined and a deadline set for the completion of all research reports. With a few exceptions all research was completed for Gisborne in January 2001.
3. All claimants and their counsel, assisted by historical experts, are required to file comprehensive and fully particularised statements of claim. These statements establish the scope and nature of the grievances to be heard. In April 2001 draft statements were discussed in Gisborne and counsel subsequently filed their final statements of claim.
4. The Crown is required to respond to the statements of claim. The Crown should give advance warning of its stance on the issues raised. It should also indicate points of agreement and commonality between the parties, where the Crown concedes to matters in the claimants' case, or where it disagrees.
5. Before hearings commence, another judicial conference will be held. This conference will set out the hearing programme, specifying which witnesses will be heard. Parties are encouraged to co-operate with one another to reduce unnecessary repetition in their cases. The length of time claimants spend in hearing is no longer significant, but the quality of their submissions is.

Throughout this process, issues of mandate are addressed as they arise. The Tribunal does not want to waste time dealing with such issues during hearings. A high degree of certainty among claimants is therefore sought prior to the commencement of hearings.

Claimants have commented that this new process is demanding. There is a greater need for early preparation and clarification of issues, and for frequent communication between claimants, their counsel, and historical experts. However, the signs are positive and results are beginning to be felt. It is expected that a total of six separate week-long hearings will be completed in Gisborne, with closing submissions, by May 2002.

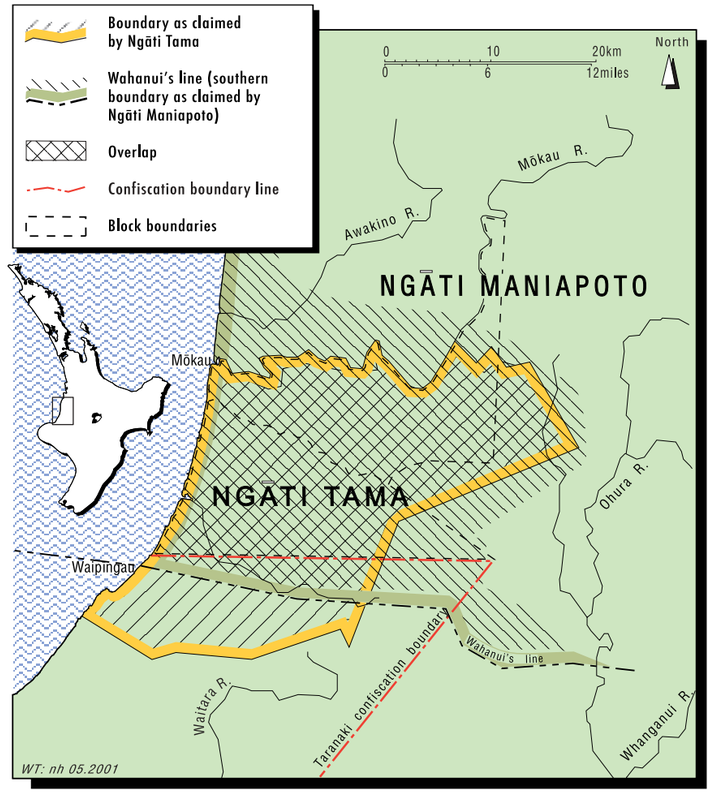
This new process represents a huge challenge for the Tribunal, the claimants and the Crown. Resources will need to be redeployed and in some areas increased. Deadlines will be hard to meet. Issues and problems will need to be confronted far earlier in the process than ever before. In my view, however, the objective justifies the change. It is the Tribunal's task to get the claimants, and the Crown, from grievance to settlement as quickly and as fairly as possible.

Mā te wā tonu tātou, ka kite i ngā hua. Noho marire mai koutou katoa.

Joe V Williams
Chief Judge/Deputy Chairperson Waitangi Tribunal

Settling Cross-claims in Taranaki

An urgent Tribunal hearing to consider Ngāti Maniapoto's claims about the proposed settlement of Ngāti Tama's historical Treaty claims relating to Taranaki was held in Wellington, 26 to 28 February 2001. These Ngāti Maniapoto claims (Wai 788 and Wai 800) were heard by a Tribunal consisting of Judge Carrie Wainwright (presiding), the Honourable Dr Michael Bassett, and Professor Wharehuia Milroy.



The Ngāti Maniapoto claimants stated that they have interests in part of the North Taranaki/Mōkau area covered by the Ngāti Tama settlement, and that they would be prejudiced by the provision of redress to Ngāti Tama within that area before Ngāti Maniapoto's claims have been heard by the Tribunal, or before Ngāti Maniapoto enters into settlement negotiations with the Crown for its Treaty claims.

In evidence to the Tribunal, the Crown submitted details of revisions to the Ngāti Tama settlement which had been agreed to by Ngāti Tama and the Crown. The Tribunal considered that, by revising the settlement and by giving a number of undertakings intended to allay Ngāti Maniapoto's concerns about the possible effects of this settlement on their interests, the Crown had conscientiously endeavoured to meet its obligations as a Treaty partner to both Ngāti Tama and Ngāti Maniapoto.

The Tribunal emphasised that if the provision of settlement redress were to be held up wherever there were overlapping- or cross-claims, this would 'thwart the desire on the part of both the Crown and Māori claimants to achieve closure in respect of their historical Treaty grievances. Indefinite delay to the conclusion of Treaty settlements all around the country is an outcome that this Tribunal seeks to avoid'. The Crown has a responsibility, however, to ensure that negative inferences about Ngāti Maniapoto's interests are not drawn from the Crown's recognition of Ngāti Tama's interests in the settlement. In the Tribunal's view, the Crown has taken, or has promised to take, appropriate steps to meet this responsibility. The Tribunal considered that, if the revised settlement with Ngāti Tama were to go ahead, the Crown would retain the capacity to provide adequate and appropriate redress for Ngāti Maniapoto when its settlement is negotiated.

For these reasons, the Tribunal found that the Crown would not breach Treaty principles by going ahead with the Ngāti Tama settlement on the basis of the revised settlement package. It also made a recommendation in relation to one particular site, Te Kawau pa, which is on the coast south of Mōkau. This site was originally to have been vested in Ngāti Tama as part of its settlement, but the Crown has now recognised that, because both Ngāti Tama and Ngāti Maniapoto have strong interests in the site, it would be inappropriate to vest title exclusively in either group. The Tribunal agreed with this position, but recommended that the Crown take an active role in trying to facilitate an agreement between Ngāti Maniapoto and Ngāti Tama by which the interests of both groups are recognised by means of joint ownership and management of the site.

Peoples of Rekohu / Wharekauri / Chatham Islands

Ngāti Tama and Ngāti Mutunga invaded Rekohu (the Moriori name for the Chatham Islands) and decimated the indigenous Moriori five years before the Treaty of Waitangi was signed. Some 900 Ngāti Mutunga and Ngāti Tama were transported to Rekohu on a British trading brig. This cramped invasion was accomplished in two journeys. There were approximately 1,600 Moriori on Rekohu at the time. Moriori, who had the same Polynesian origins as mainland Māori, had outlawed warfare centuries before. This rule of peace was described to the Tribunal as 'Nunuku's law.'

Ngāti Tama and Ngāti Mutunga voyaged 1,000 kilometres from Port Nicholson (Wellington), where they had been under threat. Their true ancestral home was in North Taranaki, from which they had been driven by Waikato Māori during the musket wars.

The invaders from the mainland did not recognise Nunuku's law. Moriori who resisted were killed and the 1,200 to 1,300 survivors were enslaved. Moriori were labelled 'paraiwhara' (blackfellows), by their conquerors. Accounts tell of a brutal servitude where Moriori were forbidden to marry and have children. Invasion, killing and enslavement took a terrible toll so that by the mid-1860s fewer than 200 Moriori survived.

> *I took possession according to ancient custom and I retained possession of the land for myself. I took possession of the land & also the people. Some of those we had taken ran away. Some of those who ran away into the Forest we killed according to the ancient customs[.] [F]rom this I knew the land was ours[.] We kept the people for ourselves. The original inhabitants did not dispute or in any way oppose our having sole possession of the land. It is now for the first time that they dispute our Title to these lands.*
>
> Toenga of Ngāti Mutunga on how he acquired his Kekerione lands 1870[1]

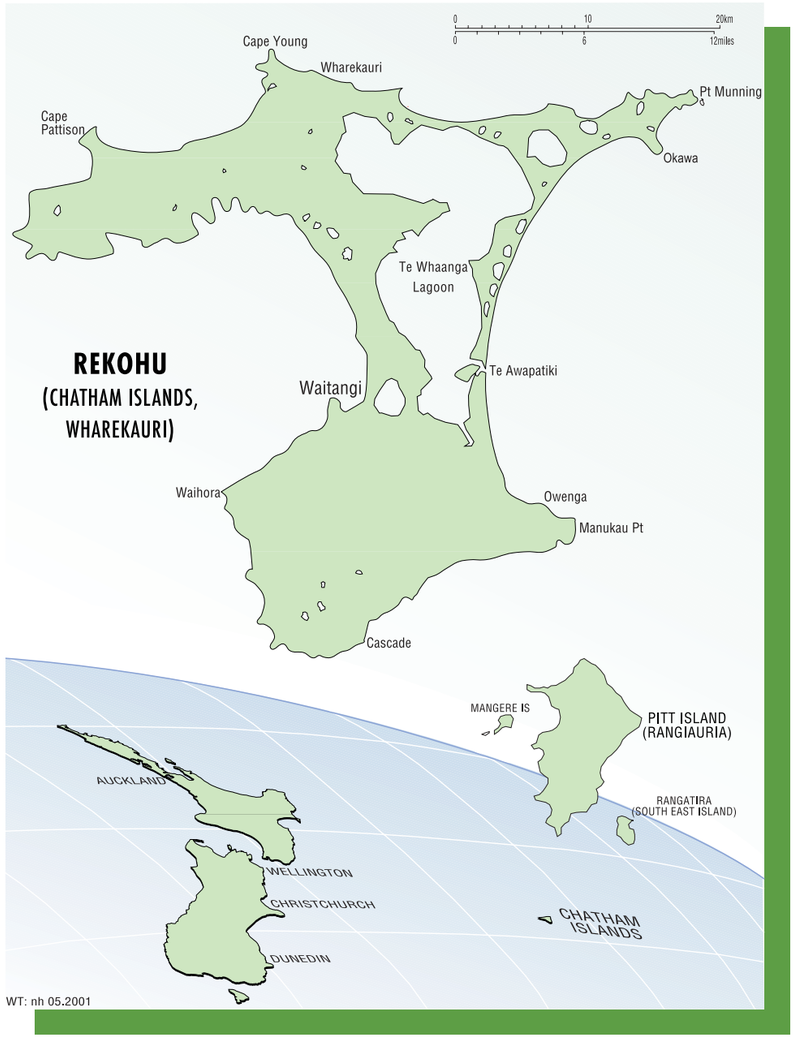
MR and RH Love for Ngā Iwi o Taranaki promoted the initial claim over Chathams fisheries on 23 December 1987. This was followed on 13 February 1988 by M Solomon's claim on behalf of Te Iwi Moriori Trust Board relating to the lands and fisheries of Rekohu. Fisheries claims were subsumed by the national settlement.

Other Findings

Both claimant groups gave evidence to the Tribunal about the negative impact of the system of individualised title ushered in by the Native Land Act 1865.

On the tenure system the Tribunal found that:

- The Crown imposed a tenure system that was opposed by Māori.
- Moriori and Māori were entitled to hold their land according to their own preferred systems.
- The tribal system was not inimical to economic development and Māori had a proven record of adapting to new economic influences.
- Under the new system many people were denied land. Tribal rights were denied, while customary society and norms were seriously affected.
- Moriori and Māori were left with an unworkable title system.
- The introduced title system had considerably impaired Moriori and Māori economic development.
- Consequential absentee ownership has affected Rekohu Moriori and Māori more than elsewhere due to the isolation of the islands from the mainland.



In relation to the claims about Crown administration the Tribunal found that:

- While fisheries are generally outside the Tribunal's jurisdiction more non-commercial reserves are needed on Rekohu to ensure traditional foods for families and for tribal occasions.
- Moriori and Māori have cultural harvest rights, particularly to albatross and mutton-birds, but the Crown has a duty to preserve endangered species and, on the evidence put before the Tribunal, the current restrictions are still necessary.
- The title to Te Whaanga Lagoon should be vested in a body representative of Moriori and Māori.
- Moriori and Māori are tāngata whenua of the Chatham Islands. Both have the right to their own institutions and they should both be consulted.

[1] Chatham Islands Minute Book, 16 June 1870, Moriori Document Bank (Wai 64 ROD, doc C3, 8.2, p 6).

Napier Hospital Report Approaches Completion

The Mohaka ki Ahuriri Tribunal is close to finalising its report on the Napier Hospital claim (Wai 692). The claim was brought by Hana Cotter, Tom Hemopo and Takuta Emery on behalf of Te Taiwhenua o Te Whanganui a Orotu (Ngāti Kahungunu). It focuses on the closure of Napier Hospital in the 1990s and the delivery of state health services to Ahuriri Māori from the mid-nineteenth century to recent times.

After their request for an urgent hearing had been declined, the claimants accepted an invitation in November 1998, from Judge Wilson Isaac, the Presiding Officer in the Mohaka ki Ahuriri regional inquiry, to consolidate their claim into that inquiry. The Tribunal heard evidence from the claimants in June 1999 and from the Crown in July/August 1999. Considerations of urgency, not least the fate of the Napier Hospital site, persuaded the Tribunal to agree to report in advance of its main report on the regional inquiry.

The claimants had raised a broad range of grievances against the Crown, some of them specific and local, others addressing core aspects of the Crown's Treaty obligations to Māori in the health sector. Their specific grievances focus on Napier Hospital. The claimants allege that their tīpuna were promised a hospital on Mataruahou, the hills overlooking central Napier, as part of the price of the large Ahuriri block purchased by the Crown in 1851. They say that by closing Napier Hospital, and not adequately consulting Ahuriri Māori, the Crown breached Treaty principles.

More broadly, the claimants assert that the terms and principles of the Treaty of Waitangi place a general obligation upon the Crown to ensure equal health service standards and outcomes for Māori. This, they say, the Crown failed to deliver for Ahuriri Māori in both historical and recent times.

Concentrating on the health sector reforms of the 1990s, Ahuriri Māori allege that the Crown, through its various health agencies operating in Hawkes Bay, denied local Māori proper workforce participation and effective representation in the decision-making structures. The agencies, they say, did not devote sufficient effort to the national policy goal of improving the markedly poorer health status of local Māori; failed to integrate tikanga Māori into culturally appropriate mainstream services for Māori; and did not involve Māori in monitoring services and health outcomes for Māori. Nor, they assert, did the agencies fulfil the Crown's partnership obligations by giving sufficient assistance to Māori health providers.

In their closing submission, the claimants argued that the Crown, and the health sector agencies, had breached Treaty principles by failing in major respects to protect and improve Māori health outcomes. The Crown vigorously denied the failings and pointed to substantial recent efforts – both in mainstream health services and in promoting Māori health providers. The issues in dispute are likely to make the Tribunal's findings on this claim of broad relevance to the state health sector. ●

Moving Forward

Morris Love

The Tribunal's financial and planning year runs from 1 July to 30 June each year. In this coming year we will see the Tribunal make significant steps in many of the current inquiries. The long running Wellington Tenths inquiry will report early in the year – bringing that inquiry to a conclusion, from the Tribunal's perspective. The first of the casebook/district inquiries, Mohaka ki Ahuriri, will also complete its report later in the year. The inquiries for the Kaipara and Hauraki districts will conclude hearings and go into report writing. The Tauranga Moana inquiry will report on the raupatu aspects of those claims. It is proposed that the Indigenous Flora and Fauna and Māori Intellectual and Cultural Property claim (Wai 262) will complete its hearings this year. A Tribunal report is expected in the later part of 2002. This means a significant part of the Tribunal's work over the past three or four years will come to a conclusion, or at least to a major milestone.

While all this is going on, new inquiries are being fast-tracked to the extent that some that have been started many years ago may well be overtaken by what we call the 'new approach to historical claims inquiries'. The first of these is the Gisborne inquiry which will work rapidly through its preliminary stages and go into a compact series of hearings finishing by June 2002. The Wairarapa and Urewera inquiries will follow a similar track as will any new inquiries as they come on stream.

In the meantime, the northern South Island inquiry awaits a hearing on procedural matters in the Court of Appeal before it can recommence its progress. The central North Island districts of Rotorua, Taupo, and Kaingaroa are being readied for hearing in an intensive research process. Other districts such as the King Country, Whanganui and the East Coast, are also in the research phase and will be slotted into the hearing programme as they become ready.

Overall, this year is a major one for the Tribunal. Many claimant groups will be readied to enter negotiations for the settlement of their claims with the Government. The results of the changes to the way claims are dealt with are now becoming evident and the pace of settlements will step up. The plan developed over the last five or so years is working and needs to be carried further forward.

Morris Te Whiti Love
Director, Waitangi Tribunal

Two New Women Judges

Judges Caren Wickliffe and Carrie Wainwright have been appointed to the Māori Land Court and to the Waitangi Tribunal. The two judges are set to make a positive impact on the work of both organisations. Both new judges have had outstanding careers to date.

Judge Wickliffe is the kaiwhakawā of the Tai Rāwhiti Māori Land Court based at Gisborne. She has been a law lecturer at the University of Waikato and at Victoria University of Wellington. A specialist in international human rights, Judge Wickliffe was a Harkness Fellow to the USA in 1991–2. Before being appointed to the bench, Judge Wickliffe also acted as legal counsel for Treaty claimants.

Caren Wickliffe

Judge Wainwright is the kaiwhakawā for Te Waipounamu and the lower North Island and is based in Wellington. She has been with law firm Buddle Findlay, where she practised as a litigation lawyer for 13 years – ten of them as a partner. During this time she also worked on secondment to Treasury and the Crown Congress Joint Working Party. Judge Wainwright specialised in judicial review and Treaty of Waitangi Law, acting extensively for Māori parties.

Carrie Wainwright

The judges' appointments were among the announcements made at the Waitangi Tribunal Twenty-fifth Anniversary Hui.

New Staff

This month the Tribunal welcomes four new staff.

Wayne Taitoko

Wayne Taitoko has been appointed registrar of the Waitangi Tribunal. Wayne was formerly a Tribunal research officer assisting on the Urewera, Whanganui and East Coast inquiries. Wayne is from Ngāti Maniapoto. He brings a wealth of experience as a former registrar of the Waikato Māori Land Court. He also worked in the Tainui research unit prior to the historic Tainui settlement. Wayne is completing a Masters Degree in Public History.

'I am excited about joining the claims administration section of the Tribunal at a time when the Tribunal is moving into its new approach to handling Treaty claims. We in claims administration will work actively to ensure that the administrative support to the Tribunal is of the highest possible quality.'

Three exciting young staff have joined the office of the Waitangi Tribunal. They are lawyers, **Ramari Paul** and **Nathan Milner**, and research officer, **Chappie Te Kani**.

Ramari and Chappie worked together at the Ministry of Justice prior to joining the Tribunal. While there, the pair contributed to a 232-page book, *He Hinatore ki te Ao Māori*, which has just been published.

Nathan worked formerly for the Office of the Ombudsman. He says he likes 'the people, the kaupapa and the opportunity to work at the Tribunal'.

Nathan Milner, Ramari Paul and Chappie Te Kani

Chappie is working on the Whanganui land claim as well as completing his studies in law and commerce.

Nathan and Chappie are former students of Gisborne Boys High School. They are both of Ngāti Porou descent, and Chappie is also Te Aitanga a Māhaki. Nathan has been working on the Gisborne inquiry and the new approach to speeding up the hearing of Treaty claims.

Ramari works as research counsel for the Tribunal. She is of Te Arawa and Ngāi Tahu descent. 'I enjoy working in close proximity to the judges of the Māori Land Court and the Waitangi Tribunal, and getting a better idea of the Treaty claims process,' she says.

Continued from page 1

The Tribunal also found that the criteria set by the Crown for the Native Land Court were inappropriate for Rekohu. Moriori were given title to only 3 percent of Rekohu lands. Relevant considerations in coming to this finding were:

- The ancestral right was with Moriori and Māori were recent invaders.
- The invasion resulted from the ill effect of contact with European technology.
- Most Māori had left Rekohu and returned to their ancestral home, Taranaki. When the Court sat in 1870, Moriori predominated in Rekohu.
- Prior to the Court hearing, Moriori had petitioned the Government to apply the principles of British justice to their case to relieve them from the consequences of their enslavement.
- If custom were to be applied to the Native Land Court determination it was not clear which custom was to be applied – the Māori 'right by arms' (so-called) or the Moriori 'right by peace'.

THE TRIBUNAL

The Tribunal consisted of presiding officer Judge Eddie Durie, Professor Gordon Orr, John Kneebone and Te Makarini Temara. Te Makarini Temara died on 21 October 1994. The hearings began on 9 May 1994 and concluded in March 1996. ●

Protecting Intellectual and Cultural Property

The Indigenous Flora and Fauna and Māori Intellectual and Cultural Property claim, commonly known as Wai 262, is one of the largest and most challenging claims ever to come before the Waitangi Tribunal.

Del Wihongi, the principal claimant, presenting evidence to the Tribunal.

There are six named claimants from six different tribes scattered from the far north to the top of the South Island. They have filed three large statements of claim. The first hearing was held in September 1997. So far, the Tribunal has heard all of the claimants' traditional evidence, as well as submissions from various international experts.

WHAT IS THE CLAIM ABOUT?

At the most general level the claim is about the Crown's failure to honour the Treaty guarantee that Māori would retain rangatiratanga over their taonga. Or, that Māori would retain the right to manage and control their highly prized possessions. The taonga affected by the Wai 262 claim broadly fall under the categories of mātauranga Māori (knowledge) and indigenous flora and fauna.

In asserting that the Crown has failed to protect Māori interests in their taonga, the claimants identify a number of government policies and statutes that have resulted in the decline of their authority and in the taonga themselves. In addition to flora and fauna, taonga affected by Crown actions include: rongoā Māori (medicine), Māori performing arts, Māori visual arts and images, sacred sites, te reo Māori, and other cultural practices. The claimants allege that a consequence of these actions is that Māori have in many cases lost their mātauranga Māori in respect of their taonga (including flora and fauna). A major issue is the failure of the Crown to afford adequate protection for Māori intellectual property. For example, iwi have no ability to prevent people from using taonga such as haka, Māori medicinal knowledge, or images of sacred sites for commercial purposes.

The way in which the Crown has assumed the right to manage and control indigenous flora and fauna comes under serious attack in the claim. The claimants assert that under the Treaty they have rights to manage and control species of indigenous flora and fauna and the ecosystems in which they occur, as well as rights to the genetic material. This means that at issue in the claim are rights and responsibilities related to the protection, control, conservation, management, development, propagation, sale, dispersal, and use of indigenous flora and fauna.

The claims call into question the Crown's right to govern in respect of Māori taonga. A significant grievance of the claimants is the fact that Crown policy on many matters related to intellectual property and conservation has been driven by international laws and agreements about which Māori have not been consulted.

THE PROCESS FROM HERE

The Tribunal is proposing to hear evidence from a range of experts this year. It will also hear submissions from third parties such as plant propagators and conservation groups who believe they may be affected by the possible settlement of the claim. Once it has heard from all parties (expected to be by March 2002) the Wai 262 Tribunal will issue an interim report on the claim to be delivered to the Government by October 2002. In a memorandum issued to all parties last month, the Wai 262 Tribunal stated that by their issuing an interim report focused on the primary issues, the claimants' prospects of achieving a negotiated settlement in priority areas would be accelerated.

Further Information

The Tribunal has commissioned six major research reports to elucidate on matters before it in the Wai 262 claim. The reports are to be published by the Waitangi Tribunal and will be available for purchase from the Tribunal from early July 2001. ●

Waitangi Tribunal

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