

TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

TE MANUTUKUTUKU

Kia puta ki te whai ao ki te ao mārama

From the world of darkness moving into the world of light

Issue 70



Waitangi Tribunal

Kei Roto | Inside

Five Reports Released	1
From the Chairperson	2
From the Director	2
Dr Ranginui Walker	3
Sir Graham Latimer	3
Interview with the Chief Justice	4
Maui's Dolphin Report	6
Whanganui Land Report	7
Te Urewera Report Part 6	9
Trans-Pacific Partnership Report	11
Remaining Historical Claims	11
He Kura Whenua Ka Rokohanga	12

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Five Reports Released

IN THIS issue we highlight the completion of two long-running district inquiries, Whanganui Land and Te Urewera, and three recent reports on urgent or priority claims. We mark the passing of two illustrious leaders in te ao Māori and the Waitangi Tribunal, Ranginui Walker and Sir Graham Latimer.

Our feature article, held over from the 40th anniversary issue, is an interview with the Right Honourable Dame Sian Elias, the Chief Justice. Dame Sian relates her early experience as a lawyer for claimants in Tribunal inquiries in the 1980s. She also discusses the impact of the Tribunal's reports on Māori Treaty rights and the status of the Treaty of Waitangi, and gives her views on the future role of the Tribunal.

The Tribunal's inquiries into Whanganui Treaty claims began in the early 1990s. Its first inquiry, into river claims, led to the release in 1999 of the *Whanganui River Report*. A district inquiry was then convened to hear claims relating to land and other issues. On 22 October 2015, the Tribunal released and handed over its report, *He Whiritauunoka: The Whanganui Land Report*, in a ceremony at Pūtiki in Whanganui.

Two months later, on 22 December 2015, the Tribunal released the sixth and final part of its Te Urewera report, which covers the environment and waterways, specific claims not covered elsewhere, and socio-economic issues. Together with the five previous parts of the report, this inquiry has now completed its reporting on the claims heard. The six parts will now be prepared for publication.

Within the last few months the Tribunal has also released three reports on claims granted urgency or priority. All addressed current issues of government policy. The first, heard under urgency, addressed the proposed reform of Māori land law. The Tribunal's report, *He Kura Whenua Ka Rokohanga*, was released on 11 March 2016, shortly before the reform legislation was introduced into Parliament. The second, also heard under urgency and released on 5 May 2016, concerned the protection of Treaty rights under the Trans-Pacific Partnership Agreement. The third, on the protection of the Maui's dolphin, a specific issue in the Te Rohe Pōtae district inquiry, was given priority and released as a separate report in May 2016. □

From the Chairperson



THIS issue of *Te Manutukutuku* conveys the pace of change across a diversifying Tribunal inquiry programme. The final months of 2015 saw the completion of two of the

Tribunal's largest and longest-running district inquiries, Whanganui Land and Te Urewera. Their reports go to the heart of historical claims held by the affected Māori communities for past generations. Meanwhile, the four current district inquiries, involving some 800 claims, are all progressing well along their paths – Te Rohe Pōtae towards issuing its report, Te Paparahi o Te Raki towards completing its hearings by mid-2017, Taihape towards commencing its hearings in early 2017, and Porirua ki Manawatū towards producing its evidential casebook by late 2017.

In addition, three reports released by the Tribunal between February and May reflect

the Tribunal's engagement with claims concerning current policy issues that meet the high threshold for urgent response. The first addresses the proposed reform of Te Ture Whenua Māori Act 1993, the second the Trans-Pacific Partnership Agreement. A third, on the protection of the endangered Maui dolphin, was released as a separate report by the Te Rohe Pōtae panel in light of the immediacy of the alleged risk to the claimants' interests as kaitiaki. All three reports are covered in this issue of *Te Manutukutuku*.

The first of the Tribunal's new kaupapa inquiries, into the claims of military veterans, will be completing its first round of hearings, of the personal testimony of veterans and their whānau, in Christchurch in July. This follows hearings in Gisborne, Hastings, Northland and Whakatane. Meanwhile, preparatory work for the Tribunal's consideration of remaining historical claims that have fallen outside the district inquiries is now under way, with a first consultative hui being held in

late June in Ōpōtiki for claimants from the North-Eastern Bay of Plenty.

The Waitangi Tribunal is in high gear across all the inquiry pathways set out in its *Strategic Direction 2014-2025*, with its main focus on the timely completion of inquiries into historical claims which the claimants wish to bring before the Tribunal.

I would also like to extend a warm welcome to Grace Smit, the new Director of the Waitangi Tribunal Unit. Grace comes to us from Special Jurisdictions in the Ministry of Justice and is of Ngāti Kahungunu descent. She is passionate about the work of the Waitangi Tribunal and I look forward to working with her as the Tribunal progresses towards its strategic goals.

Chief Judge Wilson Isaac
Chairperson



From the Director



- Ko Whakapunake te maunga
- Ko Wairoa nga awa
- Ko Takitimu te waka
- Ko Ngāti Kahungunu tōku iwi
- Ko Ngāti Matangirau tōku hapū
- Ko Whaakirangi tōku marae
- Ko Rose Robinson rāua ko Bill Smit ōku mātua
- Ko Grace Smit tōku ingoa

TĒNĀ KOUTOU. It's a privilege to write this piece for *Te Manutukutuku* as the new Director of the Waitangi Tribunal Unit. The work of the Tribunal has always been of significant interest to me and was one of the reasons I embarked upon my undergraduate degree in history at Auckland University in the early 1990s. Several years later, having studied under inspiring figures such as Keith Sorrenson, Judith Binney and Hugh Laracy, I completed my masters and was fortunate enough to be offered a teaching position myself. My career since then has taken many paths but my training in the history discipline has continued to stand me in good stead. I suspect it will similarly be the case in my new position.

Although only a few weeks into the role I am impressed and inspired by the commitment and calibre of the team working in the Waitangi Tribunal Unit. This is an important time for the Tribunal as it moves towards

completing its district inquiries and turns its attention to remaining historical claims and to kaupapa and contemporary claims. I am looking forward to working proactively with Chief Judge Isaac, the presiding officers, and members of the Tribunal to ensure the work of our unit meets their requirements.

Finally, I would also like to acknowledge and thank my colleague Julie Tangaere who, over the past three years, has performed the role of Acting Director for the Unit while also working as Director of the Māori Land Court. Thank you Julie for your leadership of the unit over this time.

Kia ora rā.

Grace Smit
Director



DR RANGINUI WALKER DCNZM (1932-2016)



On 3 March 2016, Tribunal members and staff, past and present, joined thousands of mourners at Ōrākei Marae to farewell long-serving Tribunal

member Dr Ranginui Walker DCNZM, who passed away on 29 February.

Dr Walker was born in the remote Whakatōhea kainga of Waiaua, east of Ōpōtiki. Waiaua was a tightly-knit community within the Opape Native Reserve, which survived in Māori ownership following the 1865 Eastern Bay of Plenty raupatu. In his 2007 tribal history *Opotiki-Mai-Tawhiti*, Dr Walker described the Reserve as consisting of 'small elongated, individually owned, uneconomic units [that] reduced Whakatōhea to poverty'. He was thus a child of both the raupatu and the Great Depression of the 1930s.

Having started his career as a primary school teacher, Dr Walker continued his academic studies, completing a doctorate at the University of Auckland. During the 1970s he became a nationally renowned spokesperson for Māori. From 1969 he served as secretary of the Auckland District Māori Council and as its chairperson from 1974 to 1990. During his lifetime he published many books and papers on Māori education, history and politics, and in 1993 was appointed professor and head of department in Māori Studies at Auckland University, later serving as its first pro-Vice Chancellor (Māori).

Dr Walker was recognised as one of the nation's most influential commentators, educators and Māori leaders. In 2001 he was made a Distinguished Companion of the New Zealand Order of Merit. At his passing, Prime Minister John Key said Dr Walker was 'not only an insightful commentator on important historical and contemporary issues, but was a tireless and passionate advocate for Maori'.

In 2003, Dr Walker was appointed as a member of the Waitangi Tribunal. Over the next dozen years he served as a member of three Tribunal panels conducting large district inquiries into numerous historical and contemporary claims. He saw the completion of the Wairarapa ki Tararua (2010) and Whanganui reports (2015) and the release of the Te Paparahi o Te Raki (Northland) Tribunal's report into the meaning and effect of He Whakaputanga/the Declaration of Independence and Te Tiriti/the Treaty of Waitangi (2014).

Interviewed in 2015, Dr Walker summed up his lifetime's experience:

I have great optimism that things are getting better. In the last quarter century, there's been a tremendous cultural revolution and renaissance of Maori people. I've lived through that, been a part of the revolution, the struggle for a place in the sun. We are a much better society now than we were 30, 40 years ago. It's all happening. □

SIR GRAHAM LATIMER (1926-2016)



Sir Graham Latimer, who passed away on 7 June 2016, had a long and distinguished career advancing the interests of Māori on multiple fronts.

Among many achievements, Sir Graham was one of three founding members appointed to the Waitangi Tribunal after the passing of the Treaty of Waitangi Act 1975, serving from 1976 through to 1985. He later said that in the first few years the Tribunal 'operated out of a billy can'.

Sir Graham was involved in all of the Tribunal's early landmark inquiries, notably Motunui-Waitara, Kaituna River and Manukau. They focused strongly on the impact of the environmental degradation of waterways and harbours on Māori

communities. They also reached deeply into the Māori experience of colonisation and land loss, demonstrating a context of historical grievance that helped lead in 1985 to the extension of the Tribunal's jurisdiction back to 1840.

Sir Graham's last inquiry concerned the state of te reo Māori. The Tribunal's findings, in its report released in 1986, contributed to the recognition of te reo Māori as an official language and to major reforms in state support for sustaining te reo Māori.

After finishing his service as a Tribunal member, Sir Graham continued to influence the recognition of Māori Treaty rights. Most prominently, he led the New Zealand Māori Council in a series of high-profile court cases contesting government policies of the late 1980s. Among other things, this litigation helped establish the current legal status of the Treaty of Waitangi, through the Court of Appeal's articulation of Treaty principles in its *Lands* judgment. Later,

Sir Graham reflected that up until 1987 'the Māori dimension in New Zealand law was understated... After the Appeal Court decision it attained a position of equality'.

Court action also resulted in settlements involving the Waitangi Tribunal being given binding recommendatory powers over State-owned Enterprise and Crown forest land, as well as the creation of the Crown Forestry Rental Trust, which in 1990 Sir Graham went on to chair. With Sir Graham at the helm, the trust became a principal funder of claimants' research, hearing, and negotiations' costs.

Sir Graham was a claimant in many Waitangi Tribunal inquiries, especially in his capacity as New Zealand Māori Council president, including the radio frequency and broadcasting claims. More recently, he was a claimant in his own right in the current Military Veterans Inquiry, having served in J-Force at the end of World War 2. □

A Judicial Perspective: An Interview with the Chief Justice, The Right Honourable Dame Sian Elias



DAME Sian Elias was appointed the Chief Justice of New Zealand in 1999. Among many achievements in her legal career, she represented Māori litigants in a number of high-profile court cases, including the 1987 *Lands* case, which saw the Court of Appeal articulate the principles of the Treaty for the first time. She also represented Māori claimants in a series of Waitangi Tribunal inquiries, beginning with Manukau in the early 1980s.

Dame Sian talked to *Te Manukutuku* about her experience representing Māori before the Waitangi Tribunal, and the Tribunal's achievements. The Tribunal, she says, helped contribute to a significant development in public understanding and acceptance of the Treaty of Waitangi and Māori rights:

I do think that we'll look back at the setting up of the Tribunal as the start of a huge shift in public attitudes. That was because the Tribunal acted as a bridge to understanding. It made the concepts [of the Treaty] recognisable, particularly to lawyers of course, but also to the general public, and exposed the injustices, which we hadn't really understood.

Public – and particularly Pākehā – knowledge of the Treaty was very limited when Dame Sian began practising law:

It's really hard to recapture what it was like 50 years ago. I wrote my dissertation on New Zealand constitutional law and I didn't mention the Treaty once. I had never read the text of the Treaty until I did the Manukau hearing. And I would not have been the slightest bit unusual, because when I spoke at a legal foundation AGM after the *Huakina* decision came out [in 1987], I asked for a show of hands and nobody had read the text of the Treaty. A hundred lawyers, who were all obviously quite well disposed. So I think that people don't realise what a huge change there has been, and I credit the Waitangi Tribunal with that, and in particular Eddie Durie, because of those ground-breaking decisions – Motunui, Manukau and Kaituna. They have just been transformative of our whole legal system and our cultural understanding.

It is critical to understand, she says, 'how impoverished we were in our legal thinking' before the Waitangi Tribunal began to make its mark. She described what it was like preparing for the important *Huakina* case, in which the High Court identified the Treaty as 'part of the fabric of New Zealand society' and held that the Treaty and Māori values were matters to be considered under the Water and Soil Conservation Act 1967:

When I did the *Huakina* case I was so worried about arguing about the Treaty

in the courts that I went back and read all the old cases. Every one that had a Māori litigant I looked at. And there was a lot of invocation of the Treaty in the early cases. Māori kept going to the courts because they had this expectation that what they were putting forward was right.

But after Chief Justice Prendergast's ruling in 1877 that the Treaty was a 'simple nullity' and the Privy Council turned down Te Heu Heu Tukino on the grounds that the Treaty was not legally binding unless incorporated into New Zealand statutes, 'I think everyone lost heart. And then we had years of people forgetting, so that when we did the Manukau case people thought the claim was preposterous.'

It's really hard to imagine now, but people thought talking about the Treaty was something that had been invented by a bunch of wild-haired protestors. I remember Carmen Kirkwood saying to the Tribunal very emotionally that Māori people knew that the Treaty had always been talked about on the marae, and so on, but they'd given up going outside to talk about it. And so when people did talk about the Treaty, people were incredulous. It was that sort of thing that the Waitangi Tribunal broke down.

This is not to say that Dame Sian has agreed with all of the Tribunal's decisions:

I was always quite disappointed with the *Manukau Report* in some respects

because the Tribunal was focused on how to translate this [the Treaty] into modern conditions. So it was the Tribunal that came up with the partnership notion, which I've always been slightly uneasy about, simply because in some ways if there is a Crown obligation it's something that you're entitled to expect will be performed. But if you are importing a well-developed concept like partnership, you are importing quite a lot of accommodation, and your position does inevitably get eroded by requirements of reasonableness and so on.

Dame Sian explains that her thinking on this matter is primarily a question of principle:

I used to say in Treaty litigation to clients that losing wasn't necessarily the worst outcome. That acquiescing in something that was wrong might be the worse outcome, because things do evolve. And if you have given away something that actually could have developed over time, you might have set us on a different course.

While Dame Sian is unsure what the long-term consequences of some of the Tribunal's early reports may be, particularly the articulation of the partnership principle, she is certain that they had a profound effect on the courts, which in turn helped shift wider public attitudes towards the Treaty:

It's too early to tell really whether some of these [Tribunal reports] have been entirely beneficial tracks that we have gone down. But because the Tribunal provided the bridge, and translated Treaty issues, the courts realised that these were concepts that resonated in general law as well.

In the long run, Dame Sian considers that Maori should be able to pursue 'claims of right' in the courts, rather than in the Waitangi Tribunal:

It's quite a strong strand with a number of judges that the courts should not be picking up claims of right, because we have a better process which is the Waitangi Tribunal process. I've taken the view that if you have got claims of right you should put those forward in the court, and the Waitangi Tribunal can provide an awful lot of context to use in court processes. If you have a claim of right, that's not a political claim. But that's not necessarily a view that is widely supported.

So I think we're still working that out. But I have no doubt that in those early years in particular the courts would never have responded without the Tribunal having shown them the way – without, in particular I have to say, Eddie Durie.

The work of the Waitangi Tribunal, Dame Sian explains, 'has been very illuminating for lawyers about the inadequacies of our legal order':

It says something about the need to make sure that our legal order is fit for purpose, not just for Māori people but for everybody. When you think about it, some of the worst injustices were actually achieved by law, through taking land by law, but without the ability for people to participate in it. Law's not bad if you can participate, but if it's something that's just done to you, then it's an instrument of terrible injustice.

Dame Sian considers nevertheless that the law has allowed some space for Māori:

We have had accommodation over time. That's why mantra like 'one law

for all' are pretty ignorant. Māori land is an accommodation, based on an entirely different value structure than we have for general land. But there have been plenty of other examples. I think a degree of pluralism within any legal system is not anything to be worried about. It's not contrary to basic principle, as long as it's properly thought through.

The work of the Waitangi Tribunal was particularly important when it came to taking the 1987 *Lands* case to the Court of Appeal. 'Without the Waitangi Tribunal reports, I think we would have been faced with the sort of incredulity that people had reserved for the Treaty for a long time.'

The result of the case was a negotiated settlement which gave the Tribunal powers to order the return of State-owned Enterprise land to Māori. But there was little indication at that point of the Treaty settlements that began to be made from the mid-1990s onwards:

Did we think there would be much in the way of outcome? Well, everyone thought there would be recommendations for the return of land. As people like Bob Mahuta said – as land has been taken, land should be returned. It was something that was of real concern that the SOE Act would mean that there would be no Crown land to make reparation from. But I don't think anyone foresaw the huge exchange of assets that came about.

And this is really where I say that the Waitangi Tribunal has been so critical in acting as a bridge. It didn't take well-meaning people much once they read those reports to realise that we had to do something about these injustices. So people like Jim Bolger – it was incredible the way they understood they had to face up to this or we wouldn't go anywhere as a country.

The changes that have resulted leave Dame Sian cautiously optimistic about the situation today:

Things are more complicated, but there has been a huge transfer of the economic base that Eddie Durie always said had to be achieved. I suppose I hung out so much with an older generation of Māori leaders who didn't talk in those terms, so in some ways I have a slightly purist view.

The great thing that I remember from those Waitangi Tribunal experiences was the talk. And it was lofty talk. It wasn't about money, it wasn't about assets. It was about land, but it was about what the land meant and how you didn't go around the country just seeing the roads and the fields and the fences – the features of the land all meant things.

Of course the whole world has changed so much. In a way I think I was really lucky to be involved at a time when some of the older people were still around. Well, you have to let go. They've gone. You have to move on. And Māori have always been so forward looking. That's one of the exciting things about New Zealand. It was a decision to embrace the modern. So there's no point of being nostalgic, [but it is important] to remember what the values were.

So I'm very pleased to see the success that everyone's making. I just hope we keep faith with the noble ideas too. I'm sure we will.

What of the Waitangi Tribunal in the future?

I think the Tribunal will have to evolve. I think it has evolved enormously. It has had to gear up so much for the historical claims and for the settlement processes. Maybe it can return a bit more to a smaller body, and maybe a bit less lawyer-led, which I think it had to be when it was the necessary background to the settlement process and the historical claims had to be processed. But in a way I would like to see it shift back a little bit more.

It is probably the case that there is always going to be the need for some creative thinking to help governments address their obligations under the Treaty. So I think there is a role for the Tribunal. But I would hope that some of the matters that have had to go to the Tribunal will now be sufficiently recognised as claims of right that they can be addressed by the courts. □

Maui's Dolphin Report

Martin Stanley (Department of Conservation Te Papa Atawhai)



Maui's dolphin.

IN May 2016, the Te Rohe Pōtae Tribunal released a priority report on the Māui's dolphin. The report addressed the claims of Ngāti Te Wehi and Ngāti Tahinga, who alleged that the Crown's policy in relation to the endangered Māui's dolphin (the Threat

reporting on these claims, in response to the claimants' fears that any delay would increase the dolphin's risk of extinction.

The Tribunal found that the Māui's dolphin has become a taonga to the claimants due to its endangered status,

Management Plan) did not adequately protect the dolphin from likely extinction. Nor, in the claimants' view, did it give due regard to their interests as kaitiaki.

The Tribunal is in the process of preparing its district report but agreed to prioritise

and the claimants' kaitiaki interests deserve protection under the Treaty. But the Tribunal also found that, though the prospect of the dolphin going extinct was of grave concern, the evidence did not establish that the Māui's dolphin is a taonga of 'such longstanding or particular cultural significance that it must be protected at all costs'. Nor did the Tribunal consider that the Crown's process for deciding its policy towards the Māui's dolphin was unreasonable or lacked good faith. The Crown was entitled to take into account wider social, cultural, and economic considerations, including the Crown's Treaty duties to Māori with fisheries interests in the dolphin's habitat. □

The Whanganui Land Report

ON 22 October 2015, the Waitangi Tribunal released *He Whiritaunoka: The Whanganui Land Report*, its report on Whanganui land claims, and handed it over at a ceremony held at Pūtiki in Whanganui.

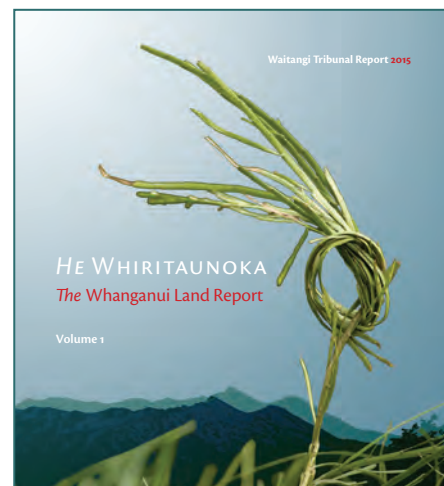
The report's release marked the conclusion of the Tribunal's inquiry into 83 Treaty claims by Māori of the Whanganui district, which covers an area stretching from the mouth of the Whanganui River to just north of Taumarunui. It also takes in lands around the Whangaehu River and Waiōuru in the east and the catchment area of the Waitōtara River in the west. A Tribunal report on the Whanganui River was issued in 1999.

The Tribunal inquiry panel comprised Judge Carrie Wainwright (presiding), Professor Wharehuia Milroy, the late Professor Ranginui Walker, and Dr Angela Ballara. The first hearing was held jointly with the National Park inquiry panel in February 2006. Then followed 18 weeks of hearings between August 2007 and December 2009, in which

the Tribunal heard over 200 witnesses give their evidence.

The earliest claim considered, Wai 37, was lodged in March 1987 by Margaret Makariti Poinga on behalf of Ngāti Hikairo. Notable claims included Wai 48, the claim of Te Aroha Ann Ruru Waitai concerning Waimarino and other lands, and Wai 1393, the claim of Te Whare Ponga Taumatamahoe Incorporated Society and Te Whare Ponga Whanau Trust, concerning the Taumatamahoe and Waimarino land blocks, burial grounds within the Whanganui National Park, and the Whanganui River Trust Act 1891.

The Tribunal investigated the circumstances of the signing of the Treaty of Waitangi in Whanganui. Few Whanganui chiefs signed the Treaty and the Crown did not discuss the terms of the Treaty in depth with them. The Tribunal considered the subsequent Treaty relationship between Māori and the Crown, and the related question of sovereignty, concluding that on 'any objective



assessment of how power came to be exercised in New Zealand after 1840, sovereignty did pass to the Crown.'

The report addresses the central issue of Crown purchase of Māori land. A particular focus is the Crown's purchase of 89,000 acres of southern Whanganui land in one large block in the 1840s, and the 450,000-acre Waimarino block in the 1880s. The Tribunal found that the Crown did not meet its own standards of fair dealing in many of its transactions, and at times acted with deception and even illegally.

In making its findings about the Crown's land purchases, the Tribunal focussed on the Treaty principle of good government, whereby the Crown needed to ensure that purchasing was conducted between willing buyer and willing sellers; that there was a clear identification of the land to be sold and the persons whose interests were affected; and that there was agreement on price. The Tribunal was of the view that

compliance with these rules was such a basic element of just and fair dealing that, where there was serious non-compliance, it was in and of itself prejudicial to Māori. Even if there is no ascertainable financial loss, there will be



The ceremony at Pūtiki marking the release of the Tribunal's report on Whanganui land claims, 22 October 2015. Judge Wainwright in centre, panel members Dr Ranginui Walker and Angela Ballara visible to the right.

damage on an emotional, psychological, and spiritual level. People who are manipulated and cheated are humiliated and reduced. There is no room for such conduct in a nation founded on ideals of justice and fairness.

The report also addresses the Crown's acquisition of land for conservation purposes through the creation of scenic reserves along the Whanganui River, and the history of the Whanganui National Park. The Tribunal found that the land for the park was acquired in breach of the Treaty and that the Crown should have acted in partnership with Māori when setting up and managing the park.

The Tribunal considered in depth the Crown's role in land development, including the history of native townships, land vested in trustees for leasing to farmers, and the development of Morikau Station. The Tribunal found that the Crown successfully encouraged Māori to transfer their land to trustees for development in Whanganui, but then implemented policy and legislation that favoured the rights of farmers who were leasing the land rather than the Māori owners. As a result, the expected benefits of land development for Māori were largely unrealised.

The Tribunal also investigated many small, local issues in the district,



Members of the Whanganui Tribunal panel at the final hearing at Pūtiki, December 2009. From l to r: Professor Wharehuia Milroy, Judge Carrie Wainwright, Dr Ranginui Walker, Dr Angela Ballara.

writing in its report that 'it is these kinds of grievances – small in scale, but personal and local, and often relatively recent – that often rankle most with claimant communities'. During the inquiry, the Tribunal tried a new approach to such issues. Claimants were given the opportunity to identify issues that the Crown might resolve by a 'discrete remedy', outside of usual Treaty settlement processes.

In practice, only one of the issues resulted in a discrete remedy, when the Crown returned Pūtiki Rifle Range to Māori ownership in 2009. However, four chapters of the report are dedicated to 31 local issues. Most concern public works, but there are also issues to do with local names, environmental management, and taonga

tūturu (cultural heritage objects). Claims about health, education, and the socio-economic status of Māori in Whanganui are also covered in the report.

Another feature of the report is four sections called 'matapihi' (windows), interspersed between the main chapters. The matapihi highlight issues of unique importance to the Whanganui claimants: the spelling of the name of Whanganui city; the failure to reserve land at Pākaitore on the banks of the Whanganui River; Māori ownership of two land blocks at Murimotu and the problem of wilding pines in the centre of the district; and the history of Waikune Prison.

The Tribunal recommended that the Crown take active steps to provide redress for the many breaches of the Treaty in settlement negotiations. In its introductory chapter, the Tribunal explained that the report's Māori title signifies peace in Whanganui:

We have called this report *He Whiritauonoka: The Whanganui Land Report* in the hope that it will mark the beginning of the next stage in the lives of Whanganui Māori, in which they will move beyond conflict with the Crown, and raruraru (difficulties) of their own, to fulfil their aspirations for a future full of harmony, unity, and cultural revival. □



Tangata whenua welcome manuhiri at Wharauora marae, Taumarunui, for a Tribunal hearing in September 2008.

Te Urewera Report: Sixth and Final Part

THE sixth and final pre-publication volume of the Te Urewera report was released on 22 December 2015. It covers the environment and waterways; specific claims not covered elsewhere; and socio-economic issues.

The members of the Tribunal were Judge Patrick Savage, Dr Ann Parsonson and Joanne Morris. Kauri member Tuahine Northover passed away before the report was completed. Work has now begun on turning the pre-publication volumes into a published report.

Environment and waterways

In the environment and waterways chapter of the report, the Tribunal found that the Crown has a duty to actively protect Māori ownership and use of forests, including the flora and fauna within those forests. It largely failed in this duty, particularly in relation to the introduction of and failure to control foreign species and in the damage done to traditional food sources such as kererū and tuna (eels), both taonga species. The Tribunal found that the Crown was in breach of the Treaty and its principles for prohibiting the exercise of the Treaty right to take kererū, without consulting the peoples of Te Urewera, who depended on birds for their physical and cultural survival and well-being, and without determining whether the prohibition was truly necessary, or regularly reviewing the need for it. Because the Crown had failed to enter into dialogue with the claimants to

ensure the protection and enhancement of the kererū population, and to consider whether a culturally appropriate and limited take might

be sustainable, it remained in breach of Treaty principles at the time of the Tribunal's hearings.



The junction of the Mimiha and Waihou streams, which are tributaries of the Ōhinemataroa (Whakatāne) River, near Ruatāhuna. The river derives its name from the Tūhoe ancestress Hine-mata-roa of Ngā Pōtiki and is a taonga of great significance to Tūhoe.



Kererū.

The chapter also addressed rivers and their ownership, finding that the rivers and streams of Te Urewera are taonga to the hapū and iwi of Te Urewera, who exercised mana and tino rangatiratanga over their waterways. The Crown should have protected this exercise of tino rangatiratanga, but did not do so.

The Tribunal found that law concerning river ownership is unclear and confusing, to the point where no one knows who legally owns many of the Te Urewera riverbeds today. Despite this, for many decades the Crown asserted ownership over the rivers in Te Urewera. Its actions, policies and laws had the effect of expropriating the rivers from their customary owners without their knowledge or consent. Both the assumption of ownership and the lack of legal clarity are breaches of the principles of the Treaty, the Tribunal found. It recommended that the New Zealand law of waterway ownership be reformed as a matter of urgency to bring it into consistency with Treaty principles.

Specific claims

The specific claims chapter addressed public works, rating, taonga tūturu (cultural heritage objects), and three claims involving schools. The Tribunal found several Treaty breaches, most of them involving broken promises on the part of the Crown. It also found breaches where the Crown received gifts of taonga tūturu and then lost track of them.

In relation to rating, the Tribunal found that imposing rates on Māori land is not a breach of the Treaty, so long as those owning or using the land receive a reasonable level of services and amenities in return; that rates assessment takes into account past contributions by Māori communities, such as land, gravel and labour; and that consideration is given to rating relief for land which cannot be developed.

Socio-economic impacts

The final chapter of the report details the massive socio-economic impacts of the Crown's Treaty breaches over many decades. It shows that, since the 1880s, the peoples of Te Urewera have experienced ongoing and severe poverty, ill health, hardship and lack of opportunity. The Tribunal found that these problems were caused mostly by the Crown's repeated Treaty breaches, as detailed in the rest of its report.

Despite the pleas of numerous Te Urewera leaders and of some Crown employees, the communities of Te Urewera were never provided with adequate healthcare or other social services. Some education was provided, but for many decades failed to respect the reo of Te Urewera communities and their tikanga.

The socio-economic high point of modern Te Urewera history came in the 1950s and 1960s, when the Crown provided local doctors, schools, housing, and employment in the timber industry. Even then, however, living conditions were still below the standards of the time. The area was economically devastated by the restructuring and privatisation of the Forest Service in the 1980s, and today parts of Te Urewera are characterised by shocking deprivation.

The Tribunal found that, as a general principle, the Crown has a duty to provide social services to Māori on an equitable, rather than an equal, basis. It explained that equal treatment gives the same services to everyone, while equitable treatment provides everyone with the services which best fit their needs. For example, providing English-only education to Māori and Pākehā alike is equal treatment, but it is not equitable because it does not meet the needs of Māori. Similarly, equitable treatment means recognising the greater needs of many Māori communities and providing more resources to meet those needs. It also means working with hapū and iwi to ensure that they are involved in the provision of social services.

The Tribunal accepted that because Te Urewera is distant from high population areas, it is difficult for the Crown to provide some social services. However this did not excuse the level of neglect which Te Urewera communities have experienced. The dire economic state of Te Urewera at the time of the Tribunal's hearings, and the attendant social problems, were prejudices arising directly and indirectly from the Crown's breaches of the Treaty. □

The Report on the Trans-Pacific Partnership Agreement

THE Tribunal recently completed an urgent inquiry into claims concerning the Trans-Pacific Partnership Agreement (TPPA), a wide-ranging trade and investment treaty between 12 states, of which New Zealand is one. In mid-2015, a range of prominent Māori leaders and organisations filed claims indicating their concern that the TPPA was likely to cause serious damage to Māori interests. Their main concern was with the extent of rights that were to be granted to international investors under the agreement, which they thought would limit the Crown's ability to fulfil its Treaty of Waitangi obligations to Māori. A large number of interested parties also joined in support.

The Tribunal granted urgency to the claims with a particular focus on the Treaty of Waitangi clause

contained in the agreement, which, the Crown said, would allow the government to continue to fulfil its Treaty obligations. The Tribunal inquiry panel, comprising Judge Michael Doogan (presiding officer), Tania Simpson, David Cochrane, Tā Tāmami Reedy and Sir Doug Kidd, heard the claims in Wellington in March 2016.

In its report, released in pre-publication form on 5 May, the Tribunal found that the principles of the Treaty of Waitangi had not been breached and that the Treaty clause 'should operate to provide a reasonable degree of protection' to Māori interests.

However, it did express some concerns about the right of foreign investors to bring claims against the New Zealand government, saying that the threat of such claims could have a 'chilling effect on the Crown's

willingness or ability to meet its Treaty obligations or to adopt otherwise Treaty-consistent measures'. The Tribunal said that the Crown should enter into further dialogue with Māori over Treaty clauses in future agreements, and on the possibility of investor claims against the government.

The Tribunal also looked at the consultation process on the TPPA. It did not make any findings, but was critical of the quality of the consultation which had taken place.

Amongst other things, the TPPA requires the Crown to bring into effect UPOV 91, a treaty on intellectual property over new varieties of plants. The Crown will consult with Māori over how this will happen, and parties were given leave to return to the Tribunal if they had concerns. □

NGĀ TOENGA – REMAINING HISTORICAL CLAIMS

IN HIS memorandum of 22 September 2015, Chief Judge Wilson Isaac, Chairperson of the Waitangi Tribunal, set out a standing panel process for the Tribunal's consideration of remaining historical claims. These are claims with grievances that arose before 21 September 1992 and that:

- ▶ the Tribunal has not yet fully inquired into;
- ▶ are not in district inquiries currently under way;
- ▶ have not been settled with the Crown; and
- ▶ are not in negotiation for settlement.

Many of these claims were submitted after the Tribunal had completed inquiries and reported on the districts with which they were connected but

before the 1 September 2008 cut-off for new historical claims. Others fell outside the scope of tribal Treaty settlements centred in districts where the principal claimant groups did not seek a Tribunal inquiry.

The Tribunal's first task is to review all claims to assess which of them may qualify for inclusion in the remaining historical claims programme. By agreement with the Attorney-General and the Chief District Court Judge, Judge Carrie Wainwright has been seconded to the Waitangi Tribunal to lead this preparatory phase. Judge Wainwright is assessing claims on a district by district basis with a view to identifying which claims remain eligible for inquiry or further inquiry, and establishing whether the issues raised by each such claim are still live.

Judge Wainwright is currently reviewing claims that arise in the North-Eastern Bay of Plenty inquiry district. There has not been a Tribunal inquiry in this district, and negotiations between the principal iwi and the Crown have not commenced. To date, the main claimant groups in the district have not sought a Tribunal district inquiry.

To hear the views of interested claimants, Judge Wainwright has scheduled a public hui in Ōpōtiki on 25 June 2016 with claimants whose claims arise in the North-Eastern Bay of Plenty. Any interested claimants who were unable to attend the hui are invited to contact Paige Bradey, Registrar, on 04 9143017 or wt.registrar@justice.govt.nz. □

He Kura Whenua Ka Rokohanga

ON 11 March 2016, the Waitangi Tribunal released *He Kura Whenua Ka Rokohanga*, its report on its urgent inquiry into three claims about the Crown's review and proposed reform of Te Ture Whenua Māori Act 1993. The claimants were Marise Lant (Wai 2478); Cletus Maanu Paul (Wai 2480), on behalf of his hapū and the Mataatua District Māori Council; and Lorraine Norris and eight others (Wai 2512) on behalf of themselves and their hapū. The Tribunal inquiry panel comprised Ron Crosby (presiding officer), Dr Grant Phillipson, Professor Rawinia Higgins, Tā Hirini Mead and Miriama Evans.

The claims, lodged during 2014, challenged the Crown's right to initiate a review of the Act, saying that only Māori can initiate a review of the legislation governing Māori land, a significant taonga tuku iho. The claimants also alleged that the provisions of the exposure draft of the new Te Ture Whenua Māori Bill, which were based on the recommendations of a 2013 review, were prejudicial to Māori and in breach of Treaty principles. They were deeply concerned that the reforms would result in more loss of Māori land.

The Tribunal held two hearings into the claims at its offices in Wellington in November and December 2015.

The Tribunal found that the Māori interest in their taonga tuku iho, Māori land, is so central to the Māori Treaty partner that the Crown is restricted

(and not unreasonably so) from simply following whatever policy it chooses. However, the Crown's interest in the 1993 Act is also sufficiently substantial to justify its initiation of a formal review.

The Tribunal concluded that, in effect, both Māori and the Crown decided to proceed with the reform of Te Ture Whenua Māori Act in 2013. However, it found that neither Treaty partner was properly informed in doing so, because the necessary empirical research on the 1993 Act and barriers to the utilisation of Māori land was not conducted. In proceeding with the reform without such research, the Tribunal found that the Crown was not acting consistently with Treaty principles. The absence of research remained a persistent flaw in the consultation on the reforms which followed later in 2014 and 2015.

The Tribunal also found that the Crown would be in breach of Treaty principles if it did not ensure that there was properly-informed, broad-based support from Māori for the new Te Ture Whenua Māori Bill to proceed. The Tribunal found that, while Māori broadly supported the 2013 review's proposals, the 2015 consultation round on the exposure draft's detailed proposals clearly showed that Māori support for the reforms was materially reduced.

The report also examines the provisions of the exposure draft of the new Bill, with a particular focus on



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Whina Cooper and her mokopuna Irene leading off the Māori land march from Te Hapua on 14 September 1975. A month later, some 5,000 marchers arrived at Parliament and presented a petition signed by 60,000 people to Prime Minister Bill Rowling. The primary aim of the hikoi was to call for an end to the alienation of Māori land.

the adequacy of its protection mechanisms. The legislation proposed to replace existing protections for landowners that are exercised by the Māori Land Court with a new regime empowering 'participating owners'. The Tribunal concluded that a number of the provisions nullify or weaken the mechanisms intended to ensure the retention of Māori land. The Tribunal found that such provisions are inconsistent with the Crown's duty of active protection. Other aspects of the exposure draft relating to succession and compulsory dispute resolution, the Tribunal found, are also inconsistent with Treaty principles.

The Tribunal recommended that the Crown avoid prejudice to Māori by further engagement nationally via hui and written submissions, after ensuring that Māori were properly informed by means of empirical research. It also made a number of other general and specific recommendations to the Crown concerning both the wider reform process and the new proposed Bill. □

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