

TE RŌPŪ WHAKAMANA I TE TIRĪTI O WAITANGI

# TE MANUTUKUTUKU



## ISSUE 69

Kohi-Tātea 2016 | January 2016

**KIA PUTA KI TE WHAI AO KI TE AO MĀRAMA**

FROM THE WORLD OF DARKNESS MOVING INTO THE WORLD OF LIGHT



Waitangi Tribunal



The Waitangi Tribunal  
Level 7, Fujitsu Tower  
141 The Terrace  
Wellington  
New Zealand  
DX SX11237  
Tel : 64 4 914 3000  
Fax : 64 4 914 3001  
[www.waitangitribunal.govt.nz](http://www.waitangitribunal.govt.nz)

Te Manutukutuku is produced and published by the Waitangi Tribunal Unit of the Ministry of Justice, and every effort has been made to ensure that it is true and correct at the date of publication.

---

## COVER

### Three pillars of the Waitangi Tribunal (from left):

Kaumātua member Sir Monita Delamere, Treaty of Waitangi Act architect the Hon. Matiu Rata, and former Chairperson Sir Edward Taihakurei Durie at Te Oneroa a Tohe (Ninety Mile Beach) in 1990; (inset) Durie, Acting Director Julie Tangaere, current Chairperson Chief Judge Wilson Isaac, and kaumātua member Tā Hirini Mead, at the Waitangi Tribunal's 40th anniversary celebration in October 2015.

---

## SUBSCRIBE TO TE MANUTUKUTUKU

To be alerted by email when a new issue comes out, please send an email to: [TMTTsubscriptions@justice.govt.nz](mailto:TMTTsubscriptions@justice.govt.nz) with 'Notify' in the subject line.

If you would like to receive a hard copy, please email your name and address (including postcode) with 'Subscribe' in the subject line.

All editions can be downloaded from the Waitangi Tribunal's website: <http://www.justice.govt.nz/tribunals/waitangi-tribunal/news/te-manutukutuku>

---

# CONTENTS

Mihi – Emeritus Professor Sir Tamati Reedy.....	4
From the Chairperson – Chief Judge Wilson Isaac .....	5
From the Acting Director – Julie Tangaere.....	7
From the Minister of Māori Development – Hon. Te Ururoa Flavell.....	8

## PERSPECTIVES:

Heather Baggott.....	9
Sir Edward Taihakurei Durie.....	10
Justice Joe Williams.....	12
Darrin Sykes.....	15
Deputy Chief Judge Caren Fox.....	16
Sir Hirini Moko Mead.....	18
Professor Pou Temara.....	20
Ron Crosby.....	21
Dr Angela Ballara.....	22
Emeritus Professor Keith Sorrenson.....	23
Dr Grant Phillipson.....	35
Hon. Dame Tariana Turia.....	36
Tā Tipene O'Regan.....	37
Professor Richard Boast QC.....	40
Dominic Wilson.....	41
Virginia Hardy.....	42
Tony Walzl.....	43
Dr Vincent O'Malley.....	44
Waitangi Tribunal Staff – Michael Allen.....	57

## HISTORY:

The Waitangi Tribunal: a Unique Institution – Dr Ann Parsonson.....	24
40 Years of Service, 1975-2015.....	30
Waitangi Tribunal Reports.....	33
Progress in Tribunal District Inquiries.....	34

## LANDMARK INQUIRIES:

Te Reo Māori – Sir Edward Taihakurei Durie.....	45
Te Reo Māori – Annette Sykes.....	46
Ngāi Tahu – Professor Michael Belgrave.....	48
Muriwhenua – Sir Edward Taihakurei Durie.....	49
Muriwhenua – Michael Allen.....	51
Muriwhenua – Dr Barry Rigby.....	52
Foreshore and Seabed – Dr Grant Phillipson.....	53
Tāmaki Makaurau – Judge Carrie Wainwright.....	54
Wai 262 – Paul Hamer.....	56



## HE MIHI KI TE WHAKANUITANGA O TE WHĀ TEKAU TAU O TE TARAIPUNARA O WAITANGI



EMERITUS PROFESSOR SIR TAMATI REEDY

### A Tribute to the Waitangi Tribunal on Celebrating its Fortieth Year

Ka hoki atu te haku o te ngākau ki o tātou rangatira i moemoeātia rā e rātou te Tiriti o Waitangi me ōna putanga.

Ko Te Hōnore Matiu Rata te Minita Māori (1972-1975) nāna i waihanganga te ture i whai wāhi atu ai te iwi Māori ki te whakatikatika i ngā hē me ngā mamae o te rau-tau kua hipa atu. Ka whakamanatia te ture i te tau 1975. Heoi, ko ngā kaupapa, kāore e taea te whakahoki ki ngā hē o mua atu o 1975.

Ko Te Hōnore Koro Wetere te Minita (1984-1990) nāna i whakatuwhera te ture kia hoki ra anō ki te tau 1840. Nā konei e taea ai e ngā iwi katoa o Aotearoa te whakatakoto ngā mamae ki te aroaro o Te Karauna, kia rangona ngā kōrero, kia hikitia ngā mamae o mua. Ko te whakautu mai a Te Karauna? A, e whakatauāki nei te Ao Māori: 'Ahakoa he iti, he māpihi pounamu.'

E tū nei te Taraipunara o Waitangi e whakanuia nei e tātou.

*The lingering thoughts in our hearts return to those ancestors who dreamed the Treaty of Waitangi and its promises.*

*It was the Honourable Matiu Rata who, as Minister of Māori Affairs (1972-1975), laid down the legislation so that the Māori people could engage in addressing the wrongs and deep hurts of the past century. The legislation was enacted in 1975. However, only claims following 1975 could be addressed.*

*It was the Honourable Koro Wetere (1984-1990) who extended the legislation to allow claims to go right back to 1840. This enabled all iwi Māori to lay out their pain before the Crown - to be heard, and to take away the burden of history. And the Crown's response? The old proverb of the Māori world sums up: 'It may be small, but it glistens like the greenstone.'*

*Here stands the Waitangi Tribunal we celebrate.*



# FROM THE CHAIRPERSON



## CHIEF JUDGE WILSON ISAAC

*Ko te mana tuatahi, ko te Tiriti o Waitangi.*

E ngā mana, e ngā reo, rau rangatira mā, tēnei te reo mānawa o te Roopu Whakamana i te Tiriti o Waitangi. Koutou kua takahia te ara ki te pō, koutou ngā pū kōrero, ngā mātāpunenga o te whakaaro i whāngaihia ngā uri ki ngā wai o te puna mātauranga, e whakamana nei i ngā kupu o te Tiriti, okioki, e moe. Rātou ki a rātou, tātou ki a tātou, tīhei mauriora.



Chief Judge Wilson Isaac and Sir Tumu Te Heuheu at the National Park report handover in 2013.

**IT** is my great pleasure and honour to introduce this special edition of *Te Manutukutuku* marking the 40<sup>th</sup> anniversary of the founding of the Waitangi Tribunal in 1975. In the 175<sup>th</sup> year since the signing of the Treaty of Waitangi, the Tribunal continues to hold fast to the mission originally set out for it by Hon. Matiu Rata, Minister of Māori Affairs: to honour the Treaty.

Over the last four decades the Tribunal has come a long way. At its start

in 1975, it had a membership of just three, including the Chairperson. The Tribunal could only hear claims dating since its foundation on 10 October 1975. The extension in late 1985 of the Tribunal's jurisdiction back to the first signing of the Treaty on 6 February 1840 opened the entire record of the Crown's conduct with Māori to scrutiny in terms of Treaty principles. Claims alleging historical grievances have since formed the core of the Tribunal's inquiry programme. Although the Tribunal was

barred from registering new historical (pre-1992) claims submitted after 1 September 2008, the Tribunal's registry holds historical claims from iwi, hapū and whānau, as well as individual Māori, across all parts of the country.

In its early years, the Tribunal's inquiries would usually focus on single claims. After its membership was expanded in the late 1980s, it was able to conduct several large inquiries at the same time. Since the mid-1990s, its main effort has been concentrated in district inquiries, each jointly hearing all claims arising in its district. Today, the largest of these, Te Paparahi o Te Raki (Northland), alone has some 400 claims participating.

The district inquiry programme, which has to date delivered reports on 79 percent of New Zealand's land area, has provided a forum for the hearing of many of the claims, both historical and contemporary, brought by iwi, hapū and whānau. Most have gone on to settle their historical Treaty claims with the Crown or are currently negotiating settlements. When the Tribunal has completed its district inquiry process, it will have heard and reported on 91 percent of New Zealand's land mass. The iwi in respect of the remaining



*Papatuanuku E Takoto Nei*, by Robyn Kahukiwa, located in the offices of the Waitangi Tribunal Unit.

## This anniversary edition presents reflections on the Tribunal's journey through the eyes of some of those who have participated in or assisted its inquiries

9 percent have entered into direct negotiations with the Crown or are preparing to do so.

Also, the accelerated pace of Treaty settlement negotiations over the past 15 years has triggered a number of urgent inquiries in which the Tribunal has been asked to assess the consistency of the Crown's process with Treaty principles. The Tribunal has also conducted inquiries into a wide range of specific contemporary issues, often under urgency, from the early *te reo* Māori inquiry to the foreshore

and seabed policy and the current inquiry into aspects of the Trans-Pacific Partnership Agreement. Altogether, the Tribunal has released 125 final reports, ranging from brief reports on specific claims to comprehensive district reports and investigations of contemporary issues of national significance.

This anniversary edition presents reflections on the Tribunal's journey through the eyes of some of those who have participated in or assisted its inquiries. Between them, our contributors draw on a wealth of diverse experience from the present and the past - from political leaders, from *iwi* leaders, from chairpersons, presiding officers and Tribunal members, from directors and members of staff, from claimant and Crown lawyers, from historians and political leaders. We focus the spotlight on several landmark inquiries and outline the Tribunal's development through its inquiries and reports.

As the Tribunal moves towards completing its inquiries into historical claims and addressing *kaupapa* (thematic) and contemporary claims, this edition of *Te Manutukutuku* highlights the contribution the Tribunal has made towards restoring and sustaining the Treaty-based relationship between Māori and the Crown. During the 40-year life span of the Tribunal that contribution has been built through

the dedicated efforts of the Tribunal's members, Māori Land Court judges and Waitangi Tribunal Unit staff, of claimants who have borne the grievances of their communities through generations, of the claimant and Crown lawyers who have honed their clients' cases, and of the historians and other experts whose research has assisted the Tribunal to get closer to the truth of the matters before it. They have enabled the Tribunal to continue with its commitment to national reconciliation in healing the wounds of the past.

Their tireless efforts are deeply embedded in the Tribunal story relayed in the pages of this special edition of *Te Manutukutuku*.

**Chief Judge Wilson Isaac**  
*Chairperson*

# FROM THE ACTING DIRECTOR



## JULIE TANGAERE

My passion has always been to work in a kaupapa Māori environment, so the offer to lead and shape the direction of the Waitangi Tribunal Unit was an exciting opportunity.

**I**n the 3 years that I have been the Acting Director, I have gained new insights and a new understanding of the diverse range of functions, specialist skills and knowledge required to effectively navigate the complexity of the Waitangi Tribunal claims process - a process that has often been perceived by the ill-informed as a somewhat protracted and long-winded one. I have come to realise, though, that the process is often lengthy because extensive research and analysis is undertaken to assist the Tribunal to provide detailed reports in making its recommendations to the Crown. The administrative work we do in the Unit is very much about supporting the Tribunal in providing an independent and culturally appropriate platform for Māori to seek recognition of Treaty breaches and grievances.

In my role as Director, I have had the privilege of speaking at the handover ceremony for two significant district inquiry reports and in 2014 I was also fortunate to have contributed to the development, launch and implementation of the Waitangi Tribunal Strategic Direction 2014-2025. The strategic direction has provided the framework within which the Tribunal will complete its remaining district inquiries by 2020 while working towards a transition to a contemporary and

kaupapa claims work programme by 2025. The Tribunal has already made positive progress on the strategy implementation with the initiation of the first kaupapa claims inquiry (Veterans) in 2014 and the Chairperson's recent announcement to commence a new process to address the remaining outstanding historical claims. It is an exciting time to be a part of the Unit as we now consider the skill sets, capability and resourcing required to enable the Unit to appropriately support this new programme of work.

In the 40 years of the Waitangi Tribunal's existence, many people have shaped the way in which the Unit has operated and supported the Tribunal process. In closing, I would like to acknowledge the commitment and

contribution of all those who have been actively involved in the Tribunal process during that time, from presiding officers, tribunal members, managers and staff to claimants, their representatives and the Crown. Together you have shaped and become part of the history of this unique organisation, the Waitangi Tribunal. Congratulations everyone!

Ngā mihi ki a koutou anō, tēnā tātou katoa.

**Julie Tangaere**  
Acting Director



Current and former directors Julie Tangaere, Darrin Sykes and Cath Nesu at the Waitangi Tribunal's 40th anniversary celebration in October 2015.

# FROM THE MINISTER OF MĀORI DEVELOPMENT



HON. TE URUROA FLAVELL

*(Ngāti Rangiwewehi/ Ngāpuhi)*

I wish to congratulate the Waitangi Tribunal on reaching its 40th birthday. I pay tribute to the former Māori Affairs Minister Matiu Rata, who had the foresight to set up the Tribunal in 1975.

**T**his judicial body has heard a wide range of claims and ruled on many landmark decisions over time, including te reo Māori, the flora and fauna claim and the foreshore and seabed.

The Tribunal's involvement in social matters has made significant contributions to our society. Its influence has helped lead to te reo Māori becoming an official language, various levels of Māori schooling options being available, the return of customary lands, and Crown apologies for the mistreatment that was experienced by tribes.

The Tribunal provides tangata whenua, iwi, hapū and tribal entities with the opportunity to share their stories and grievances about how they were treated by the Crown in the past. Māori realise the importance of a judicial body which gives them the chance to have their history publicly recorded. Our people constantly remind us of the importance of this record for generations to come.

That record also highlights wrongdoing by the Crown and identifies ways those acts can be corrected by the Government of the day. The issue of who owns the Takutai Moana, for example, led to tens of thousands of people, including me, walking to Parliament in protest in 2004. In that same year, the Tribunal's report highlighted the

concerns by tangata whenua as well as its findings and recommendations.

One point of that report that sticks in my mind is the Tribunal finding that the Crown breached Article 2 of the Treaty. It details a Government plan to take away the Māori Land Court and High Court's jurisdiction in respect to the foreshore and seabed. I raise this not to point the finger, but to reiterate how powerful publicly available information, such as that Waitangi Tribunal report, is to our society.

Despite the importance of the Tribunal to tangata whenua, it is disappointing that few people ever come to learn about the stories recorded by the Tribunal. I encourage everyone to take the time and read at least one Waitangi Tribunal report to broaden their understanding about what makes Aotearoa our home. The Waitangi Tribunal does not serve Māori alone: it is a judicial body that has been established to uphold Te Tiriti o Waitangi, which is a partnership between tangata whenua and non-Māori.

Thank you to both past and present Tribunal kaimahi for your dedication in shaping Aotearoa.



# A MINISTRY OF JUSTICE PERSPECTIVE



HEATHER BAGGOTT

*General Manager, Special Jurisdictions, Ministry of Justice*

As we celebrate this milestone in the life of the Waitangi Tribunal and reflect on its contributions to our nation over four decades, it's opportune to acknowledge those who have worked for and with this important institution.

***He aha te mea nui o te ao?***

*What is the most important thing in the world?*

***He tangata, he tangata, he tangata***

*It is the people, it is the people, it is the people*

**IT** has been the commitment and hard graft of these many, many passionate souls that has helped whānau, hapū and iwi across Aotearoa share their histories, their stories, their grievances so they may be heard and addressed.

I have spent most of the past 16 years as a public servant working in and around the Treaty settlement process. I spent 10 years at the Office of Treaty Settlements, during which time I reviewed numerous briefs to the Tribunal, attended many hearings and judicial conferences, appeared as a Crown witness several times, and pored over the pages of numerous Tribunal memoranda and reports. In recent years, as the General Manager of Special Jurisdictions in the Ministry of Justice, I have had the privilege of providing oversight support to the administration of the Tribunal.

My career in this business is short compared to some and my perspective is largely from that of a Crown official. My experience with all the Tribunal staff I have worked with is they have shown integrity and empathy, and an enormous passion for the kaupapa of the Tribunal. Time and again these staff have been prepared to go above and beyond to ensure the Tribunal is well supported and able to consider the claims before it comprehensively, yet fairly and efficiently.

Beyond the staff at the Tribunal there is a large and diverse 'community' who have committed some or all of their lives and careers to advancing claims before the Tribunal and in the Treaty settlement process generally. There are Māori leaders and practitioners, claimants, community leaders, lawyers, historians, researchers, public servants, politicians, judges and judicial officers, to name a few. All of these people, young and old, past and present, are equally deserving of recognition for their commitment and contributions to this incredible process of resolving injustices and nation-building in the quest to realise the intent of the Treaty partnership envisioned in our founding document. It is a huge privilege for me to be among you, to have contributed, and to be part of this 40<sup>th</sup> anniversary celebration.

# A FORMER CHAIRPERSON'S PERSPECTIVE



SIR EDWARD TAIHAKUREI DURIE

From the beginning there was tension over the proposed Tribunal's shape. Consistent with its significance in assessing Crown policy against constitutional objectives, Māori Land Court Chief Judge Ken Scott, who assisted with the Act's drafting, favoured a formal tribunal under a High Court Judge. The Minister, Hon. Matiu Rata, preferred the inquisitorial processes of the then Māori Land Court, which would give vent to the peoples' voice.

The discussion reflected the difference between the legal overload of the United States Claims Court, which took 25 years to resolve its first case (the Sioux claim to the Black Hills), and Justice Tom Berger's renowned McKenzie Valley Pipeline Inquiry, where the Judge took evidence at the spring campfires of the Canadian Inuit and Dene Indians.

Initially both views won. Rata's 1975 statute established a commission of inquiry with an express power to limit legal engagement. However, the National government appointed Scott (Labour losing office before appointments were made), who instituted a formal, legal approach. Nonetheless, the approach was short-lived. The Tribunal first sat (on Joe Hawke's fishing claim) under the chandeliers of Auckland's Intercontinental Hotel as though it were dealing with the Treaty of Versailles. Māori walked out and that was nearly all that the Tribunal did for the first five years.

During this time I was a judge sharing chambers with Chief Judge Scott in Rotorua. I attended the USA Senate inquiries on Indian claims in Washington DC and the Berger inquiry in the Canadian Arctic at Inuvik. On returning, I considered that Māori should be heard through their iwi

institutions without intermediaries and in their own cultural context. I was then asked by Minister Hon. Ben Riwai Couch, in 1980, to lead the Tribunal in a new direction.

Outside of Wairarapa, Couch's closeness to ordinary Māori was not well known. In fact he was a former member of the New Zealand Māori Council who had run shearing gangs. Both I and a Mr. Aila Taylor had similar experiences, having spent our salad days on the Māori-dominated slaughter chains of our respective freezing works. Couch's shift in direction and my own involvement emboldened Aila to pursue an extraordinary claim against the Think Big Projects of Taranaki, which were the flagship of the Muldoon government's policies (the Motonui-Waitara claim, Wai 6). The successful outcome of Aila's claim, with Hon. Bill Birch efficiently renegotiating international contracts, was largely due to public pressure following the country's unique exposure to the detailed Māori comprehension of the environment, of reef fishing, of spiritual perceptions and of the Treaty, as expressed through the voices of ordinary, working people. The 'people's approach' had succeeded (although whether it could succeed in quite the same way for the future is another story).

The extension of the Tribunal's jurisdiction to historical issues was then inevitable. As the Manukau and Ōrākei claims showed, Māori live with history. The Tribunal could not avoid historical analysis in expressing the contemporary circumstances of the claimant communities. Accordingly, although members of the House were wary of opening the Pandora's box of our largely hidden history, those like Hon. Koro Wetere who had followed the Tribunal's work knew full well that the box was already open.

Interestingly, South Africa faced the same issue of structure for historical disputes processes when I was invited to contribute to the African National Congress debate on policy in Johannesburg and later, when the ANC assumed power, to the Constitution debate in Cape Town. The new Republic opted for both forms, a formal Claims Court for 'black spot' removals under apartheid post-1914 and the less formal Truth and Reconciliation process for the larger historical issues. However, unlike our process, the South African reconciliation did not engage with the critical issue of wealth redistribution, which was a much more difficult problem for them than for us.



Kaumātua member John Turei, Chief Judge Edward Taihakurei Durie, and member Professor Gordon Orr at the pōwhiri for a Ngāti Awa Raupatu inquiry hearing.

## The Treaty, after a century and a half of Māori pleas, was thus indelibly inscribed in New Zealand law and it was then too late to cancel out a word of it

The jurisdictional change in New Zealand led to a much enlarged Tribunal (from the original three), but the single most important change, in my view, was the introduction of kaumātua Tribunal members. These identified and respected the customary leaders in the claimant community, bringing stability to claimant groups, maintained customary protocols when chairing sessions, quickly detected testimony that was not credible to Māori ears, gave practical expression to what is meant by 'tribe' (the abuse of the concept has since been brilliantly examined by the Tribunal's Dr Angela Ballara) and, when supported by anthropologists like Dr Dame Joan Metge, gave new meaning to history by explaining Māori responses in terms of Māori practice. This was especially the case with the traditional mode of business by gift exchanges, which were still prevalent in their lifetimes. They also helped produce a fledgling paper on Custom Law, which many academics have used since.

We were also privileged to be joined by Professor Sorrenson of Ngāti Pukenga, and then several other historians, as members, as staff, as independent contractors like the late and highly respected Professor Alan Ward, or as Crown consultants as with the late Donald Loveridge. These were

all well qualified to compare the oral tradition with documentary records and to place Māori claims in respect of Crown policy in the context of contemporary mores and politics.

We were thus equipped as a bicultural tribunal by dint of both composition and process when we embarked on the first, formal, historical inquiry in Muriwhenua. Muriwhenua was selected as part of the northern district, which first encountered early and extensive settler colonisation and consequential land loss through the partial confirmation of pre-Treaty purchases.

At the same time the Muriwhenua leaders, the Tribunal founder Hon Matiu Rata and a founding Tribunal member Graham Latimer (later Sir Graham) quickly appreciated that the true role of the senior lawyers would lie in advancing the Tribunal's findings of fact and Treaty interpretation in the superior courts. Thus they engaged David Baragwanath QC, later Justice Sir David Baragwanath (and soon after Sian Elias, now Chief Justice Dame Sian Elias QC), to open with a challenge to the fisheries Quota Management System on one day, and to the State Owned Enterprises Bill 1986 on another, to seek immediate Tribunal findings and to transport those

findings to the superior courts. Such was the urgency that the issues were put to the Tribunal and reports made to Government within 24 hours.

Notwithstanding the precarious expedition of the Tribunal's business at that time, the result is now history: an historic settlement on fish and the beginning of a Treaty jurisprudence which is now standard fare in University law courses. The Treaty, after a century and a half of Māori pleas, was thus indelibly inscribed in New Zealand law and it was then too late to cancel out a word of it.

I express my great love and affection for all those of the Tribunal whose responses to the Māori leadership helped to bring about this result: the Māori Land Court judges; the regular members, not least our dear friend and tireless worker the late Professor Gordon Orr; the historians and other academics both within and outside of the Tribunal; the staff and the former Directors of my time - the late Maarire Goodall, Sir Wira Gardiner, Buddy Mikaere and Morrie Love; and the administrative staff of the Justice Department, including my longest serving secretary, Mata Moke.

# A FORMER CHAIRPERSON'S PERSPECTIVE



JUSTICE JOE WILLIAMS

Justice Joe Williams started his career in the Treaty sector as a claimant counsel, featuring in a number of key historical inquiries in the 1980s and 1990s. From 1999 he served as Deputy and Acting Chairperson and then from 2004 as Chairperson of the Waitangi Tribunal until his appointment as a judge of the High Court in 2008. On 29 September 2015 he spoke to *Te Manutukutuku* about his own journey with the Waitangi Tribunal.

## THE TREATY AND THE WAITANGI TRIBUNAL IN THE 1980S

Justice Williams was a law student in the first half of the 1980s, graduating in 1986. He describes this as a period of 'great turmoil around the Treaty': 'The Treaty was a big issue, but it was a political issue - it was an issue for the streets, mostly, not for the courtroom.'

At the time, it was not entirely clear to him what these events portended, even though 'something big was afoot - that was very obvious'. He had gone to study in Canada, which 'was probably half a decade ahead of us in terms of indigenous legal rights debates':

*My time over there taught me that you could lawyer for iwi and hapū and make a living out of it. I wanted to be there fighting for those communities. I took half the money that I could have earned in the public sector or the academy to go and work in a law firm to learn how to do that. Only because I had seen in Canada what toolled-up lawyers could do in terms of challenging the system. For me the timing was unbelievable, because the big shifts in official attitudes to the Treaty and Māori interests were made*

*right at that time that I got back to New Zealand and I found myself on the crest of a wave, and goodness knows where it was going to end up. But that feeling was true because something tectonic did shift in that period and the decade following.*

It wasn't until after 1985, when the Tribunal was given jurisdiction to look at historical actions of the Crown, that things began to shift. 'What went on in the street moved into the forums of civil debate, starting with the Waitangi Tribunal itself and then getting into the courts generally.' He describes this as a 'Māori tide, on quite a broad front, sweeping through the structures of formal legal power in the second half of the 1980s, with the Tribunal being an iconic shift, but part of a much bigger thing going on.'

## REPRESENTING CLAIMANTS IN THE WAITANGI TRIBUNAL

Once engaged in representing claimants before the Waitangi Tribunal, Justice Williams experienced what he describes as 'the joy of working with actual Māori communities':

*I got to work with old people and young people, and try and articulate their experiences to a Tribunal that was hungry to hear it. I had to try and marshal that energy and point it in the right direction. It was a huge challenge, as much of a political job as a legal job. To do that day in day out was an incredible privilege for the decade and a half I did it. They were real people with real issues, real pain from the past, real pain in the present.*

*All of my experiences were of watching and working with communities putting their best foot forward. And seeing them enjoy the fact that there was a forum whose job it was to listen attentively to what they had to say was unbelievably empowering. I did Te Roroa, Muriwhenua, Hauraki, Tauranga, Ngawha, Ahuriri and I can't think of one where that didn't happen. The process became almost a celebration for actual living working communities celebrating their survival. And that was brilliant, that was the best part of the job in my view. You felt like you were doing something good when people walked away from the process with their chests puffed up for the first time.*





Chief Judge Joe Williams speaking during the Gisborne inquiry.

**After a decade and a half of evolution it was reasonably clear to me that better shape was required than had been the position in my time as counsel, that there should be some firmer structure around the inquiry process, in order to save unnecessary waste of time and effort**

Presenting the claimants' case to the Tribunal was its own kind of privilege. 'Those Tribunals had eminent historians, eminent jurists and eminent kaumātua – all trying to achieve what I was trying to achieve, but from their own perspective. Wise people from many walks of life, whose job it was to judge wisely.'

### **AS A PRESIDING OFFICER AND CHAIRPERSON OF THE WAITANGI TRIBUNAL**

By the time Justice Williams was appointed Māori Land Court Chief Judge and Deputy Chairperson in 1999, several district inquiries were in preparation or hearing, with more to follow. It was clear to him that reform was necessary to complete the remaining district inquiries in good order. This was partly because the Rangahaua Whānui series of historical research reports – which had been commissioned in the hope that the inquiry process would be shortened or even avoided altogether – had not produce the desired results. 'The Crown didn't want to play ball with that.'

*By the 2000s after a decade and a half of evolution it was reasonably clear to me that better shape was required than had been the position in my time as counsel, that there should be some firmer structure around the inquiry process, in order to save unnecessary waste of time and effort. While flexibility was an important value in the Tribunal's processes, insufficient structure was causing wastage. I think I said at the time and I still feel now that there's something wrong with a system where those who start the process don't get to finish it – their children do.*

In response, Justice Williams designed the 'New Approach' to historical claims – detailed pleadings and a statement of issues to frame expedited hearings. The New Approach was rolled out first in the Turanga (Gisborne) district inquiry:

*To some extent it succeeded. I still don't think we've got our heads around the job of actually writing Tribunal reports. I certainly don't think we have integrated our efforts with the settlement process in a way that maximises the contribution the Tribunal can and should make. But those are things I wanted to*

*achieve. These objectives are just far more difficult to achieve than I had predicted.*

### **THE WAITANGI TRIBUNAL AND TREATY SETTLEMENTS**

From the early 2000s expanding engagement between Māori and the Crown in reaching historical Treaty settlements has resulted in a growing number of applications for urgency for claims alleging Treaty breach in the Crown's negotiation processes and terms of settlement, including its recognition of Māori groups' mandates. Justice Williams describes how the Tribunal's approach to these issues evolved:

*The great risk of speeding up the Treaty settlements is that it would come to oppress groups caught up in the wake of other people's settlements, or unhappy with their own. We predicted this would come pretty quickly once the process sped up. And if the process of Treaty settlements was itself going to be oppressive, claimants needed a forum.*



Justice Joe Williams and Sir Edward Taihakurei Durie at the Tribunal Members Conference, 2008.

**We have made some progress, I think, but not enough. We've still got some massive issues to confront**

*I wanted the Tribunal to become that forum, a kind of Treaty ombudsman if you like. And the forum had to have particular skills. The Tribunal needed to be a knowing insider – independent but understanding of how tough this process is for everybody, including the Crown.*

*This was a time where the Tribunal had to spend some of the capital it had built up over the years in the Māori world. The Tribunal had always been the good guy, seen as articulating justified Māori historical claims to the wider community and the government. But if we did this ombudsman job right, we were going to have to be the bad guy occasionally. And we'd be spending capital we'd built up in the Māori community in that process.*

*So this was a much tougher test, I think, of our independence and our integrity than the historical claims process, where in many ways the facts spoke for themselves so powerfully. We had to not fear saying no, and we had to not fear saying yes.*

## THE WAI 262 REPORT AND THE STATUS OF MĀORI CULTURE AND IDENTITY

Justice Williams' final act with the Waitangi Tribunal was to complete the report on the Tribunal's whole-of-government inquiry into the Wai 262 claim concerning Māori intellectual and cultural property – *Ko Aotearoa Tēnei*. Four years after its release in 2011, many of the report's findings and recommendations remain unaddressed. Justice Williams reflects:

*What we tried to do with that report was to find a doable menu of reforms that was Treaty consistent, but we felt that compromises can and should be made. It was an area where compromise is the only useful answer on both sides. With or without Wai 262, these are live issues every day in Aotearoa and compromises have still to be made. Typically in New Zealand difficult change occurs incrementally in an apparently ad hoc way and in time these changes come to take on a certain shape – like the Treaty settlements process itself, like the Treaty story itself. So whether successive governments pick up Wai 262 and run with it or not, they're going to have to pick up the issues and respond to them, because they're just there and they can't be ignored. I think that is well understood.*

## THE FUTURE

Justice Williams concluded by reflecting on the future of the Treaty of Waitangi in New Zealand life:

*We have made some progress, I think, but not enough. We've still got some big issues to confront, particularly in social policy and social justice areas generally. These are matters I see more clearly in my work as a High Court judge, especially in the Court's criminal jurisdiction. In that story the Treaty will also speak, of that I have no doubt.*

*I think New Zealanders generally, now, embrace the Treaty as our unique beginning. Maybe it's a generational thing. I definitely don't think it's a Wellington thing, not in the feedback I've been sensing around the country. And in the general Māorification of public life, I think the Treaty will remain front and centre in some form, as a rallying point. Could the Treaty ever be a rallying point? Could 6 February at Waitangi be a celebration? I think that's inevitably where we're going.*

# A FORMER DIRECTOR'S PERSPECTIVE



DARRIN SYKES

Darrin Sykes was Director of the Waitangi Tribunal Unit from 2004 to 2010, before taking up his current position of Chief Executive at the Crown Forestry Rental Trust. He talked to Te Manutukutuku about his time as Director.

**D**arrin arrived at a time when Tribunal members and staff were preoccupied with completing a number of major district inquiry reports, as well as sustaining 'a very aggressive hearing programme'. 'There was no mystery about that period in time. People were busy contributing to helping panels getting reports out the door.' The difficulty he faced was in providing enough support to the report writing effort, while sustaining the inquiries that were then in hearings. 'I was aware we had to get people on the road.'

A particular highlight during his time as Director was 'the collective staff effort to supporting the completion of a large number of reports'. During this period, from 2004 to 2010, the Waitangi Tribunal issued some 20 reports. 'That would probably be the highlight - the accumulation of a heap of people that were supporting Tribunal panels during that period of time, whether they were permanent staff, fixed-termers or contractors. It was a big people effort. It was huge!'

Darrin explains further that the reason why 'the Tribunal was able to put out so much in that period was a really high commitment by people':

*The commitment of people to be a part of something bigger than*

*themselves was fantastic. When the Tribunal's work has come to an end, I think the Tribunal itself and all people that have participated in that process can stand back and reflect on being part of something major.*

Another highlight was his attendance of at least five major report releases. A consistent element of those report release ceremonies, Darrin explains, was the importance of the event to the claimants. 'You could see it was the closure of one journey and the beginning of something else. Those groups really thought it was an important way to close that part of the process.'

Reflecting on the Waitangi Tribunal's achievements over the past 40 years, Darrin says that it is 'a significant contribution, however intangible': 'I don't think anyone in their right mind would argue that the Tribunal hasn't made a significant contribution. It's just that it's layered over many years'. Some reports have contributed to major policy changes, others have had more subtle influence:

*I think the Tribunal's importance is something that will be better acknowledged probably in another generation or two. I think there's still too much in the trenches now to get people to look above it.*

# A PRESIDING OFFICER'S PERSPECTIVE



DEPUTY CHIEF JUDGE CAREN FOX

Deputy Chief Judge Caren Fox (Ngāti Porou, Rongowhakaata) has been a judge of the Māori Land Court since 2000. She spoke to Te Manutukutuku about her experience of the Waitangi Tribunal and its inquiries.

## The Tribunal's inquiries in those early years had significance and impact

**B**efore her judicial appointment, Judge Fox developed a career as an academic, specialising in international human rights. She was also engaged in private practice and acted as counsel in several of the key inquiries of the 1980s and early 1990s, including Te Reo Māori and the Sealords inquiry. 'These were formative years for me, and I've never forgotten them.'

Particularly important was her exposure to the work and influence of Sir Edward Taihakurei Durie, Chairperson of the Tribunal and presiding officer in those inquiries. 'It's undeniable what he contributed to the development of both the Tribunal and in terms of the broader jurisprudence on the Treaty - his contribution has been phenomenal and outstanding, and we should all honour and respect him for that.'

The Tribunal's inquiries in those early years, she says, had significance and impact:

*Its work went to the constitutional core of New Zealand and that's largely because of the intellects - both Māori and Pākehā - associated with the Tribunal at the time, all of those great minds who were committed and passionate about seeking justice and resolution for New Zealand over the issues concerning historical claims in particular.*

Since 2000, Judge Fox has been presiding officer in two major historical inquiries. The Central North Island inquiry led to the 2008 report, *He Maunga Rongo*. Because the Crown was already in the process of negotiating a settlement with some but not all of the groups in the central North Island, the Tribunal decided to prioritise early reporting on the major issues. 'At the time some criticism was directed at the approach taken, but if we hadn't taken that fast tracking, generic look at all the issues, reporting quickly thereafter in two years, we would have missed an opportunity to help all the parties - both Crown and Māori.'

Judge Fox's second historical inquiry, Porirua ki Manawatū, is now getting underway, with hearings on the historical claims of one of the iwi involved, Muaūpoko, 'because the Crown wants to settle with Muaūpoko as quickly as possible and we want to be as helpful as possible to both. So we need to accelerate the historical programme for them.'

The inquiry has also involved early hearings featuring the claimants' kōrero tuku iho - oral traditions that have been passed down over generations:

*We started that process before the historical casebook was complete, largely because the parties wished*





The Porirua ki Manawatū inquiry panel: Hon. Sir Doug Kidd, Tania Simpson, Sir Tamati Reedy, Deputy Chief Judge Caren Fox, Dr Grant Phillipson.

*to build momentum within the tribes to gather in the knowledge and the kōrero they have now before some of their kaumātua get too old. It's been a very useful process and has provided a solid platform for the claimants and any of the historians working on the casebook, because they will be able to pick up from that kōrero what is of central importance to the claimants.*

Judge Fox has also presided in a number of significant urgent inquiries. The first was the inquiry into claims concerning the management of aquaculture. 'Our report led to a settlement, which I'm very pleased about.'

From 2004, Judge Fox presided over a series of inquiries into claims about the Crown's settlement negotiations with Te Arawa. These inquiries culminated in a report that was issued within days of another Tribunal report on the Crown's settlement practices in the Auckland region:

*Up until that point the Crown, I think, had fallen into a trap of trying to marshal people into bigger and bigger groupings, ignoring clear tribal distinctions between groupings. And that's not a criticism - I understand the urgency. But both of those reports helped the Crown take a step back and really analyse whether or not its policy was working,*

*or whether it was causing too much division within different groups.*

An urgent inquiry on issues relating to the Crown's involvement in the Kōhanga Reo movement led to the 2011 report, *Matiu Rautia*:

*The Kōhanga Reo Report made a number of recommendations about the parties going into facilitated discussions to resolve some of the issues that were identified in the report. But for various reasons both internal and external to the Kōhanga Reo Trust and because of the Crown's approach to the national trust, there's been a delay. But I have no doubt that once those issues are resolved they will work well together and hopefully move on and do what they need to do to get the number of children we need passing through that system in order to preserve our language.*

The most recent urgent inquiry Judge Fox has presided over concerned a government review of the New Zealand Māori Council's 1962 Act and the management of Māori wardens. This inquiry raised issues about the right of Māori to self-government, and the question of who controls the drafting of legislation that only impacts on Māori. 'My understanding is, on that claim, after we reported, the New

Zealand Māori Council has spent the last triennial election period getting its house in order, so as to start negotiating with the Crown about its future as far as its relationship with the Crown is concerned.'

The Tribunal's report on the review of the 1962 Act and Māori wardens also featured, for the first time, a significant discussion of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and its relevance to the claims:

*It was certainly our view that while we didn't have jurisdiction to find the Crown in breach of the Declaration, what it could do is that it could further elaborate the nature of some of the principles in the Treaty. I think that was an important use of the Declaration and I will be interested to see what happens with that in the future and how it will be argued in the Tribunal as a result.*

On the future, Judge Fox considers that now is time for a 'period of reflection':

*I'm really pleased we did our strategic plan, which takes us through to 2025. Because once all the historical claims are dealt with and all the kaupapa claims are dealt with, I do think that even if we begin the process now we do have to have an internal discussion about where to from here. We have got some of the best brains in the Treaty field working as members on the Waitangi Tribunal. We should use that resource, and talk about how we move into the future. And then we should be bold enough to initiate discussions externally as well.*

In particular, Judge Fox would like to see the Tribunal take on a mediation role:

*Sometimes - especially post-settlement - the reason why the Crown and Māori may be in dispute is because the relationship's broken down and all that is needed is getting the parties together, having the right facilitators to mediate the issues and seeing whether or not common interests and common ground can be found in order to bring about the resolution of whatever problem there is.*

## THE WAITANGI TRIBUNAL: AN INTERESTING JOURNEY

---

DISTINGUISHED PROFESSOR SIR HIRINI MOKO MEAD

---

In Canada it is called the 'Truth and Reconciliation' process and here it is the 'Treaty of Waitangi' process, which is carried out by the Waitangi Tribunal under a landmark piece of legislation called the Treaty of Waitangi Act 1975.



**It is a harrowing experience for claimants to talk about their grievances and it is equally harrowing for the officiating Waitangi Tribunal panel to hear them**

---

**T**he Act was amended in 1985 to allow Māori claimants to deal with historical issues that go back to 1840, the year the Treaty was signed. Since then, many historical claims have been settled, including Wai 46, the claim of my iwi, Ngāti Awa.

The primary focus in Canada was on the lost generations, the children who were forcibly taken away from their families and put in the hands of the churches to colonise and assimilate them. Here in Aotearoa, the primary focus was on land and how legislation was used to disempower Māori, take their assets, their land, their wealth, and eventually destroy the leadership system and the foundations of Māori society.

I had the privilege of learning about the Waitangi Tribunal process first from the viewpoint and experience of taking an iwi claim to the Tribunal, following the claim step by step, persevering with it, learning about it by direct engagement and navigating our way through it to the final settlement in 2005. Before this, as lead negotiator for our iwi we had attempted to settle our claim by negotiating directly with the Crown, beginning in 1981. The first offer from the Government (the Crown) was turned down by our people as being absolutely inadequate and unsatisfactory - that was in 1983. Our next effort produced another settlement

offer in 1990 and we accepted it as a down payment on the main claim.

By then we had decided to make an application to the Waitangi Tribunal and we were given a registered number, Wai 46. The settlement that followed the Tribunal inquiry was the most comprehensive that had ever been offered to Ngāti Awa but we had to argue our way through every phase and part of it. We thought the Crown was mean to us. Compared to other settlements, it was modest, but we worked hard for many years to achieve it.

Then in 2003 I was appointed as a Tribunal member and have since spent several years being involved on the other side of the table, hearing the claims of other iwi, hapū and whānau. The grievances that claimants put before the Tribunal are often similar but there are differences in severity, depending very often on who was the Crown at the time and who were the officials acting for the Crown. It is a harrowing experience for claimants to talk about their grievances and it is equally harrowing for the officiating Waitangi Tribunal panel to hear them and to receive not only the accounts of the pain claimants suffered but also their anger. It is the Tribunal that receives the anger of the people and not the Crown, but this is a necessary part of the process.

There is a huge educative advantage in claimants presenting their lists of Treaty breaches and the history of what happened to their people to the Tribunal. This is the 'truth' part of the process, which requires claimants to research the issues, recover lost information, to know in detail how they lost their lands, their assets, their wealth and their culture. It is often a revelation to the young members of the iwi; some of them become very angry and often vent their anger upon who is there before them. After the angry rangatahi (youthful members) have vented their anger a few times they settle down, reflect on what they have learnt and then want all of the revelations properly recorded. There is a desire to remember what happened and to think about reconciliation.

At the end of the process, the Crown apologises to the claimants and hopes that the utu (compensation) offered will be accepted as appropriate and enduring. At the end of it all a tremendous amount of information has been gathered and hours of submissions and cross examinations have been heard and those who attended the hearings regard them as a valuable moment in history when they learnt a great deal about themselves and what happened to their ancestors and how they and their descendants survived.

Another aspect of the process is that it often causes divisions among the claimant groups because the people are caught up in the tensions between aiming for a collective settlement for the whole tribe or hapū or bowing to the individual claims of whānau groups who want to have their own settlement. Sometimes old animosities within the larger group are reawakened.

At the beginning of the Treaty inquiry process these competing groups were not in competition and often they had no idea they had a Treaty grievance and so collective actions based on whakapapa (genealogical) relationships were sound. But as the process labours on hearing after hearing, the divisions begin to firm up. As a Tribunal member and as a kaumātua (elder) member, I often warned the claimants about the dangers of inter-hapū or inter-whānau competitiveness and the threat to the unity of the iwi that might happen to them. What was required was for the claimants to focus on Treaty breaches and proving prejudice as a result of Crown and government actions against them.

The Waitangi Tribunal process aims at and hopes for reconciliation first between the collective and the Crown and also among the groups within the collective that were competing against each other. After a settlement the collective gradually emerges as a



Sir Hirini Mead at the report handover ceremony for the Ngāti Awa Raupatu inquiry, 1999.

powerful entity that receives the bulk or all of the settlement that is to serve every member of the group living now and for generations yet to come. Some claimants handle these issues very well and others not so well.

The Waitangi Tribunal celebrates its 40<sup>th</sup> birthday this year and can be proud of its achievements. It has produced a host of reports that, taken together, provide a rich source of historical information in relation to the colonisation of New Zealand, the meeting of cultures and the struggle of Māori to survive in the face of the colonial machinery that rolled over them. These reports also add significantly to our knowledge regarding legal and constitutional matters. The story itself is familiar to indigenous peoples around the world. In our case the work of the Tribunal has made an honest endeavour to bring about reconciliation between the two parties of the Treaty of Waitangi, that is, between Māori and the Crown, which includes everyone else.

We can say that most of the truth has now been presented, tested and recorded and that has been a really worthwhile and helpful task. Now the focus is upon reconciliation. It is a slow progress and we are on the way. There is no doubt that the work and achievements of the Waitangi Tribunal deserve the gratitude of the nation for what it has accomplished.

We also need to recognise a debt of gratitude to the Honourable Matiu Rata and the Government of the day that passed the landmark Treaty of Waitangi Act 1975, which opened the way towards reconciliation.



The Te Rohe Pōtae (King Country) inquiry panel at the memorial for Rewi Maniapoto, Kihikihi, December 2013. From the left: John Baird, Judge David Ambler, Sir Hirini Mead, Dr Aroha Harris, Professor Pou Temara.

# A KAUMĀTUA MEMBER'S PERSPECTIVE



PROFESSOR POU TEMARA

I was appointed to the Tribunal in 2008 as a tikanga member and I remember my first Tribunal hearing clearly. I suspected that I might be expected to ask questions but didn't think that I actually had to!

**SO** when the presiding officer asked the panel if we had any questions I was alarmed at the prospect. Here were these lawyer types on the panel asking these precise lawyerly questions and as the inquisition progressed towards me the depth and breadth became a worry. Could I measure up and if I couldn't, what would that mean for the mana of my whānau, hapū and iwi? In desperation, I began to txt Professor Wharehuia Milroy, an experienced member. His answer was classic Wharehuia, 'E tā, just say your words boy'. So I did. And I was fine.

I have sat with many members and presiding officers and learnt much about professionalism, which includes sitting for long hours and remaining alert. I have the utmost respect for the judges who presided over the inquiries that I've sat on. From the members of the Tribunal panels in which I have participated I have learnt the virtues of courtesy and patience - something I'm not noted for - and of engaging in conversations with witnesses to bring out the heart of their evidence. I have especially enjoyed the opportunity to again work with my professor and mentor Tā Hirini Mead and realising that he is still the professor and I am still the student.

In seven years and six tribunals, you get to know the claimant and Crown lawyers because you see and hear them often. They become part of the whānau of the Tribunal. So too do the Tribunal staff who look after us and ensure that we are well informed and comfortable.

There's no doubt that over the forty years of its existence the tikanga Māori that the Tribunal has striven to uphold have evolved. The Tribunal has at times faced some major challenges in ensuring a safe and supportive environment for all who wish to give their evidence at our hearings. It has occasionally had to deal with some tense situations, for instance in the drama of the Urewera hearings and the shooting of the flag during the pōwhiri. This is where the tikanga member of the Tribunal panel often plays a critical role. That is our job: to provide cultural safety for the Tribunal and to help create a welcoming space for all those participating.



# A GENERAL MEMBER'S PERSPECTIVE



RON CROSBY

in the modern world, tension points in the Māori-Crown relationship are bound to recur. All of the inquiries I have sat on have arisen from such tensions in a contemporary setting. The advantages that the Tribunal can offer to Māori, the Crown and the nation is an ordered means of addressing those tensions.

That outlet for Treaty grievances is vital to ensuring ongoing confidence in the Treaty's promises to Māori. Having grievances heard in a reasoned manner, with increasing numbers of Māori judges and members, adds to that sense of confidence.

The pool of Tribunal members is now sufficiently varied to enable the Tribunal Chair to achieve a balance in fixing the membership of hearing panels. Panels comprise a balance between women and men from Māori and the general community, and of experienced people from a wide range of historical, legal, policy, and broader community backgrounds.

I come from a South Island province (Marlborough) which has a low population but challenging environmental issues in a large, diverse land and sea area. Te Tau Ihu (the northern South Island) also has a historically fraught mix of relationships between eight iwi. Many of New Zealand's provinces share similar themes. That provincial background has assisted me in practical terms in Tribunal considerations.

However, the experience of learning how central government policy is developed, and of the significance and intellect of policy analysts in that process, has been a learning curve for me. The accumulated knowledge of other members has particularly assisted in the required step to understand such issues.

Other features of the Tribunal have particularly impressed themselves upon me. One is the mana that the kaumātua members bring to the Tribunal from their invaluable instilled knowledge and cultural experience of tikanga, te reo and iwi/hapū relationships. Others are the inherent authority the presiding judges bring with them and the very high level of dedication and knowledge provided by a helpful, cheerful Tribunal staff. All add significantly to the Tribunal's performance.

The principal conclusion I have reached is that a common path must be found somewhere between the sometimes conflicting objectives of politicians, policy analysts, Māori leadership, Māori generally, and the general community's interests and aspirations. That common path must respect and give effect in practical terms to the Treaty in the modern world. To achieve that outcome requires the common sense and sound judgement of a Tribunal membership from diverse backgrounds.

Possibly most importantly in the modern setting, it also requires a recognition by both Crown and Māori that each continue to owe duties under the Treaty to make it work. The Māori Wardens Inquiry Report *Whaia Te Mana Motuhake* 2015 expressed that concisely:

*Neither Treaty partner can claim monopoly rights when it comes to making policy and law in the realm where their respective interests overlap. Therefore, they both owe each other a duty of good faith and a commitment to co-operate and collaborate where circumstances require it.*

**W**hakamā is a word that springs to mind when asked to contribute reflections as a member of the Waitangi Tribunal with only four years of experience in that role.

However, one point of difference is that I am one of a 'new' generation of Tribunal members who will not have the privilege of serving on a district inquiry into historical claims.

A misconception is often encountered in the general community that somehow the functions of the Tribunal will cease with the completion of the district inquiries - as though the binding nature of the Treaty itself will expire when the historical reports are concluded. That misconception ignores the reality that the Treaty continues to be a living document underpinning the relationship between Māori and the Crown. Anyone searching the Treaty for a sunset clause is doomed to disappointment - it does not exist.

In future, the Tribunal's *Strategic Direction 2014-2025* will increasingly take effect. Urgent inquiries will continue to take precedence, but over time a shift will be occurring to kaupapa (thematic) and contemporary claims.

As the Treaty settlement processes bed down, and Māori adjust to the post-settlement phase with significant iwi asset backing and a new leadership role

# A HISTORIAN MEMBER'S PERSPECTIVE



DR ANGELA BALLARA

**F**or 40 years the Waitangi Tribunal has given incomparable service to the people of this country, tangata whenua and tangata tiriti alike. For 30 of those years it has been able to hear Māori claims of prejudice resulting from Crown policies and actions dating back to 1840. For this reason historians have become essential to its deliberations, and some of them, including myself, have been honoured and fortunate enough to be invited to take part.

Historians are not highly regarded as a species in some New Zealand quarters. To most of my mokopuna and their generation – at least to those with no tangata whenua connections – ‘history’ is a dry collection of ‘facts’ that are acquired, if at all, out of necessity, and put out of mind again as quickly as possible. Historian grandparents quickly learn not to provoke eye-rolling by attempting to discuss any aspect of Aotearoa’s past. As compared to the histories of exotic (to children) nations such as China or Brazil, New Zealand’s past is thought to be boringly domestic, irrelevant to their lives, and totally uncool.

But to all the Māori claimants I have met, the past is not ‘history’. The past is the living, continuing expression of their expanding identity. They look back along their multiple whakapapa lines to

the founding ancestors that established the mana of their various kin groups.

As part of the same process, they look at what happened to those more recent tīpuna who lived through the centuries of colonisation, and at their own lifetimes, and it is as if no time had passed. The achievements of their ancestors in the remote past, and the disparagement of their language and culture in the education systems of the nineteenth and twentieth centuries, are felt by them personally. The taking of their land by governments, whether through the New Zealand Settlements Act of 1863 or the Public Works Act of 1928 – they view both categories of takings as ‘raupatu’ (confiscation) – are resented by claimants living today as though they happened to them this morning.

To many Māori ‘we’ does not mean ‘I and my whānau living today’; it means ‘I myself plus my living whānau plus my tīpuna who have passed beyond the veil, extending into ngā wā o mua (time immemorial)’. The ‘past’ is a horizontal and continuing moment, with no before and after, no beginning, and no end in sight.

This is the thrill and the lesson of the experience for the historian. We learn that we are in the presence of the Māori leaders we have studied and admired. We meet Tumu Te Heuheu of Tūwharetoa, and the awe is overwhelming as we experience the continuing ihi and wehi of his ancestor Mananui. We stand at Te Pōrere and Te Rena in the shadow of Mount Tongariro and experience the continuing wairua of Te Kooti Rikirangi resonating among the local tangata whenua. We learn that history is not just a collection of past events that we attempt to understand as intellectual problems in academic

studies, but is a living continuum happening in our presence.

The Waitangi Tribunal process is not all joy, of course. For Tribunal historians, as against historians working on behalf of claimants or the Crown, in whose work advocacy is sometimes regrettably detectable, there are frustrations. Working with lawyers and writing by committee are two of them. The professional debate continues on the quality and characteristics of Tribunal history: is it worthy to be called academic history, or is it presentist, speculative, a form of advocacy, and, worst of all, is it political?

It is almost a cliché now that lawyers want certainty and historians hanker after nuance. Tribunal historian members write what they consider to be exhaustive, balanced, accurate and nuanced accounts of significant events leading to a particular result, leaving conclusions to the reader. From a legal perspective, the historian has the unfortunate need to see events from all sides and is not interested in assigning ‘fault’ or ‘cause’ – bases from which to make decisions. So historians find themselves pulled up sharply: why are we reading all this detail? What are the possible conclusions? Kaumātua and general members add their vital understandings to the mix. In the end, the creative combination of talents bound together in the Tribunal’s inquisitorial process brings a balanced result – a Tribunal report that tries to make a practical contribution to truth, reconciliation and the eventual settlement of Treaty claims.

# A HISTORIAN MEMBER'S PERSPECTIVE



*[Reprinted largely verbatim from issue 64, May 2012]*

## EMERITUS PROFESSOR KEITH SORRENSEN



Professor Sorrenson (second from left) on a site visit during the Ngāti Pahauwera hearing, Mohaka ki Ahuriri inquiry, 1997.

The publication of the second and final report of the Tauranga Moana district inquiry in 2010 marked the end of Professor Keith Sorrenson's 24 years of service with the Tribunal. Already a leading authority on the history of Crown-Māori relations, Professor Sorrenson was appointed to the Tribunal in 1986, straight after the retrospective extension of the Tribunal's jurisdiction to 1840.

Professor Sorrenson served on many inquiries - Ōrākei, Mangonui sewerage, Muriwhenua fishing, Ngāti Rangiteaorere, Māori electoral option, Te Whanganui ā Tara me ona Takiwā, Taranaki, allocation of radio frequencies, Ngāti Awa Raupatu, Mōhaka ki Ahuriri, Napier Hospital, Te Tau Ihu o te Waka a Māui, and Tauranga Moana - and may well have attended more hearing days than any other member.

As the Tribunal's leading historian member, Professor Sorrenson made other significant contributions, such as assessing the adequacy of research casebooks to proceed to hearing. Looking back, he says he 'quickly learned how much more there was to Māori land grievances' than he was aware of when he wrote his seminal thesis in 1956 on late nineteenth-century Māori land purchases.

Professor Sorrenson always found it 'a great relief, and an enlightening and uplifting experience' to step away from his busy life as head of Auckland University's Department of History to attend hearings on marae and to work with such distinguished Tribunal members as kaumātua Sir Monita Delamere and Bishop Manu Bennett, Chief Judge Sir Edward Durie, and Professor Gordon Orr.

## TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI THE WAITANGI TRIBUNAL:

# A UNIQUE INSTITUTION



DR ANN PARSONSON

*Tribunal member*

While the treaty can be regarded as the possession by the whole of our nation of an instrument of mutuality that has endured for the past 134 years, to the Maori people it is a charter that should protect their rights. The Bill is primarily aimed at satisfying honour.

*Hon Matiu Rata, speaking on the introduction of the Treaty of Waitangi Bill into parliament, 8 November 1974.*

### THE TRIBUNAL'S BEGINNINGS

The Waitangi Tribunal emerged from the vision of generations of Māori leaders, who over many decades had kept Te Tiriti o Waitangi/The Treaty of Waitangi at the forefront of their political engagement with the Crown and of their attempts to secure justice for their claims in the courts and from parliament. The Tribunal was established by the Treaty of Waitangi Act 1975 as a standing commission of inquiry, laying the basis for a new national process to hear and ultimately resolve Māori grievances against the Crown.

The cornerstone of the new process was to be Te Tiriti/the Treaty itself. Underlying it was a commitment to honour the principles of the Treaty by investigating Māori claims. In effect, the Tribunal was to consider the nature of the relationship created between Māori and the Crown when the Treaty was signed in 1840, and the rights and responsibilities that flowed from it. The Tribunal's focus on a foundational agreement with tangata whenua, the people of the land, and its inquisitorial role, distinct from the courts, at once distinguished the Tribunal's proceedings from those of

many institutions across the world with jurisdiction over indigenous claims.

The 1975 Act charged a specialist three-person Tribunal with hearing claims brought by any Māori, determining whether 'any current or future legislation or government policy' were or would be 'inconsistent with the principles of the Treaty of Waitangi' and, if so, assessing whether that did or might cause prejudice to Maori claimants and making recommendations to the government accordingly.

For many Māori - including the Minister of Māori Affairs, Hon. Matiu Rata, who sponsored the legislation - the restricted scope of the Tribunal's jurisdiction was a disappointment. It lacked historical jurisdiction and any power to enforce its recommendations. In addition, the importance placed on the 'principles' of the Treaty was controversial: many felt that this new yardstick was designed to undermine the force of the articles of the Treaty itself. It nevertheless represented an attempt to ensure that the Tribunal had the flexibility to consider and make practical recommendations on an as yet unknown range of contemporary issues. At the same time, for the purposes of its proceedings the Tribunal was granted

exclusive authority to determine the 'meaning and effect of the Treaty' as embodied in its English and te reo Māori texts and to decide issues raised by the differences between them. The basis had been laid for a bilingual and bicultural process that reflected the essence of the Treaty agreement.

### HISTORICAL CLAIMS COME TO THE FORE

Under the chairmanship (from 1980) of Chief Judge Edward Taihakurei Durie, the significance of the Tribunal's powers began to emerge. Its first substantial reports, on the Motunui-Waitara, Manukau Harbour, Kaituna River and Te Reo Māori claims, all raised issues which challenged or impinged on public policies (environmental policies, in the case of the first three), and all resulted in findings and recommendations which, to varying degrees, supported the Māori claimants.

And it was not only the Tribunal's findings that signalled a sea change in the consideration of Māori claims, but the language in which they were couched, scarcely heard before in official assessments. The Manukau Report, released in 1985, exposed the significance of longstanding historical



The members of the Ōrākei Tribunal. From the left: Professor Keith Sorrenson, Georgina Te Heuheu, Chief Judge Edward Taihakurei Durie, Bishop Manu Bennett, Sir Monita Delamere, Professor Gordon Orr. Photograph taken by Gill Hanly.



injustices tracing back to the 'Land Wars' (1863-64) and land confiscation – impacts which, in the Tribunal's view, had lasted to the present day. 'We are frankly appalled', said the Tribunal, 'by the events of the past and by the effect that they have had on the Manukau tribes.' Yet 'it is not their loyalty that is in question but the good faith of the other party to the Treaty, the Crown in right of New Zealand.' (pp 1, 99)

This kind of indictment was designed to help a largely uninformed public to begin to understand the weight of Māori grievances and the need for the Crown to take them seriously. The Muldoon government's immediate reaction to the first of these, the Motunui-Waitara report (1983), was to ignore its recommendation to overturn the right of the local Synfuels plant to discharge industrial waste and raw sewage into the sea at Motunui and onto the traditional fishing reefs of Te Āti Awa hapū. But public and media pressure led to a rapid about-face.

In the same period, tensions in New Zealand race relations had continued to grow, evident during the massive and often highly charged Springbok Tour protests (1981) and each year at the fraught commemoration of Waitangi Day. But change was coming. Condemnation of the Treaty among many protestors as a 'fraud' was succeeded by a general determination within Māori leaderships to see the Treaty honoured. At Turangawaewae Marae in September 1984 a watershed hui called for recognition of mana Māori

motuhake, political and economic change for Māori and reparations for past Treaty breaches. That year the Labour Government decided to allow the Waitangi Tribunal to investigate historical claims. In 1985 the Treaty of Waitangi Amendment Act extended the jurisdiction of the Tribunal back to 6 February 1840, opening both legislation and all the historical policies and conduct of the Crown to scrutiny.

The Ōrākei (1987) and Muriwhenua Fishing (1988) reports followed in quick succession. The Tribunal's expanded jurisdiction enabled it to examine the historical claims of Ngāti Whātua about their almost complete land loss in the Auckland city area. Because of the Bastion Point protests, and dramatic television coverage of the evictions and arrests that ended a year's occupation of the land in 1978, New Zealanders had some awareness of the land grievances of Ngāti Whātua, even if they were not well understood – and some sympathy with them. But the Tribunal's first fisheries report was released to a public unprepared for what seemed quite radical findings that the Treaty guarantee to Māori of their fisheries meant their 'activity and business of fishing', their right to fish – and thus to develop that right by participating in commercial fishing through the new Quota Management System then being introduced. That the recognition of Māori rights should extend to entitlement to fishing quota was a step too far for many at the time, including the fishing industry itself. The

public tensions, hostility and predictions of doom generated at the time are a reminder of the shaky ground which the Tribunal trod, but also of the importance its work was assuming as it laid bare the laws, policies and processes by which Māori had been dispossessed of their land and fishing rights since 1840.

## TREATY PRINCIPLES AND BINDING POWERS

The Tribunal's initial work in identifying and articulating the Treaty principles by which it assessed claims received a considerable boost from the Court of Appeal's *Lands* judgments of 1987 on challenges to the privatisation of state assets under the State-Owned Enterprises Act 1986. The Act included safeguards for Māori interests: 'Nothing in this Act', s 9 stated, 'shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi'. The Court highlighted the importance of the opinions of the Waitangi Tribunal, and added its own considerable weight to the formulation of Treaty principles, famously finding that 'The Treaty signified a partnership between Pakeha and Maori requiring each to act towards the other reasonably and with the utmost good faith' and that the Crown assumed a duty of 'active protection of Maori people in the use of their lands and waters to the fullest extent practicable' (NZ Maori Council v Attorney-General [1987] 1 NZLR, 642)

The Lands case also resulted in the Tribunal being granted the discretionary power to make binding recommendations in respect of lands the Crown transferred to State-owned Enterprises, which became liable to resumption by the Crown for return to Māori ownership if the Tribunal were to find related claims well-founded. Similarly, the Tribunal was granted binding powers for the return of forest land in an agreement the Government reached with the Māori Council in 1989: the government could sell cutting rights to Crown forests, while retaining the forest lands so that they could be returned to Māori if their Treaty claims were proven. The Tribunal would in fact use its new powers sparingly.

## DISEMPOWERMENT, LOSS OF LAND AND AUTONOMY

In the 1990s, amidst the considerable public goodwill generated by the commemorations of 150 years since the signing of the Treaty, there was growing interest in the Treaty and the work of the Tribunal. The Chairperson was now able to draw on an expanded Tribunal membership of 16, enabling several inquiry panels to work in parallel. Since then, the panels have comprised a unique mix of Māori Land Court judges, kaumātua and kuia members, and legal, historian and prominent lay members. Panels have been assisted by a dedicated staff and an expanded administrative unit, most recently located in the Ministry of Justice, providing a comprehensive range of support services.

As major reports were produced, strong historical analyses and a range of Treaty principles were developed that challenged long-standing public beliefs that the Treaty had mattered only in 1840. The *Ngai Tahu Report* (1991) underlined the impact of early post-1840 Crown monopoly purchases covering much of the South Island, which left iwi communities with tiny or no reserves. Denied an economic land base by the Crown's failure to endow them with adequate reserves, Ngāi Tahu were left as a 'disintegrated tribe without any power to take a visible part in the political economy of the nation' (*Ngai Tahu Report*, p 907). The report pointed to the paramount

importance of the fundamental accord embodied in the Treaty: 'the exchange of the right to govern for the right of Māori to retain their full tribal authority and control over their lands and all other valued possessions' (*Ngai Tahu Report*, p 236). In other words, the right of *kāwanatanga* was qualified by the lasting guarantee of *tino rangatiratanga*.

The Tribunal also began inquiries into confiscation claims. In 1996 it reported on the first of these in Taranaki, following a series of dramatic and painful hearings. Its *Taranaki Report* argued that the iwi claimants had suffered deprivation not only of land but of their rights. Māori had been disempowered, had suffered 'the denigration and destruction of Māori autonomy or self-government', despite the fact, the Tribunal stressed, that Māori autonomy was pivotal to the Treaty and that it was 'also the inherent right of peoples in their native territories' (*Taranaki Report*, pp 3-4). As first peoples, they had rights to manage their own policy, resources and affairs.

The theme of disempowerment of hapū and iwi by Crown encroachment on and non-recognition of their autonomy has resonated powerfully through Tribunal reports since then. The *Turanga* (Gisborne) report pointed to the far-reaching impacts of the Crown's failure to establish any relationship with Tūranga leaders after they had signed the Treaty in 1840, and its determination, in the context of

wider war in the 1860s, to break their 'independence' before the war got any more expensive. By the end of 1865 it had come to fear that 'continued Māori autonomy would compromise both the process of settlement and its own authority' (*Turanga Tangata Turanga Whenua*, p 739). The assault by Crown forces on the defensive Waerenga a Hika pā in November that year was brief, as had been hoped; but its sequel was not. The conflict between the Crown and Māori in Tūranga, the Tribunal stated, contains 'some of the darkest and most dramatic moments in our history as a country' (pp 739-740). Then, and afterwards, the Crown adopted policies 'specifically designed' to destroy Māori autonomy - including the provisions for and issue of detribalised titles to land in Tūranga.

The Central North Island Tribunal, which considered the claims of numerous hapū and iwi from Taupō, Rotorua and Kaingaroa in its report *He Maunga Rongo* (2008), found that under the Treaty, Māori were entitled to the same rights and powers of self-government as were settlers. Central North Island Māori leaders repeatedly sought recognition of such rights, and the Crown could and did contemplate working in various ways with parallel Māori institutions - national Māori assemblies, either self-convened or convened by the Crown - over a 50-year period from 1860. Yet the Crown failed to take the opportunities before it, or actively undermined or rejected



The Gisborne inquiry panel in hearing, 2002. From the left: Dr Ann Parsonson, Dame Margaret Bazley, Chief Judge Joe Williams, Professor Wharehuia Milroy.

them. The Tribunal concluded that the Crown had kept Māori powerless at the central government level, while also denying their autonomy at regional and community levels.

The Te Urewera Tribunal found that Tūhoe had not been offered an opportunity to sign the Treaty in 1840, but entered into a Treaty relationship with the Crown some 50 years later when they negotiated a unique agreement that was embodied in statute. The Urewera District Native Reserve Act 1896 recognised the right of the peoples of Te Urewera to govern themselves in the newly constituted Reserve and seemed to constitute a milestone in Crown/iwi relations. But the Crown failed to ensure that the Act actually worked and, in the end, embarked on ruthless purchasing of individual interests in Reserve lands in defiance of its own statute and its promises to ensure the Reserve lands would be inalienable, protected by tribal collective control. The Crown eventually acquired a very large block of core Te Urewera lands (though at the time, it was unable to use them), and the self-governing aspirations of Te Urewera peoples were left in tatters.

## A BICULTURAL PERSPECTIVE

Through its reports, and through the wisdom and knowledge of its kaumātua members, the Tribunal has been a strong voice also for the recognition of tikanga, of Māori law and Māori values and philosophies, particularly in understanding Māori relationships with and rights to their land and waterways and resources, and their obligations of kaitiakitanga. It has shown that studying our shared past and present through a monocultural lens will not do.

The Tribunal has highlighted the deficiencies of laws and government policies that generally failed to ensure that hapū and tribal communities retained collective ownership and management of their lands, and that flew in the face of the customary law that has guided Māori communities and bound them together for generations. Such policies have placed immense strain on communities, and their impacts on whānau and hapū have been inter-generational. Their ability

to protect their rights, their ways of life and their well-being has been severely compromised. Monocultural health and education policies have compounded these impacts. And despite the poor fit of many Crown policies with the norms and values of Māori law and society, Māori have often had very limited power to challenge those policies successfully.

## DISTRICT INQUIRIES AND PROCESSES

The extension of the Tribunal's jurisdiction back to 1840 led to a rising tide of historical claims. The Tribunal thus had to confront a major challenge. The influx of claims was fast outpacing its ability to hear and report on claims one by one or iwi by iwi, and a widening array of new grievances was emerging. Moreover, many claims and grievances overlapped.

In the mid-1990s Chief Judge Durie responded by reorganising the Tribunal's hearing and reporting processes into a nationwide programme of district inquiries in which all claims arising in a district would be grouped for joint inquiry. Hearings would commence once most of the documentary and research evidence had been completed, with the Tribunal preparing a combined report after hearing all the claims.

In the early 2000s Chief Judge Joe Williams pioneered a 'new approach' in the Tūranga (Gisborne) district inquiry, which has since been adopted in varying forms in all subsequent district inquiries. It introduced an interlocutory phase in which, with most evidence ready to hand, the claimants would finalise detailed statements of their claims, the Crown would give its response (including any concessions) and the Tribunal would determine the issues still in contention. These would then be the focus of the hearings and the Tribunal's report. Amongst its principal aims, the new process sought to deliver faster, more efficient inquiries and to position claimants and Crown to negotiate the settlement of those claims adjudged well-founded.

The length of time taken to complete hearings and reports remains a concern today, though it has been pointed out that in comparison with the processes in countries like the USA and Canada, the Tribunal's record stands up well. The size of the task is sometimes forgotten. The Tribunal's inclusive approach - combining all claims and grievances in an area into a single inquiry - has resulted in some large district inquiries; the current Te Paparahi o Te Raki (Northland) inquiry has some 400 claims before it.



A site visit during the Stage 1 Tauranga inquiry. From the left: Sir John Turei, Hon. Dr Michael Bassett, Judge Richard Kearney, John Clarke.





The Mangatū Remedies panel in hearing, 2012. From the left: Tim Castle, Judge Stephanie Milroy, Professor Wharehuia Milroy, Dr Ann Parsonson.

**Except on the rare occasions when the Tribunal makes binding recommendations, it is not directly involved in settling Treaty claims**

Land loss in the nineteenth century is still a major issue for most claimants, but in district historical inquiries others are of crucial importance too. Among them are:

- sustained Crown undermining of tino rangatiratanga;
- the loss of hapū and iwi economic development opportunities in areas such as farming, forestry, tourism, gold-mining and geothermal power;
- the long-term impacts of multiple ownership visited on Māori by the Crown's 19<sup>th</sup> century title regime for Māori land, given effect through the Native Land Court;
- the Crown's assumption of control over waterways;
- the degradation of waterways and customary fisheries;
- the Crown's health and education policies, and the failure to protect te reo Māori and ngā reo ā iwi;
- the fate of wāhi tapu and of taonga lost to whānau and hapū; and
- the Crown's provisions for relationships between Māori and local authorities, and the marginalisation of Māori within their own rohe in terms of local decision-making.

For its part, the Crown has sought comprehensive treatment of claims, and researchers have responded with reports and volumes of supporting documents that are often very substantial. The Tribunal must meet the expectations of the claimants, the Crown and the public for robust reports that reflect the range of evidence before it and the submissions of legal counsel for all the parties involved. Despite these challenges, the Tribunal has completed district inquiries across 79 per cent of New Zealand's land area, which the final inquiries now in progress will raise to 91 percent - in the remaining 9 per cent, claimants are in or preparing for settlement negotiations without a Tribunal inquiry.

### **KAUPAPA (THEMATIC) INQUIRIES**

Alongside the major district historical reports, the Tribunal hears and reports on many other claims. Since 1978 it has produced 125 final reports. A number of these are kaupapa (thematic or single issue) reports on inquiries held under urgency that have focused on major policy developments which Māori alleged were likely to prejudicially affect them. These have included:

- the government allocation of broadcasting and radio frequency rights;
- policy and legislation regarding the ownership and management of petroleum resources;

- legislation giving the New Zealand Kiwifruit Marketing Board a monopoly to export kiwifruit;
- capital funding of wānanga in comparison with other tertiary education institutions;
- proposals to reform the legislative regime for aquaculture and marine farming; and
- legislation vesting ownership of the public foreshore and seabed in the Crown.

The Tribunal has by no means upheld all the kaupapa claims brought before it. Where it has done so, it has focused on practical recommendations, some of which have resulted in Crown settlements with the claimants. In 2001, for instance, Te Wānanga o Aotearoa received a \$40 million settlement package over three years, and wānanga were recognised as an important part of the state education system. Similarly, in 2004 the government settled Māori claims to commercial aquaculture, providing for settlement assets to be allocated to Iwi Aquaculture Organisations.

### **SETTLING TREATY CLAIMS**

Except on the rare occasions when the Tribunal makes binding recommendations, it is not directly involved in settling Treaty claims. Since 2000, however, as the pace of settlement negotiations has ramped up, a number



of claimants have challenged the Treaty compliance of Crown settlement policy and practice and have sought the Tribunal's intervention. The grounds of claim have tended to focus on the Crown's conduct of the negotiation process, how it decides which Māori groups it will settle with, and the terms of settlement.

From the resulting inquiries – granted only when the high threshold of urgency is met – the Tribunal's reports have aimed at helping all parties to progress their negotiations on the basis of Treaty principles and towards the shared overall objective of durable settlement and a restored Treaty relationship. On occasion, broader changes in the Crown's policy and practice have resulted from the Tribunal's recommendations, for instance in its approach to relationships amongst overlapping iwi/hapū groups following the Te Arawa Settlement and Tamaki Makaurau reports in 2007.

## THE TRIBUNAL 40 YEARS ON: A RETROSPECTIVE ASSESSMENT

Forty years after its establishment, how should we assess the role of the Waitangi Tribunal in our society? Its reports have laid the foundations for major Treaty settlements. Its hearings have, over the years, remained a powerful part of the Tribunal's inquiry process. This is where tangata whenua are finally able to present their own evidence before the Tribunal.

The oratory of kaumātua as they lay down the bases of their claims, and bring to the Tribunal what Justice Durie once called their 'old knowledge', can be memorable. Hapū and whānau speakers may outline painful stories – often revealing the human impact of government policies on small communities – from their oral histories and carefully collected family documents. The histories Tribunal members hear span many generations: from traditions of settlement, the significance of whakapapa and relationships within and beyond claimant tribal groups, the values and beliefs of tupuna, the operation of customary law and the obligations of kaitiakitanga in respect of land, rivers, lakes and resources, through to speakers' experience of the Crown's policies in their own lifetimes or those of their parents and grandparents. In two current inquiries, Te Rohe Pōtae (King Country) and Porirua ki Manawatū, 'Ngā Kōrero Tuku Iho' hui heard oral traditions from hapū and iwi from across the district about tribal identity, relationships with the land and historical events. The Tribunal's reports mediate that tribally held knowledge of relationships and the nature of customary society as essential context for understanding the claims and the issues before the Tribunal.

Some years ago, the Turanga Tribunal was struck by the fact that 'some of the darkest and most dramatic moments in our history' are remembered only by tangata whenua and a handful of New Zealand historians.

It pointed to the gulf between Māori and Pākehā understandings of our history and the difficulties this created for a process of reconciliation:

While only one side remembers the suffering of the past, dialogue will always be difficult. One side commences the dialogue with anger and the other side has no idea why. (*Turanga Tangata Turanga Whenua*, p 740)

Today, that gulf is slowly being bridged. The Tribunal has won a degree of public acceptance, even if suspicion has not entirely been laid to rest. Pākehā New Zealanders still tend to ask when the claims will be finished, but most agree that historical Treaty settlements need to be made, and understand why – an understanding underpinned by decades of thorough Tribunal inquiry and reporting.

Over the years, the Tribunal has drawn on evidence that assists it in different ways: Māori understandings of their past and present experience of marginalisation in New Zealand society, and a wide range of expert historical studies of Crown policy and practice. Its own authority on Treaty matters underlies the findings it makes on the claims before it. Its work has had far-reaching impacts on government and community institutions previously untroubled by biculturalism, Treaty rights and the importance of relationships with tangata whenua.

Without a doubt, the Tribunal's work has a crucial place in the Treaty settlement process and in Pākehā – and Māori – acceptance of settlements. And that is simply because – despite the evidence of Māori initiative and resilience over the generations, and of some government attempts in the 20<sup>th</sup> century to grapple with the unhappy outcomes of earlier policies – the injustices that have emerged in the unique investigative forum that is the Tribunal have been compelling. That is why there is broad recognition now of the need to address deep wrongs and rebuild Māori-Crown relationships on the foundation of Treaty-based partnership.



Kingi Taurua and Judge Craig Coxhead at the Te Raki Stage 1 report handover, November 2014.

# 40 YEARS OF SERVICE

# 1975-2015




---

**1974** 8 November: Hon. Matiu Rata leads the first reading of the Treaty of Waitangi Bill.

---

**1975** 10 October: the Treaty of Waitangi Act is enacted, establishing the Waitangi Tribunal to hear claims brought by Māori alleging prejudice arising from breaches of the principles of the Treaty by the Crown since 1975.

---

**1975–1976** Māori Land Court Chief Judge Kenneth Gillanders Scott becomes the first Chairperson. Laurence Southwick and Graham Latimer are appointed as the founding members of the Tribunal.

---

**1978** The Tribunal issues its first two reports, on the Ngāti Whātua fisheries regulations claim (Wai 1) and the Waiau Pā power station claim (Wai 2).

---

**1980–2002** Chief Judge Edward Taihakurei Durie is appointed Chairperson. He leads the development of the Tribunal over the next two decades.

---

**1983–1985** Reports on the Motunui-Waitara (Wai 6) and Manukau (Wai 8) claims establish some of the foundations for the Tribunal's interpretation of Treaty principles and the rationale for inquiring into pre-1975 historical claims.

---

**1985** The Treaty of Waitangi Amendment Act 1985 empowers the Tribunal to hear claims relating to legislation, policies and actions of the Crown back to the first signing of the Treaty on 6 February 1840. Membership is increased to five, in addition to the Chairperson.

---

**1986** The report on the te reo Māori claim (Wai 11) contributes to the enactment of the Māori Language Act 1987, which sees Māori recognised as an official language of Aotearoa/New Zealand and the establishment of Te Taura Whiri i te Reo Māori/the Māori Language Commission.

---



---

**1986** The interim report on the State-Owned Enterprises (SOE) Bill (Wai 22) leads to the inclusion of a clause requiring the Crown not to act inconsistently with Treaty principles. In the subsequent *Lands* case judgment, the Court of Appeal articulates core Treaty principles and rules that in the disposal of state-owned land the interests of claimants with grievances relating to it must be protected.

---

**1987** The Ōrākei report (Wai 9) is the first to consider Crown policies and practices under the Tribunal's expanded jurisdiction back to 1840, including the first significant findings on the Native Land Court.

---

**1988** A statutory amendment makes land owned or formerly owned by a SOE liable to resumption by the Crown for return to Māori where the Tribunal adjudges a claim relating to the land to be well-founded.

---

**1988** The report on the Muriwhenua fishing claim (Wai 22) contributes to the interim national fisheries settlement and the Māori Fisheries Act 1989, which establishes the Māori Fisheries Commission.

---

**1988** The Tribunal's membership is expanded to 16, in addition to the Chairperson.

---

**1990** Amendments to the Education and New Zealand Railways Corporation Restructuring Acts enable the Tribunal to make binding recommendations for the return of certain education and railway lands to Māori.

---

**1991** The Ngāi Tahu report (Wai 27) concludes the Tribunal's first comprehensive inquiry into the historical claims of a large iwi. Its findings and recommendations contribute to the negotiation and settlement, in 1998, of the Ngāi Tahu claim.

---

<b>1992</b>	The report on Ngāi Tahu sea fisheries contributes to the final commercial fisheries settlement between the Crown and Māori, known as the 'Sealord' deal, which establishes Māori as major participants in New Zealand's commercial fishing industry. The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 confirms the agreement and ends the Tribunal's jurisdiction to hear Māori claims in respect of commercial fisheries.	<b>1999– PRESENT</b>	The report on the claims of Ngāti Awa in the Bay of Plenty in 1999 is the first of a series of district inquiry reports on historical and contemporary claims. They include: Rēkohu/the Chatham Islands (2001) Te Whanganui a Tara/Wellington (2003) Mohaka ki Ahuriri (2004) Tauranga Moana (2004, 2010) Tūranga/Gisborne (2004) Kaipara (2006) Hauraki (2006) Central North Island (2007) Te Tau Ihu/Northern South Island (2008) Wairarapa ki Tararua (2010) Te Kāhui Maunga/Tongariro National Park (2013) Te Paparahi o Te Raki (Stage 1, 2014) Whanganui (2015) Te Urewera (2009–2015). These wide-ranging district reports assist the negotiation of subsequent settlements of historical Treaty claims.
<b>1992</b>	A statutory amendment bars the Tribunal from making recommendations concerning private land (other than former SOE land regulated by the 1988 Act). Remedies for breaches of Treaty principles are to be derived only from Crown property and public revenue.		
<b>1994</b>	The report on the Māori electoral option (Wai 413) contributes to increased Crown funding to raise the number of Māori registered on the electoral rolls.		
<b>1995– 1996</b>	The Tribunal launches its district inquiry programme to hear and report on all claims arising in a district. The large-scale Rangahaua Whānui research programme helps to establish the nature and scope of claim issues to be heard.	<b>2000</b>	The report on claims concerning the Pakakohi and Tangahoe settlement (Wai 758, 142) concludes the first of a series of urgent inquiries into the Crown's Treaty settlement policy, process and terms as the Crown and Māori broaden their efforts to settle historical (pre-1992) Treaty claims.
<b>1996– 1997</b>	The Muriwhenua Land (Wai 45) and Taranaki (Wai 143) reports highlight the impact of Crown involvement in the early alienation of Māori land and in <i>murū me te raupatu</i> – the New Zealand Wars and the land confiscations and disempowerment that followed.	<b>2002</b>	The report on claims concerning aquaculture and marine farming (Wai 953) contributes to a significant national settlement with Māori.
<b>1995– 1998</b>	The report into a claim concerning Tūrangi township (Wai 84), established in the 1960s for the Tongariro power scheme, leads the Tribunal to use its binding powers for the first time to order the return of SOE land after negotiations fail to progress. Claimants and Crown subsequently agree a settlement.	<b>2004</b>	The report on the government's controversial foreshore and seabed policy (Wai 1071) finds the Crown to be in Treaty breach. The policy is legislated, then replaced in 2011 by the Marine and Coastal Area (Takutai Moana) Act.
<b>1998– 2001</b>	The Te Whānau o Waipareira (Wai 414), Napier Hospital (Wai 692) and Wānanga Capital Establishment (Wai 718) reports address, respectively, the delivery of social services by urban Māori organisations, hospital service provision for Māori and the absence of foundation capital for new Māori tertiary institutions. A subsequent settlement provides \$40m in capital establishment funding for Te Wānanga o Aotearoa.	<b>2005</b>	The Tribunal publishes its guide to the 'new approach' to hearing historical claims in district inquiries, developed in the Tūranga/Gisborne district inquiry. The approach is designed to improve efficiency by defining unresolved issues as a focus for hearing and reporting on claims.
<b>1999– 2008</b>	Chief Judge Joe Williams becomes Deputy Chairperson following Justice Durie's appointment to the High Court bench. He serves as Acting Chairperson until his formal appointment as Chairperson in 2004.	<b>2007</b>	Urgent reports on the Tāmaki Makaurau (Wai 1362) and Te Arawa (Wai 1353) settlement processes help to prompt a major change in the government's approach to accommodating overlapping relationships between settling groups and adjacent iwi.
		<b>2008</b>	The Tribunal's membership is expanded to 20, in addition to the Chairperson.
		<b>2008</b>	A statutory amendment removes the Tribunal's power to register new historical Treaty claims or historical amendments to contemporary claims submitted after 1 September 2008. Around 1800 new historical claims are filed in the final four weeks before the deadline.

**2009–  
PRESENT**

Chief Judge Wilson Isaac becomes Chairperson following the appointment of Justice Joe Williams to the High Court bench.

**2010**

The Te Rohe Pōtae/King Country district inquiry (Wai 898) pioneers ngā kōrero tuku iho hui as an additional pre-hearing forum for claimants to present their oral and traditional evidence. This approach is subsequently adopted in other district inquiries.

**2011**

The Ko Aotearoa Tēnei report on the Wai 262 claim concludes the Tribunal's first 'whole-of-government' inquiry. The report recommends reform of 'laws, policies or practices relating to health, education, science, intellectual property, indigenous flora and fauna, resource management, conservation, the Māori language, arts and culture, heritage, and the involvement of Māori in the development of New Zealand's positions on international instruments affecting indigenous rights'.

**2012**

An urgent report on kōhanga reo (Wai 2336), in part a sequel to the 1986 Te Reo report, finds that Crown policies are adversely affecting the kōhanga reo movement.

**2012**

The Tribunal's first report on the national freshwater and geothermal resources claim (Wai 2358) suggests that the government should postpone selling state power assets until the potential impact on settlements with Māori has been resolved. The asset sales programme nonetheless proceeds as planned.

**2014–  
2025**

The Chairperson releases the Tribunal's *Strategic Direction 2014–2025*, which outlines a comprehensive approach to hearing all outstanding claims by 2025. As well as completing the final district inquiries already under way and providing for claims requiring urgent attention, the strategic framework envisages completing historical (pre-1992) claims by 2020 and kaupapa (thematic or single-issue) claims by 2025.

**2015**

As at the Tribunal's 40<sup>th</sup> anniversary in October 2015, 2501 claims have been registered, 1028 have been fully or partly reported on, and 123 final reports (151 including preliminary and part reports) have been released covering 79% of New Zealand's land mass. The Tribunal's membership consists of the Chairperson, 20 members and judges from the 11-strong Māori Land Court bench while serving as presiding officers in Tribunal inquiries. It is serviced by a Ministry of Justice unit comprising around 55 staff.



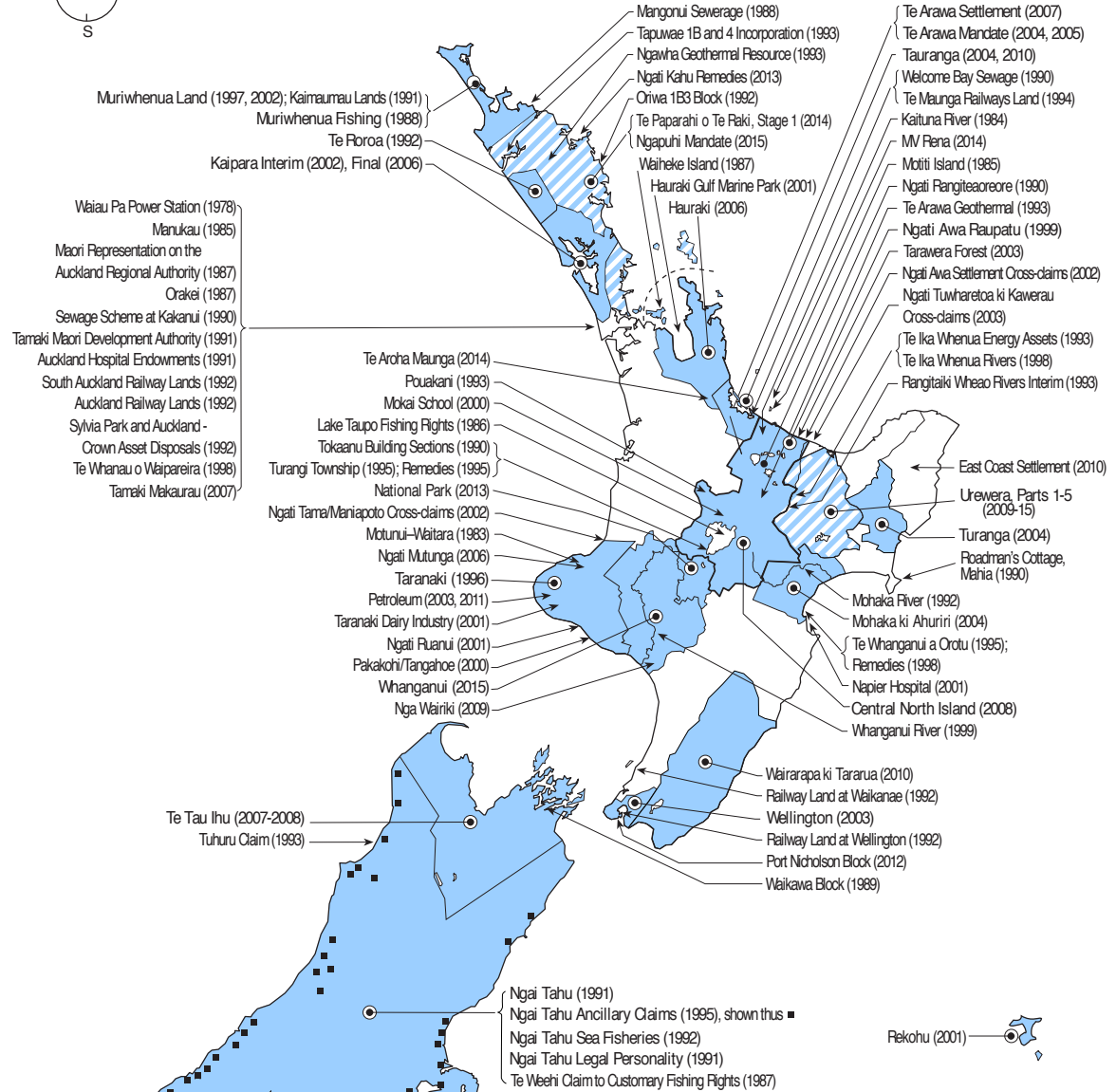
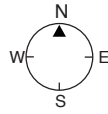
**Back row (from left):** Ronald Crosby, Dr Ann Parsonson, Judge Michael Doogan, Basil Morrison, Dr Aroha Harris, Dr Rawinia Higgins, Dr Grant Phillipson, Judge Stephen Clark, Judge David Ambler, Judge Layne Harvey, Tim Castle, Nicholas Davidson, Dr Monty Soutar

**Front row (from left):** Joanne Morris, Judge Sarah Reeves, Professor Pou Temara, Sir Tamati Reedy, Deputy Chief Judge Caren Fox, Chief Judge Wilson Isaac (chairperson), Sir Hirini Mead, Miriama Evans, Dr Robyn Anderson, Dr Angela Ballara

**Absent:** Judge Stephanie Milroy (then deputy chairperson), Judge Patrick Savage (deputy chairperson), Judge Craig Coxhead, John Baird, Professor Richard Hill, the Honourable Sir Douglas Kidd, Kihī Ngatai, Tania Simpson, the Honourable Paul Swain, Professor Ranginui Walker, Kaa Williams



# Waitangi Tribunal Reports As at October 2015



NHarris, 25sept2015

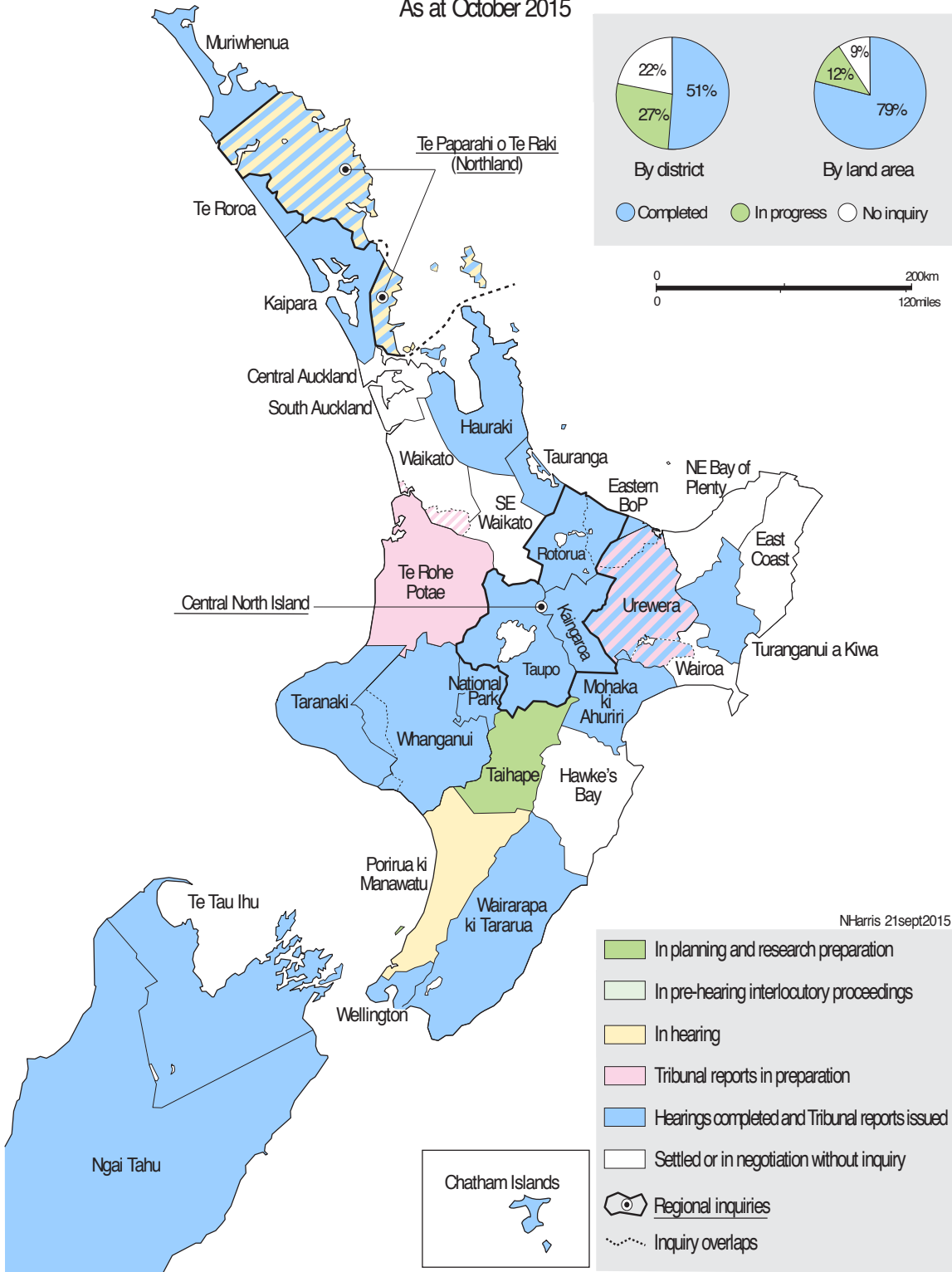
- District Tribunal reports
- ← Other Tribunal reports
- Fully reported
- ▨ Partially reported

### Kaupapa inquiries

- Fisheries Regulations (Ngati Whatua) (1978)
- Claim Relating to Maori 'Privilege' (1985)
- Te Reo Maori Claim (1986)
- Imposition of Land Tax (1990)
- Fisheries Regulations (1990)
- Radio Frequencies (1990)
- Treaty of Waitangi Fisheries Commission (1992)
- Fisheries Settlement (1992)
- Maori Development Corporation (1993)
- Maori Electoral Option (1994)
- Broadcasting Claim (1994)
- Kiwifruit Marketing (1995)
- Wananga Capital Establishment (1999)
- Radio Spectrum (1999)
- Ahu Moana (2002)
- Seabed and Foreshore (2004)
- Offender Assessment Policy (2005)
- Aotearoa Institute (2005)
- Haane Manahi Victoria Cross (2005)
- ANZTPA Regime (2006)
- Maori Culture and Identity - Wai 262 (2011)
- Kohanga Reo (2013)
- Freshwater & Geothermal Resources, Stage 1 (2012)
- Mana Motuhake (2015)

# Progress in Tribunal District Inquiries

As at October 2015



## REFLECTIONS OF THE FORMER CHIEF HISTORIAN: STRATEGISING HISTORY



DR GRANT PHILLIPSON

*Tribunal member*

The mid-1990s was a challenging time for the Tribunal. It was transitioning from a small body, hearing claims one by one, to a larger organisation, hearing multiple claims on a district basis.

This generated strategic dilemmas. In what order should the districts be heard? How do you research and inquire into so many claims at once, and stage it so that new evidential casebooks would be ready each year? How long should a casebook take to prepare? Should every registered claim get its own research? How much research was enough? What level of proof would the Tribunal (and the Crown as a party) require?

The Chairperson, Sir Eddie Taihakurei Durie, asked me (as research manager and then chief historian) to design a 'casebook method', work out a principled basis for saying which districts should go first, make calls as to how much research would be enough for the Tribunal to proceed, and review all draft Tribunal Reports.

Setting an order for the districts was not simple. We agreed that districts with raupatu would remain top priority (because raupatu is such a serious breach). Otherwise, I had to work out which districts lost the bulk of their Māori land in what order. The resulting district inquiry programme was mostly accepted by Māori, except in the Central North Island. Iwi there were granted a higher priority by Chief Judge Williams in 2001, leading to our first ever multi-district, staged, 'modular' regional inquiry -

another strategic innovation causing both opportunities and headaches!

Before the mid-1990s, the Tribunal had a stop-start approach, holding hearings as each stage of research was finished. Sir Eddie wanted claimants' research completed as a 'casebook' in advance of hearings. My proposal for a casebook method required a pre-casebook assessment of any current research, knowledge and claim issues in a district, the design of a research programme (in detailed consultation with claimants), the commissioning of multiple projects by CFRT and the Tribunal, the management and completion of those projects by the casebook deadline, the review of the finished casebook for its sufficiency, and then gap-filling research while hearings progressed. Simple! We applied this method in Tauranga, northern South Island, Mohaka ki Ahuriri, Kaipara, Hauraki, Te Urewera, Whanganui, Taranaki, Wellington, and other districts, adapting it even to districts part-way through at the time the casebook method was developed.

One of my most contentious jobs in this was fighting what seemed like a never-ending battle over how much research was enough. At that stage (the late 1990s and early 2000s), the Crown was not following its current practice of

making concessions in Tribunal inquiries. With no Crown concessions, research had to be as comprehensive as possible - to the nth degree, as I was sometimes accused of. I received much 'stick' for this. Some complained that we were taking too long and doing far too much - a 'grave train' for historians. Even so, claimants usually wanted even more research, and the Crown's lawyers sometimes argued in submissions that the Tribunal had insufficient evidence. I hope that the ultimate results speak for themselves in the many impressive district reports that the Tribunal produced.

These are a small selection of quandaries we faced during my time as chief historian. In addressing them, I worked with many amazing, talented, and dedicated Tribunal members and staff. We strove always to provide a quality truth and reconciliation process for Māori and the nation, and to ensure claimants a forum where their grievances could be heard and findings made for the world to see. We worked to help restore the Treaty relationship between Māori and the Crown, to heal the past and secure the future.

# A MĀORI POLITICAL LEADER'S PERSPECTIVE



HON. DAME TARIANA TURIA

In my submission to the Waitangi Tribunal in 1995, my first sentences positioned me in direct relationship to the river at the heart of that claim (Wai 167):

*I am a mokopuna of Te Maa of Ngāti Ruaka, Tamaupoko and therefore a mokopuna of the awa. I am married to Hori Turia, of Ngati Ruru and Ngati Kurawhatia hapu of Tamaupoko and Ngati Pamoana of Tupoho, a mokopuna of the awa.*

**MY** story and my association with the river are not unique. In the 1999 Waitangi Tribunal report on the Whanganui River, close to 400 pages of research, stories, waiata, poetry and statements of fact reflect the view of Whanganui iwi that Te Awa Tupua is a living being, an indivisible whole which is central to our health and wellbeing. The report articulates the enduring concept of the inseparability of the people and the river; it presents the desire of Whanganui iwi to protect, care for, manage and use the river as in keeping with our physical and spiritual relationship.

As the descendants of Ruatipua and Paerangi, our rapport with te awa tupua, through the kawa and tikanga passed down through successive generations, has been known since time immemorial. But there are many others who inhabit the rohe of Whanganui who did not know our stories. Those whom Chief Judge Taihakurei Durie once described as tangata tiriti - the people who have a special status in this land of ours by right of Te Tiriti o Waitangi.

At the time when Matiu Rata instigated the establishment of the Waitangi Tribunal, discontent had been emerging about the position of tangata whenua within our own land. The Māori

renaissance was challenging the Crown to protect and advance the revival of our culture, our reo, our people. Dame Whina Cooper led Te Roopu Matakite in the hikoi to Parliament, driven by the call for 'not one more acre of Māori land' to be alienated. Many of us were declaring 'the Treaty is a fraud'; we were seeking to resolve decades of grievance through petitions, court cases, land occupations.

In that turbulent environment, Matiu's initiative was visionary. His legacy as Minister of Māori Affairs will always include the fact that he was able to persuade his cabinet colleagues to set up a special tribunal. A tribunal to establish a legal process to investigate the multifarious grievances of whānau, hapū and iwi as a result of the Crown's breaches of the Treaty. A tribunal which would become the place where stories of our nationhood were aired and recorded forever.

Over the last four decades the stories of our shared history have now become known; tears have been shed as the shame and pain of injuries incurred in the course of colonisation have been uncovered.

Over 18 years as a Member of Parliament, there were never moments more poignant than when the House experienced the enduring trauma of settlement legislation. Amongst the most profound experiences for me were

the times in which I led the debate on those settlement stories, seeking to give dignity to the history released by the respective iwi while mindful of the need to support their distinctive pathways forward.

The public gallery was always full as elders and mokopuna alike gathered to witness history being made. As the waiata rang through the chamber, there was always a sense of the significance of that moment. Politicians, officials, whānau and the wider public came together to pay respects to those who had pioneered the passage of the legislation. At the same time, we all clung to the hope that we could write a new story based on a deeper understanding of the past.

And so now that I have returned home to our river, my greatest desire is that the stories we tell of te awa tupua become a shared narrative for all who call Whanganui home. In this 175th anniversary year of the Treaty, the trust and confidence we develop in each other can only be strengthened by the new perspectives that the Waitangi Tribunal has brought to the fore. To me, that is the greatest gift that came with the Tribunal - the opportunity for an informed conversation about what it means to live in this land.



## LANDMARK INQUIRIES: NGĀI TAHU



### TĀ TIPENE O'REGAN

Tā Tipene O'Regan is the former chairperson of the Ngāi Tahu Māori Trust Board. He is best known for his work in leading Ngāi Tahu through the Waitangi Tribunal's inquiry into their historical land and sea fisheries claims, on which the Tribunal issued its main report in 1991.

**H**E was a leading figure in the design and negotiation of the Treaty Sea Fisheries Settlements of 1989 and 1992. He then led Ngāi Tahu through Treaty settlement negotiations with the Crown, culminating in settlement legislation in 1998.

Tā Tipene sat down with Tribunal historian member Dr Ann Parsonson to talk about the history of the Ngāi Tahu claim and the Waitangi Tribunal's inquiry:

*I think the most important dimension of the historic Ngāi Tahu claims is that they had been running in the main since 1849. The Ngāi Tahu claim was not something that was developed for presentation to the Tribunal. It was a claim with its own history, and almost its own antiquity, that was really reshaped to present to the Waitangi Tribunal. Once the Tribunal had reported we then had the best part of eight years of negotiation and litigation, part of which involved the Tribunal itself. That shaped very much the negotiation with the Crown and the ultimate settlement.*

*I think the important thing about the Ngāi Tahu claim itself, though, apart from its history, is that it was brought to the Tribunal as a collection of claims. We intended to bring each of the Ngāi Tahu purchase*

*contracts and mahinga kai, which involved sea fisheries as well as land-based fisheries and resources, each separately in turn.*

*But we altered that intent as a consequence of the SOE legislation, because we were led to believe that the SOE legislation was going to shift a lot of Crown assets away from the status of Crown land and convert them into private assets held by companies, and this was going to make them in our view much less available for potential use in settlements. It was our interpretation that the Crown was basically emptying its pockets in advance of being found liable, and that interpretation persisted for a considerable time.*

The Tribunal's hearings began very soon after the claim was submitted. Crown lawyer Shonagh Kenderdine led a large Crown team:

*A staff of some 30 people were assembled to do battle with the evils of Ngāi Tahu. Whereas Ngāi Tahu had one academic historian working for us on a pro bono basis, another professional historian working for us on a virtual pro bono basis, a QC working on very reduced rates, and a solicitor in Christchurch.*

The Tribunal panel appointed to hear the claim, with Deputy Chief Judge Ashley McHugh presiding, commanded respect:

*I think it's important to note also the concentrated intellectual firepower of the Wai 27 tribunal and the sheer eminence of its membership was unusual and in my view probably unmatched, except only rarely since. This grouping of people for a Tribunal were really quite remarkable.*

The hearing process itself was, for Ngāi Tahu, 'hugely important':

*We met for one week every month for nearly two and a half, three years. That was pretty demanding organisationally for our small team. Our people turned up in large numbers and sat there absolutely glued in their attention to the proceedings unfolding before them. No matter how procedurally boring they might have been to some of us, those aunties and uncles of ours sat there in their seats and were fascinated by the whole unfolding of evidence over the years. They were particularly staunch and particularly loyal.*

*But you see the reason for this importance was a whole generation of us had inherited the claim. Only very few of us knew much about what the claim actually consisted of. We had inherited a grievance. Just what*

**If you look to the two elements that kept [The Ngāi Tahu claim] going - one was mahinga kai and the other factor was the thing that binds mahinga kai, which is whakapapa**

*was in it and how it came about was not particularly clear in many minds. And so the importance of it was that at the end of the process there was a much larger body of Ngāi Tahu seniority who understood what their parents and grandparents had been on about better than they did before the Tribunal process started.*

Ngāi Tahu also had, through this period, what Tā Tipene describes as a 'huge financial difficulty':

*In those days there was practically no funding of the Tribunal process. The short point is that at the end of the first 18 months our \$3.2 million of accumulated assets had gone. And it was just about at that point that our longstanding bankers notified us that they were no longer going to extend any credit to us and that we were consequently going to go down the tubes...*

*We were able to capitalise various businesses which made it possible for us to keep funding the struggle. Up to the night before the passage of the Ngāi Tahu settlement legislation third reading in October 1998, we had spent just under \$20 million. That in itself is a remarkable story. We were later (post-settlement) able to recover a certain amount later from the Crown Forest Rental Trust in back rents and various elements of that kind, but getting there and getting to settlement was challenging in the extreme.*

*We mounted this enormous case virtually on a self-funding basis with some help from an old man in Japan who trusted us when our fellow New Zealand citizens and financial system - and I might add politicians - sought to bring us to a halt by cutting off our supplies. It's a memory that stays with me and I don't easily forget when people want to talk about the whole new era in race relations. You can forgive foolishness, you can forgive stupidity, and you can even forgive ignorance, but it's much more difficult to put aside actual administrative and state malevolence.*

The Tribunal's Ngāi Tahu Report, which came out at the beginning of 1991, was the first major report on an iwi's historical claims. 'The main Ngāi Tahu case, which dealt with reserves not awarded, was completely vindicated. But very important parts of it the Tribunal failed to uphold.' They included Princes St under the Ōtākou Tenths, the claim relating to Fiordland and the long-held contention about whether the foothills or the main divide set the boundary of the massive 8 million hectare Canterbury purchase of 1848, negotiated by Henry Tacy Kemp. 'In each of those three things it was the view of the Ngāi Tahu Trust Board that the Tribunal had erred.'

The political climate, Tā Tipene recalled, was quite different from the present day:

*It must be appreciated that the politicians were saying what they were going to do and what they were not going to do quite plainly while the Tribunal sitting was in process. There was not the kind of hands-off approach you might have today, where you might get some mutterings from the Minister in Charge of Treaty Negotiations about something that's been said in front of a Tribunal. But there was no such reserve from Sir Douglas Graham and his colleagues. I remember then Minister of Finance Richardson busily inveighing that Ngāi Tahu was impugning the economic sovereignty of the state, and she wasn't going to have a bar of it... So we were profoundly suspicious of what you might call the good intent of the state in terms of its operational*

*behaviour, and we had a fair amount of evidence to support our suspicions, because - I'll be frank - we had friends as well as foes inside the ship of state.*

A critical element of the claim that was upheld by the Tribunal, and went on to feature as a major part of the settlement, was mahinga kai - areas of food and resource gathering that in the original land transactions were meant to be set aside for permanent use:

*I think to understand the centrality of mahinga kai you've got to go back into the history of the Ngāi Tahu claim itself, because it is against all the laws of historical gravity that Ngāi Tahu should have been able to keep the Ngāi Tahu claim going for seven generations. And if you look to the two elements that kept it going - one was mahinga kai and the other factor was the thing that binds mahinga kai, which is whakapapa. So you have these two interacting elements in our history which essentially the power culture could not get to - sort of little tabernacles of identity which the enemies could not enter. Those little elements meant that mahinga kai, when it came through in the Tribunal hearings, was the most robustly argued, the most robustly evidenced element of the whole case.*

*It became a huge element in the settlement. But there are quite important parts of the settlement that are still lying there to be attended to. Many of those surround natural waters, the nature of the relationship with water which we parked to one side from the settlement - for later attention. Customary use rights in water and the natural environment - there's still quite a lot of work to do there because it's not really been tested.*

Ngāi Tahu's sea fisheries claim and the Tribunal's report on it also contributed to what became a national commercial fisheries settlement with Māori:

*Right through the whole Ngāi Tahu process we also had running (a) the Māori lands case and (b) the whole period of fisheries legislation, and two fisheries settlements in 1989 and 1992. So there was a parallel process going*

on. The Ngāi Tahu Sea Fisheries Report eventually came out complementing the Muriwhenua Sea Fisheries Report... But in that period these matters were huge politically. And they were also extraordinarily expensive. The fishing industry itself raised something like \$5 million to knock Ngāi Tahu out of the proposed High Court proceedings on fish, and played a major part in the final sea fisheries hearings of the Waitangi Tribunal...

In the event, our position on sea fisheries was upheld by the Tribunal and led in no small measure to the ultimate fisheries settlements in 1992. But it was a tumultuous and demanding period with major litigation on several fronts contemporaneously.

Ultimately, in Tā Tipene's view, the Tribunal's inquiry and two major reports (on land grievances and sea fisheries) and the subsequent Treaty settlement have had only a marginal impact in increasing public understanding of Ngāi Tahu rights:

*I don't think on the whole that the nation cared at all about Ngāi Tahu's rights or the nature of the rights. They just wanted to know that the noise had gone away and that it hadn't been too expensive. There are a lot of very good people who still come up to me at airports and in the streets sometimes, and say, I just want to say thank you for what you've done for New Zealand, or some little comment of that kind. It still happens. There are people who feel like that, about what we've done as a nation. But on the whole we have a media that doesn't probe very deeply, and there's very little evidence of reflective judgement on a regular basis.*

*I found it very interesting reading the editorials from the time of the settlement. They were much more informed and optimistic than the sort of editorials one reads today. Society in many ways has changed, but on the whole the big concern of the politicians was to minimise the apparent cost and the negotiation process made that plain.*

## **I think the Waitangi Tribunal has been very valuable within our national culture for us to ventilate questions and to do so in a relatively non-hostile way**

*If you look at the Ngāi Tahu report when it came out, it was full front page news. They were big media events. There is no treatment of the Tribunal's work like that nowadays. There's just nothing like that level of attention paid. It's a footnote on Radio New Zealand, or somewhere page 2 or page 4 of the newspaper. Which is useful I suppose in suggesting that wider society is not frightened by the process any more, but it also means that Treaty issues are less discussed than they were. Society's general attention and level of understanding has receded, and as it recedes we go into one of those phases in which the national cerebrum is anesthetised for a while.*

Looking to the future, Tā Tipene sounded a note of caution: 'We have a capacity to anaesthetise ourselves against realities and wait for them to hit us. We don't build our seawalls and moles in advance.'

Tā Tipene offered a few final thoughts on the role of the Waitangi Tribunal, and the hearing process more generally, in the resolution of historical Treaty claims:

*I think the Waitangi Tribunal has been very valuable within our national culture for us to ventilate questions and to do so in a relatively non-hostile way. And we've subjected our history to due process... The legal process tends to be adversarial and there*

*has been a very great challenge in bringing the disciplines of history and legal due process under some measure of control... The lawyer may or may not be historically literate, but it's a very great challenge for a lawyer to shift out of lawyer mode and genuinely pursue truth, particularly when historical truth is generally like beauty in the eye of the beholder - depends which angle you're looking at it from. And there is the view that the notion of historical truth is itself an oxymoron.*

*And it's in these sorts of historical conflict that these questions can become quite esoteric and therefore become very suspect in the minds of the wider public. Because it's easier to strike your hands and say, who can really know? There's a tendency and walk away, and avoid dealing with things. And so then you say well we've got to have some sort of agreement to settle this matter, and your agreement to settle this matter involves a compromise. And the compromise means you're giving up on something you believe - on both sides! So it's a question of where it puts you in terms of your history. It's important that the compromises are not forgotten, that the content of the questions is not lost - that our mokopuna know why we chose to settle and not to continue the struggle. It's actually a very hard thing to do - to give up on a heritage grievance!*

## WORKING IN THE WAITANGI TRIBUNAL: A PRACTITIONER'S PERSPECTIVE



Image Services, Victoria University  
of Wellington

---

### PROFESSOR RICHARD BOAST QC

---

**MY** experience of appearing before the Tribunal has been a somewhat unusual one, as I have appeared in some inquiries as an expert witness and in others as counsel – and on two occasions, in defiance of all the rules, having to do both. My first experience of the Tribunal was as a barrister when I was co-counsel for the claimants, along with Paul Heath (now Justice Heath of the High Court) in the Pouakani inquiry held at Tokoroa in 1989. The claimant was John Hanita Paki, and the Tribunal claim developed out of a complex claim in the Māori Land Court heard by Judge Hingston at Rotorua in 1987.

The claim was essentially about some extremely complex survey issues arising out of the Taupōnuiatia West, Pouakani and Maraeroa blocks investigated in the Native Land Court at Taupō in 1887. I think my grasp of the survey issues at stake was rather imperfect, but luckily I was able to focus in my submissions and cross-examination on the more straightforward issue of survey costs. Fortunately Paul Heath grasped the technicalities of the case perfectly, and we had a first class expert witness, Max Harris, who had mastered all of the issues and who was a genius at explaining them.

From around 1990 to 2001 I did not practise in the Waitangi Tribunal as

counsel at all, but I did give historical evidence in a number of inquiries. High points included giving evidence on Ninety Mile Beach before the Muriwhenua Lands Inquiry (when it first occurred to me and a number of others that there seemed to be something wrong with the Crown's legal claims to the foreshore) and giving evidence on the somewhat neglected Mohaka-Waikare confiscation at Tāngoio marae during the Mohaka ki Ahuriri Inquiry.

Low points included being cross-examined at length by Crown counsel during the Te Whanganui-a-Orotu inquiry in 1993 on red lines, pin holes in maps and other such matters which I had never thought to check. (The Tribunal was forced to remark that 'it was unfortunate that the importance of closely examining this primary source of documentary evidence on whether or not Te Whanganui-a-Orotu was included in the purchase was not sufficiently appreciated when the research on this claim was commissioned'.)

In the 1990s Tribunal practice was evolving, and was in a process of moving from one-off special investigations (such as Pouakani) into large-scale district inquiries, of which Mohaka ki Ahuriri was the first. This was further developed in the Gisborne district inquiry in 2001-2002, when I decided to return to the bar. Gisborne was the first of the Tribunal's 'new approach' inquiries. With Chief Judge Williams (as he then was) presiding, the inquiry marked a dramatic shift in procedural style, with a move towards much more formal pleadings, statements of issues, and written questions of clarification, all designed to formalise and streamline the process. The hearings were very compressed, with a week-long hearing nearly every

month from December 2001 until mid-2002, finishing up at Gisborne Boys' High School, and was one of the most intense and absorbing experiences of my career.

Most of the Tribunal claims I have been involved in were connected with Kensington Swan, where my wife Deborah Edmunds is a partner and head of the Māori legal services group. In the Gisborne inquiry Kensington Swan represented Te Whānau a Kai, one of the smaller groupings in that inquiry, but who happened to include the novelist Witi Ihimaera, who often mentions Whānau a Kai and their home turf at Waituhi in his novels. Witi gave wonderful evidence for Te Whānau a Kai in our claimant hearings at Waituhi in early 2002.

Of all the inquiries I have had the good fortune to be able to participate in, it is Te Urewera which stands out, a truly massive affair with many hearings all over the marae of this vast and (to me) somewhat mysterious region. We represented numerous groups in this inquiry, but for me the most evocative of all the hearings was that for a group we did not act for: the Ngāti Haka-Patuheuheu hearings at Waiohau. This was the locale for the tragic story of the 'Waiohau fraud' and the hearing truly felt like a historic occasion in its own right.

Another standout was the Tribunal's urgent investigation into the Crown's foreshore and seabed policy, heard in 2003 with Judge Wainwright presiding. This was another intense, even gripping, experience and in my opinion was the Waitangi Tribunal's finest hour, the Tribunal playing a vital role during a time of a profound – and unnecessary – political crisis.



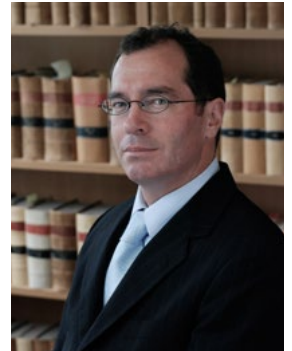
## Another standout was the Tribunal's urgent investigation into the Crown's foreshore and seabed policy

I have been involved in other inquiries as well, including the Central North Island, Wellington, Northern South Island, and Rohe Pōtae inquiries. All of these were fascinating experiences. It has been very instructive to see Tribunal practice evolve and develop, and the evidence prepared for the inquiries by an array of talented historians has taught me an enormous amount.

The camaraderie of the Waitangi Tribunal bar (whether claimant or Crown counsel) has also been memorable. The morning teas and lunches in marquees and marae dining rooms all over the country, listening to kuia and kaumātua from all over the country talk about their history, and being able to see the inside of so many beautifully painted and carved buildings which I would never otherwise have been able to visit – all of these things have formed part of a rich and wonderful experience for which I will always be grateful.

# A CLAIMANT LAWYER'S PERSPECTIVE

DOMINIC WILSON



**AS** a Pākehā lawyer appearing before the Waitangi Tribunal, I have enjoyed working closely with Māori communities. For my work I have been welcomed into whānau and hapū and have had my eyes opened to a Māori world that operates for many Pākehā as an unknown quantity.

As with other legal forums, lawyers have important functions as advocates for their clients, marshalling the evidence for the claims and ensuring its relevance. However, the Tribunal process necessitates some special requirements for the role. I think it is vital that lawyers support te reo Māori and the observance of tikanga Māori. Lawyers before the Tribunal also need to have a good knowledge of the history of Aotearoa. Outside the hearings, lawyers often play a crucial role behind the scenes mediating conflicts within the claimant group and clarifying their legal instructions.

One of the more difficult aspects of the Tribunal's process is the need to balance the desires of Māori claimants to present their claims as they see fit with conducting inquiries with due legal process and formality. While the Tribunal remains subject to the rules of natural justice and other aspects of due legal process (such as the Evidence Act 2006 so far as it applies), various provisions of the Treaty of Waitangi Act 1975 allow for and promote a tailored therapeutic approach to the hearing of Māori claims in the Tribunal. The field of therapeutic jurisprudence has highlighted how the legal process itself can be as remedial as the actual case decision.

A number of commentators have highlighted how in the 1980s the Tribunal moved the venue for its hearings from the ballroom of the Hotel Intercontinental

and onto the marae. This appears to have been a metaphor for a move to a more therapeutic process. In my experience the Tribunal has worked hard to provide an appropriate process for the hearing of claims. This can be seen in the recent innovation of 'ngā kōrero tuku iho' hearings in the Te Rohe Pōtae and Porirua ki Manawatū inquiries, where claimants have been able to present their oral traditions. At times, however, the input of lawyers has overshadowed the claimants and jeopardised the therapeutic nature of the Tribunal's process for claimant communities. It is important that the various participants continue to ensure that the Tribunal's hearing process itself is a critical aspect of the resolution of Māori Treaty of Waitangi claims against the Crown.

The Waitangi Tribunal's inquiries into claims have not only been of general benefit to the claimant communities, they have also played an important role in improving cultural relations, contributing to the wider dissemination of knowledge about Māori culture. The Tribunal's work, to some extent, promotes the 'mutual comprehension and respect' between Māori and Pākehā that Sir Taihakurei Durie discussed as a keystone for cultural conciliation in his seminal paper 'Will the Settlers Settle? Cultural Conciliation and Law' (Otago Law Review: 3, (1996), p449).

In my experience, many Pākehā live under a mantra that 'we are all kiwis' and still do not even recognise that Māori might hold a different world-view. Sometimes such views arise from assimilationist dogma, but mostly, I think, Pākehā just don't know. Accordingly, I think it remains important for the work of the Tribunal to be more widely advertised and incorporated into educational programmes.

# THE CROWN LAW OFFICE

## TE TARI TURE O TE KARAUNA



VIRGINIA HARDY

*Deputy Solicitor-General - Kaihotū Ture Peke*

We are always invited to Waitangi Tribunal hearings; we always turn up.

**S**o government lawyers in the Waitangi Tribunal have been engaged comprehensively with all claims and urgent applications - canvassing history, current law and policy, politics and relationships, principle and compromise, all of which are tested within the spare framework of the Treaty of Waitangi.

The unusual breadth of the Tribunal jurisdiction is challenging - this is not the place for narrow legal argument; 'black letter' lawyers find the forum unattractive. The substance of policy and legislation is scrutinised to an extent well beyond the jurisdiction of the courts. This breadth of inquiry twins with the (generally) recommendatory powers of the Tribunal. So at its best, what is required of participants is deep and practical thought about the Treaty merits of policy and law.

But there is also a more familiar public law context which has tended to inform the Tribunal's treatment of Crown conduct. While the Tribunal has over the years explored merits, beyond process, the approach it has developed has reflected some of the limits on judicial review where government decisions have high policy content - Tribunal inquiries have generally referred the detail of issues to the Treaty partners to resolve.

It goes without saying that the Tribunal's findings and recommendations have not always been welcomed by government. But what must be acknowledged is the scale of the contribution which the Tribunal has made to New Zealand's, and to successive governments', understanding of the history which underpins Treaty grievances.

And although participants in Tribunal inquiries and the broader settlement process, as well as those outside it, can be persistently frustrated by the time taken, I think the Tribunal's impact is best tested by outcomes in the long term. With Te Urewera, history explored by the Tribunal underpinned the innovative outcomes reached by Ngāi Tūhoe and the Crown, but it did take time. The process of negotiating settlements has also been critiqued and enhanced in the longer term by some of the Tribunal's thoughtful recommendations focussed on the Crown's engagement with iwi and hapū.

More diffusely, consideration of Treaty dimensions, prompted in part by the challenge posed by the Tribunal's jurisdiction to the scope and pace of implementation of government policy, has become a regular part of government assessment of policy.

And where government has declined to follow recommendations, as

with the 'shares plus' concept associated with the mixed ownership model for energy companies, the role of the Tribunal is nevertheless acknowledged in Crown participation in the hearing process and in the analysis and further consultation over the recommendations which that process produced.

So perhaps, over the decades since 1975, and although this may appear a modest acknowledgement, turning up counts.

Finally, Crown counsel recognise that we participate in a unique jurisdiction. Over the past 40 years the Tribunal has demonstrated leadership in operating biculturally.

In that context, Tribunal hearings can pose particular challenges for Crown counsel. Especially in historical claims, heard within the district inquiries on the marae, symbolism is powerful. The anger of claimants is frequently expressed directly to and at us. Sometimes this requires agile response. In the Te Urewera inquiry, before the hearings, the New Zealand flag was shot through (an event Judge Savage alluded to in his recent decision on the urgent application for inquiry into the current flag referendum). Crown counsel stepped forward to gather the flag, mirroring the claimants' symbolic act. But memorably, at the tea breaks and hākari there is gracious inclusion.

# A HISTORIAN'S PERSPECTIVE



---

TONY WALZL

---

From a personal perspective, my involvement in Treaty issues over the past 27 years has been an experience that has formed and shaped my entire professional life.

**H**aving worked in most inquiry districts, I have been lucky as a historian to research and write on the widest of subject matters. The rigour of Tribunal inquiry places demands on researchers to strive to the fullest to accurately present research findings and honestly express a viewpoint about subject matters which are often complex and controversial.

The Tribunal has the unenviable task of being presented with a wide range of perspectives from which they are required to reach findings that address claims and shape the way in which the past is viewed. I am honoured that I have been given an opportunity to contribute to history in the making. Being part of a process that ultimately has led to change and will have ongoing impacts in the future is something unique. Working to assist those who are seeking justice for past wrongs is a personal source of great pride. That this has been my life's career gives me a deep sense of satisfaction.

For me, the most significant aspect of working in Treaty issues over such a long period has been the opportunity to work alongside many claimant groups, albeit for short but concentrated periods. I have been humbled by the generosity I have been shown, where I, from outside of the community, have been treated with kindness, respect and good humour. I have travelled throughout the country

to the furthest reaches, the original home places of many iwi and hapū. Being told of sites of significance, places where history unfolded, and some of the secrets of whenua and moana has given me eyes to view the landscapes of these islands quite differently.

I have witnessed the earnest efforts of hundreds of women and men, who tirelessly work in the pursuit of redress for the many harms that have been inflicted on their people, the effects of which they still deal with. Motivated only by a belief in right action and the achievement of benefits for their whānau and hapū, these workers toil to achieve a greatly improved future for their children and mokopuna. I have been amazed at the resilience with which they deal with the many setbacks that are encountered.

The parallels with the past struggles of tūpuna are clear to see. In the reports I write, I can never come close to reflecting the realities of their experiences. I have been glad to contribute in a small way to assisting in their great effort, but I have not borne any of the trials or great responsibilities that have rested on their shoulders. That burden has been theirs alone, and they have borne it with a strength, patience, humour and love that can only be appreciated by those, like me, who have been honoured to witness it.

# A HISTORIAN'S PERSPECTIVE



DR VINCENT O'MALLEY

I first presented evidence to the Waitangi Tribunal in 1997, four years after I accepted Professor Alan Ward's offer to take up a three-month contract with the now long-defunct Crown-Congress Joint Working Party.

**T**wenty-two years after taking up that job and two of my former colleagues from the CCJWP (Dr Grant Phillipson and Dr Robyn Anderson) are now Tribunal members. Sadly, Alan - a staunch and passionate advocate for the Tribunal process - passed away last December. For my own part, in June of this year I gave evidence to the Tribunal for the final scheduled time. A three-month jaunt in Wellington evolved into a career researching Treaty claims.

Over the years I have appeared before the Tribunal on behalf of iwi, the Crown Forestry Rental Trust (CFRT) and (more latterly) as a Tribunal-commissioned witness. Every time it has been a privilege. I have had the opportunity to meet with, and learn from, kaumātua, kuia, claims managers and claimants, most of whom have been extraordinarily gracious, patient and welcoming in allowing me to share their stories. For a working class Pākehā, and a State House kid from Christchurch to boot, it has been an amazing window into another world. I am, and always will be, eternally grateful for the opportunity to be part of this immensely important process.

The Tribunal really has been the coalface of New Zealand history for the last two decades, its seams rich not just with tales of deprivation and loss, but

also of remarkable resilience, heroism and survival. Over the years I have tried in various ways to share some of the stories that I have encountered through my own research with a wider audience, whether through books, articles, blog posts, conference papers or talks to community groups and schools.

However, now that the Tribunal's historical inquiries are beginning to enter their final phase - the daylight at the end of a long and occasionally trying tunnel - it is my great hope that some more concerted attention might be given to making this research more freely available to iwi and the wider public. An online repository of the more than one thousand research reports commissioned by claimants, the Crown and Tribunal over the years might be a good start (perhaps combined with a bound collection of hard copies at the National Library and/or elsewhere). It would be a relatively small investment that would go a long way towards shining fresh light on this research.

On the Waitangi Tribunal's 40<sup>th</sup> anniversary it seems appropriate to look not just back to those great pioneers such as Dame Whina Cooper and her fellow Māori Land March participants, but also forward, to ensuring the history they helped guarantee would be told can also be shared with, and remembered by, future generations.



## LANDMARK INQUIRIES: TE REO 1986



SIR EDWARD TAIHAKUREI DURIE

Māori travellers by train to the capital in the diaspora years of the 1950s on had a glimpse of the future of their language as they cringed to the guard's call of the approaching stations - oh-tacky, why-can-I, parra-pram and pie-cock.

Only the dulcet tones of Marama Koea, announcing arrivals and departures at journey's end, gave a glimmer of hope that the capital might have a place for Māori and for the language which fed their intelligence and emotions.

Attitudes changed slowly but dramatically in the capital following the petition of Te Reo Māori Society and the Māori Students of Te Huinga Rangatahi in 1972, the institution of Māori Language Day (extended to a week in 1975) and the leadership of Kara Puketapu of Waiwhetu as Māori Affairs secretary in establishing the first Kōhanga Reo in Lower Hutt in 1982. The following year, Te Reo o Pōneke went to air.

The public and comprehensive review of official policy, however, in the Tribunal's Te Reo Māori Report in 1986, set the foundation for long-term government policy debate and commitment.

Not least to be convinced of the need for the language were many Māori themselves. In the 1950s these had been cautioned by their elders, desperate for the peoples' survival in the context of a demographic dispersal, to focus on the language and skills of the Pākehā, as though their knowledge of Te Reo had inhibited their own capacity in that area. The Te Reo hearing restored the true perspective. The impression that most remained on my mind, after listening

to the likes of Sir James Henare, Canon Maori Marsden, Canon Wi Huata, Wiremu Ohia, Dr Rangi Walker and Hiko Hohepa, was that those who spoke outstanding Māori spoke also outstanding English.

Impressive too were the numbers drawn from all quarters and different disciplines, all bound in common accord in seeking to retain and advance Te Reo. A tribute is due to Huirangi Waikereperu and the members of Ngā Kaiwhakapūmau i te Reo Society of Wellington, who brought the claim and who, along with their able counsel, David Rangitauira and Annette Sykes, brought the people together and marshalled their evidence and that of expert witnesses. As if in recognition of the pioneering work of both Puketapu and the Māori students, the hearings began at

Waiwhetū marae and were continued at Victoria University's Te Herenga Waka.

The Report was a beginning, not an end. While soon after, Te Reo Māori became an official language and could be used in the Courts, and Te Taura Whiri i te Reo was established, the foundations of the report were being built upon, with further Tribunal inquiries on radio frequencies and broadcasting assets. The findings were taken to the Courts, most notably by the New Zealand Māori Council, right through to the Privy Council, which ruled in 1994 that the government was responsible under the Treaty for the preservation of the Māori language. Out of this process Māori radio blossomed, Te Māngai Paho was born and Māori Television eventually left the womb.

Chief Judge Durie and Paul Temm, two members of the Waitangi Tribunal, visit the kōhanga reo at Waiwhetū during the Te Reo inquiry, 1985. Photograph taken by John Nicholson. Ref: EP/1985/2942/15-F. Alexander Turnbull Library, Wellington, New Zealand.



## LANDMARK INQUIRIES: TE REO MĀORI



ANNETTE SYKES

Ko te reo te mauri o te mana Māori

*The language is the life force of mana Māori*

*Sir James Henare*

**AS** an advocate who utilises te reo me ōna tikanga as a natural part of the court process, and in my daily life, it is important to remember how far the struggle for the survival of te reo rangatira as a living language has progressed. Undoubtedly, the jurisprudence that has emerged from the Waitangi Tribunal, in its role as a constitutional safeguard, has been pivotal in the process of reclamation and revitalisation, in rescuing te reo from 'going the way of the moa', as many feared.

The Te Reo Māori Claim arose from a High Court decision in 1979, confirmed by the Court of Appeal, that no Māori might use his language in the courts of New Zealand if he could speak English. The Court of Appeal concluded: 'The use of the Maori language in New Zealand is a matter of public importance but it does not follow that it raises a question of law in the circumstances of the present case. The Treaty of Waitangi to which reference was made does not deal with the legal point now in issue...'. In observing as it did that the Treaty did not cover the right to use Māori in the courts, the Court of Appeal was declaring the law as it believed it existed. Unsurprisingly, this was challenged in the heartlands and kāinga of te ao Māori.

The outrage that resulted came on the back of prominent protests of the period which had seen the introduction of a Māori language day that in 1975 became Māori language week. This galvanised a claim to the newly established Waitangi Tribunal by esteemed elder Huirangi Waikerepuru of Taranaki, supported by Ngā Kaiwhakapūmau i Te Reo. Amongst a number of other specific matters, the claim alleged that various acts and 'broadcasting and educational policies are inconsistent with the principles of the Treaty and as a result (the claimants) are prejudiced in that they and other Maori are not able to have the Maori language spoken, heard, taught, learnt, broadcast or otherwise used for all purposes and in particular in Parliament, the Courts, Government Departments and local bodies and in all other spheres of New Zealand society including hospitals'.

As a newly admitted solicitor - and, I was to learn later, the first female Māori lawyer to appear before the newly formed Waitangi Tribunal - the case is indelibly etched in my memory. The hearings, conducted at Waiwhetu Marae, Lower Hutt over a period of four weeks, saw a traditional legal forum transformed into a wānanga. Witness after witness, rangatira after rangatira, regaled the Tribunal members (Chief Judge Durie, Graham Latimer and Paul

Temm QC) about the whakapapa origins of te reo; the social and economic impacts of not being permitted to speak te reo Māori in school; and the impact of Eurocentric education and broadcasting. Tribal groups from all the four winds of Aotearoa accompanied their spokespeople in busloads. Men and women orators chastised the Māori language policy and practice of the Crown and its agencies. Groups such as the New Zealand section of the International Commission of Jurists and expert linguists such as the late Sonny Waru and the late Koro Dewes put the argument for affirmative action.

The resounding conclusion felt by many was that te reo Māori was the soul of Māori society and that the essence of our identity was under systemic attack. Even Secretary of Justice Callaghan acknowledged that denying Māori the right to use te reo Māori in the courts 'may give rise to such a deep-seated sense of injustice as to prejudice the standing of the courts in some Maori eyes'. The legal situation was, he concluded, 'at odds with our bicultural foundation at Waitangi in 1840'. The Tribunal agreed, finding:

*The Treaty was directed to ensuring a place for two peoples in this country. We question whether the principles and broad objectives of the Treaty can ever be achieved if there is not a recognised place for the language of one of the partners to the Treaty. In the Maori perspective, the place of the language in the life of the nation is indicative of the place of the people.*

The Tribunal made five key recommendations to the Government:

1. To legislate to allow te reo Māori to be used in courts and dealings with local and central government.
2. To establish a statutory body to 'supervise and foster the use of the Maori language.'

## The resounding conclusion felt by many was that te reo Māori was the soul of Māori society and that the essence of our identity was under systemic attack

3. To inquire into the teaching of te reo Māori and 'to ensure that all children who wish to learn Māori should be able to do so.'
4. For broadcasting policy to take account of the Treaty obligation to 'recognise and protect the Maori language'.
5. To provide for and promote bilingualism in the Public Service.

Following these recommendations, Māori was made an official language of New Zealand under the Māori Language Act 1987. I am pleased to say that despite some resistance to the implementation of the Act, te reo is now often used in the general courts by Māori-speaking practitioners and at the request of participants in the court process and is increasingly the dominant language in the Waitangi Tribunal and Māori Land Court.

There are now many institutions working to recover te reo, including Te Taura Whiri i Te Reo, Te Māngai Pāho and the Māori Television Service, most of them set up since the 1980s. These

agencies, like the Kōhanga Reo National Trust established in 1982, have come under further scrutiny by the Waitangi Tribunal. Disconcertingly, the state of te reo has fluctuated from decline prior to 1980, to gradual improvement from 1980 to 1996, to a renewed decline. As a former member of Te Māngai Pāho, one of the recurring concerns in the struggle for language revitalisation is the adequacy of funding allocated by the state to fund the network of 22 iwi radio stations that have been born from these initiatives and the rate of growth of the Māori Television Service itself. Who controls the allocation of this resourcing, and for what priorities, is as much a difficulty as the adequacy of the annual allocation of resources.

In this 40<sup>th</sup> year of the Waitangi Tribunal the struggle for te reo Māori continues. Vigilance is fundamental to staying the process of colonisation and to affirming our rights, which were so clearly articulated by the Te Reo Tribunal:

*...by the Treaty the Crown did promise to recognise and protect the language and that that promise has not been kept. The 'guarantee' in the Treaty requires affirmative action to protect and sustain the language, not a passive obligation to tolerate its existence and certainly not a right to deny its use in any place. It is, after all, the first language of the country, the language of the original inhabitants and the language in which the first signed copy of the Treaty was written.*

## LANDMARK INQUIRIES: NGĀI TAHU




---

### PROFESSOR MICHAEL BELGRAVE

---

**W**hen the Ngāi Tahu claim commenced hearings in August 1987, it was billed as the biggest the Waitangi Tribunal would have to deal with. As far as area of land involved, this was true, but in terms of the number of issues to be covered and the complexity of the different tribal interests involved, this was far from the case. However, it was (alongside Muriwhenua) the first full historical investigation by the Tribunal after the change of legislation in 1985 extended its jurisdiction back to 1840. It was the first inquiry where the Tribunal commissioned its own evidence and claimants and the Crown presented their own historical research, and it laid down many of the Tribunal's ongoing practices in dealing with historical claims.

More than anything else, the claim demonstrated how complex the historical evidence could be and how specialised historical issues were in making findings and recommendations. In the beginning, most of those involved believed that Māori claims were so self-evident that no great research would be required. Ngāi Tahu's claims had already been aired before many commissions of inquiry and had been the subject of numerous settlements.

Most of the attention was initially on the Ōtākou tenths, because this claim had never been settled previously,

although the story was, it was thought, well known. In 1844 Ngāi Tahu had, it was claimed, been promised during the purchase negotiations that one tenth of the land would be returned to them.

The evidence soon showed that whatever claim Ngāi Tahu had to the 'tenths', this was not it. No one was prepared for the depth of research required, the vast store of archive material that needed to be located and assessed, the complexity of the arguments that would be required, or for the time it would all take. Even National Archives would be severely stretched by the demands made upon it. The government had not even appointed a historian to the full tribunal. The claimants had done little research prior to hearing and none on Ōtākou. The Crown did not know what, if any, response would be required of it.

It very soon became evident that it would not be over by Christmas. Not only did the claimants and the Crown develop extensive research teams, but the Tribunal also put together a group of researchers under Professor Alan Ward, who had been appointed to review the evidence.

When the Tribunal issued its first Ngāi Tahu report in 1991, there was considerable criticism of the length of time the whole process had taken and its cost. The government introduced direct negotiations as an attempt to bypass the Tribunal, and the Tribunal itself, with its district inquiry model, looked for ways to make things move more quickly.

Yet, when compared with many later Tribunal reports, Ngāi Tahu does not seem so slow. Improvements in the process were made, using summaries of evidence rather than reading entire research reports out at hearing. But

other changes only added to the length of hearings, such as the introduction of the cross-examination of witnesses. The length of time for research, hearing evidence, and report writing could not be unrealistically reduced.

There were three Ngāi Tahu reports. The first dealt with the large land purchases by the Crown between 1844 and 1864. The Tribunal found that serious breaches of the principles of the Treaty had left Ngāi Tahu impoverished and with inadequate reserves for their own subsistence, denying them the capacity to benefit from the economic development of their island and without access to their promised natural food reserves, their mahinga kai. This would form the basis of the iwi's Treaty settlement in 1997. The second was the fisheries report, which, when it was released in 1992, precipitated the Sealord negotiations and nationwide settlement of commercial fishing claims. The last report, issued in 1995, wrapped up the iwi's remaining claims.

The Ngāi Tahu claim occurred with a good deal of public interest, with a journalist from the *Press* embedded in the claimants' team. While all this was done with a sense of urgency and excitement, no one could anticipate where the process would lead. There was no settlement regime, no commitment from government to fully implement Tribunal recommendations. All of that was yet to come.



## LANDMARK INQUIRIES: MURIWHENUA




---

SIR EDWARD TAIHAKUREI DURIE

---

The Muriwhenua inquiry broke new ground in several respects. One - not necessarily the most important - was the detailed and compelling evidence on the association of Māori with their ancestral seas.

Similar evidence had been touched on in the preceding contemporary claims of Waitara, Manukau and Kaituna, but not with the same comprehensiveness or history, and modern historians discussing the colonial treatment of Māori had focussed mainly on land loss. This case introduced, in the context of historical claims, a possibly equivalent loss of fishing rights as well.

On this land of dense population, the once extensive customary fishing had only marginally survived the many years of fishing licensing policy. By the 1980s all that regularly existed were Māori farmer-fishermen operating at almost subsistence levels. The key issue at the time of the inquiry was that the unsecured customary fishing right - which was all that remained - was about to be finally extinguished by the then proposed Quota Management System. This would see fewer boats catching more fish on a large commercial basis and the disappearance of the local fisherman.

The Tribunal established the principles by which customary fishing rights would be recognised and provided for. Its report paved the way for a national Māori fisheries settlement. This was, I think, the first major settlement resulting from the Tribunal's operations. The principles have not since been challenged and were endorsed by the

Tribunal which later heard the Ngāi Tahu claims. It was a major event in our history.

Another respect in which new ground was broken arose from the disproportionate extent to which the major farms in the district were Crown-owned and in respect of which Māori had claims as a direct result of the processes by which Māori in the district had been relieved of those lands many years ago. Once again there was an immediate threat to Māori interests. The Māori right to compensation in kind was at risk with the imminent transfer of these Crown lands to a third party, the proposed State-owned enterprises. It came in the form of a State-Owned Enterprises Bill then pending before the House of Representatives.

To deal with the situation the Tribunal created a record in reporting time, still unbroken, reporting to Government within 24 hours of the issue being raised by counsel (David Baragwanath QC). The result is history. The legislation was changed to make the State Owned Enterprises legislation subject to the principles of the Treaty of Waitangi, the Courts determined that the alienation of the land without protection for the claims was contrary to the Treaty, and a national settlement was given effect to by further legislative provisions in the SOE and Treaty of Waitangi Acts, enabling the Tribunal to order the return

of such lands to Māori ownership upon the hearing of the Māori claims. This too was a major development in the Treaty claims process and it all came from the Muriwhenua inquiry.

A further change in direction arising from this case was predicated by the focus of the evidence on the hapū losses as distinct from those of the iwi. I think it fair to disclose now the considerable contribution of the geographer, the late Dr Evelyn Stokes, later Dame Evelyn, with her detailed reports and analysis of land losses according to hapū districts. At the time, Māori had become attracted to the creation of a nation state consciousness through the common origins or shared relationships of the several hapū of a district, identifying collectively as an iwi. Dr Stokes's approach, aligned as it was with the evidence of social anthropologist Dr Dame Joan Metge, was a reminder that the customary body for the exercise of corporate functions was in fact the hapū. Later, the historical basis for this position was clearly established by the remarkable research of Dr Angela Ballara, who was later a Tribunal member, in her book *Iwi, the Dynamics of Māori Tribal Organisation from c. 1769 to c. 1945*.

Probably due to the Government's determination to maintain settlements according to 'large natural groupings', settlements continued to be made on an iwi basis. This led to the formation of post-settlement governance entities in which wealth and political power is centralised, putting at risk the traditional conception that wealth is distributed and that power ascends from the bottom up.

Nonetheless, I think largely as a result of the approach ushered in by the Muriwhenua Tribunal, post-settlement governance entities have seen the need for the more regular distribution of wealth to the local level. Significantly, too, the eventual Muriwhenua settlement with the Crown, as distinct from most



The Muriwhenua Fishing inquiry panel arrives at a hearing. In the group: Sir Monita Delamere, Georgina Te Heuheu, Bishop Manu Bennett and Chief Judge Durie. APN / Northern Advocate.

other settlements, did in several parts correspond with the principal hapū.

As mentioned, there were several aspects to the Muriwhenua inquiry which were distinctive and ground-breaking. A most significant one to me was the assessment of the early land alienations by reference to the Māori customary mode of business, which Dr Dame Joan Metge described in terms of gift exchange, as documented by Raymond Firth in the 1920s in *The Economics of the New Zealand Māori*. Other witnesses referred to this as a customary *tuku whenua*, or gifting of land, with all the associated obligations of an implicit, conditional exchange. I cannot think of anyone coming closer to an understanding of history in Māori terms than when the Tribunal embarked upon this discourse, shedding light on otherwise inexplicable aspects of recorded Māori conduct.

**Dr Stokes's approach was a reminder that the customary body for the exercise of corporate functions was in fact the hapū**

## LANDMARK INQUIRIES: MURIWHENUA



MICHAEL ALLEN

*Principal Historian, Waitangi Tribunal Unit*

The Muriwhenua inquiry, which began in 1986, was not just the first major inquiry into historical claims. It is in many senses our longest running inquiry, an outcome which few could have predicted when the inquiry began.

The claim was brought on behalf of the five principal iwi of the Muriwhenua region: Ngāti Kuri, Te Aupōuri, Te Rarawa, Ngāi Takoto, and Ngāti Kahu. Chief Judge Edward Taihakurei Durie, Tribunal Chairperson, appointed a panel of six members to hear the claim, himself presiding along with Bishop Manu Bennett, Monita Delamere, Georgina Te Heuheu, Keith Sorrenson and Bill Wilson.

Although the claim raised a range of land and water issues, events required the Tribunal to give certain aspects priority. First, in 1986 the Tribunal conducted an urgent inquiry into the proposed sale of state-owned assets. The Tribunal's report helped to bring the Treaty into legislation and to influence subsequent litigation by the New Zealand Māori Council in the Court of Appeal, in which the principles of the Treaty were articulated by the courts for the first time. The outcome included a change to the Tribunal's governing legislation, giving the Tribunal powers to order the return of certain state-owned land should the Tribunal find a claim in relation to that land to be well-founded.

Next, the Tribunal addressed fisheries and environmental aspects of the claim, in 1988 releasing reports on sea fisheries and the Mangonui sewerage scheme. Its *Muriwhenua Fishing Report* helped give fisheries issues prominence

in the national consciousness by highlighting the historical trajectory of Māori exclusion from fisheries. 'What is surprising is that a people who once depended so heavily on the sea resource should now find themselves almost totally shut out of an economic activity which was so much a part of their way of life.' The report contributed to a series of major settlements on fisheries issues, which included the distribution of some \$170 million worth of assets to iwi.

The Tribunal then commenced its main inquiry into historical land claims. It was at this point that the panel was reconstituted: Chief Judge Durie and Bishop Bennett were joined by Joanne Morris and Professor Evelyn Stokes. Hearings proceeded through to 1994. The Tribunal decided that, in order to help the claimants prepare for settlement negotiations, the inquiry would focus initially on claim issues up to 1865, because - by that time - much of the land in the Muriwhenua district had passed from Māori ownership.

The Tribunal's report, released in 1997, focused mainly on the meaning of a series of land transactions that occurred up to 1865. Some took place before the Treaty signing and were inquired into and in many cases confirmed by the Crown in the early years of the colony. The Crown also made many land purchases directly from Māori after 1840. The

claimants put to the Tribunal that Māori entered into these land transactions on the understanding that they were reciprocal 'tuku' (gifts) in traditional terms. By contrast, the Crown argued that Māori understood that the transactions amounted to permanent alienations.

In its report, released in 1997, the Tribunal drew on evidence provided to it about the nature of Māori customary law, and how Māori exercised rights to their land before colonisation. The iwi of Muriwhenua, the Tribunal found, essentially continued earlier patterns of engagement with people after the arrival of Europeans. Land transactions were an attempt to incorporate the new arrivals into their communities - enduring for so long as that relationship produced mutual rewards:

*We consider that Māori entered into these transactions with entirely different expectations: that the transactions imposed obligations on the settlers, of which they ought reasonably to have been aware, but which they generally did not fulfil.*

The Tribunal produced two other documents in addition to its main report. The first was a 'review of evidence' on pre-1865 issues, produced by the Tribunal's historian member Professor Evelyn Stokes in May 1996, and released in 1997. The review was produced

in order to 'assist the Tribunal in managing the large volumes of evidence, research opinion and primary source material in this case'. The second was another review of evidence produced by Professor Stokes, this time on post-1865 matters. The review was issued by the Tribunal in 2002 for the parties' consideration.

After the release of the Tribunal's main report, the five iwi - who had acted together during the course of the inquiry - decided to act independently for the purposes of Treaty settlement negotiations. The separate negotiations were stuttering, however, and in 2008 the five iwi joined together in a single forum designed to allow for joint negotiation over redress, particularly in sites of shared interest. From this process, four of the iwi have been able to advance their negotiations to the point of reaching a settlement with the Crown.

The fifth iwi - Ngāti Kahu - opted to withdraw from the negotiations in 2011, and instead pursued an application for the Tribunal to exercise its binding powers to order the return of certain lands within their rohe. Thus the Muriwhenua Tribunal was constituted for a third time - Joanne Morris was joined by Judge Stephen Clark (presiding officer), Robyn Anderson, and Pou Temara. An inquiry was held under urgency at the end of 2012. In its report, issued in February 2013, the Tribunal declined to order the return of properties. Ngāti Kahu have since appealed this decision, which has been partly upheld by the High Court. The matter is currently before the Court of Appeal.

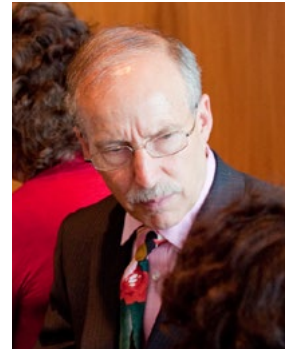
## LANDMARK INQUIRIES: MURIWHENUA

---

### DR BARRY RIGBY

*Senior Research Analyst/Inquiry  
Facilitator, Waitangi Tribunal Unit*

---



This account of what made Muriwhenua Land a 'landmark inquiry' relies upon oral history interviews recorded with three Tribunal members in the years 2000 and 2001. They were the late Bishop Manuhua Bennett, Joanne Morris, and Justice Eddie Durie. They all considered that Muriwhenua had helped shape their understanding of what the Waitangi Tribunal was all about.

**M**anu contrasted the intense bicultural encounter in Muriwhenua with the legal formality of the 1987-1995 Ngāi Tahu inquiry. Both inquiries went through three phases - fisheries, local, and land - but there, according to Manu, the comparison stopped. During the Muriwhenua Land years from 1990 onwards, he noted how his Pākehā colleagues increased their cultural understanding. In particular, he admired Joanne for her 'amazing enthusiasm'. He paid tribute to his fellow kaumatua and 28<sup>th</sup> Maori Battalion veteran, Monita Delamere. Monita carefully tutored Joanne in the Tribunal's kawa.

Joanne, looking back from the year 2000, reflected on all this as a 'steep learning curve' for her. Her abiding memories of the hearings were the enormous respect the claimants exhibited for our kaumātua, and towards Eddie Durie, our presiding officer. Eddie, she remembered, could beautifully capture the essence of the evidence and argument at the end of an arduous hearing day. I recall the dramatic Joe Williams cross-examination of Crown witness Fergus Sinclair as an example of how exacting we could be with each other.

When Eddie reflected on the meaning of the Muriwhenua experience in the year 2001, he combined the fishing and Mangonui Sewerage inquiries (1986-1988) with the larger (1990-2002) Muriwhenua Land inquiry. He remembered how he had drawn on Manu and Monita's wisdom throughout most of those arduous hearings. We lost Monita in 1993 and Manu in 2001.

The late Professor Bill Oliver's critique of the Tribunal's 1997 Muriwhenua Land report left Eddie completely mystified. Bill had given persuasive evidence of Crown Treaty breaches at our 1992-1993 hearings. His subsequent condemnation of the report as biased in favour of the claimants' tukuwhenua interpretation (advanced by people like the late Maori Marsden) made no sense to Eddie. He believed that the larger Muriwhenua inquiry, beginning in 1986, had allowed Maori to speak with their own voice. To him that made Muriwhenua Fishing, Mangonui Sewerage, and Muriwhenua Land all landmark inquiries.



## LANDMARK INQUIRIES: FORESHORE AND SEABED, 2004

**I**N 2003, the Court of Appeal's landmark decision *Ngāti Apa v Attorney-General* overruled earlier court decisions that the Crown owned New Zealand's foreshores. It found that Māori could still be customary owners of the foreshore and seabed. Rather than allow Māori to bring claims to the High Court or Māori Land Court for full ownership, the Government decided to create a special 'customary title', recognising Māori use-rights and resource management rights. In practice, the Government said, this offered Māori more than they would actually get through the courts under existing law, while ensuring public ownership.

The issue galvanised the nation. Some members of the public worried that Māori would control access to the beaches. Māori, for their part, protested that this was yet another land grab, depriving them of their legal rights. Māori protest culminated in a hīkoi to confront Parliament in Wellington. Iwi from around the country also sought an urgent hearing from the Tribunal. Their claims were heard over six days in January 2004, with the Tribunal's report produced four weeks later.

In its report, the Tribunal found that Māori foreshore and seabed claims were of long standing; they were not recent. The Tribunal also said that the Crown's foreshore and seabed policy would confiscate Māori property rights, without consent or compensation. This was a serious Treaty breach. It was also discriminatory because only Māori rights were to be taken. Other private foreshore rights would be left intact. Further, in place of their property rights, Māori would get a lesser 'title' of uncertain effect or use. The Tribunal recommended that, because there was no genuinely pressing need to act, the Crown should wait and negotiate an agreed solution with Māori. There seemed to be common ground for a solution, since Māori were happy to

DR GRANT PHILLIPSON

*Tribunal member*



Department of Prime Minister and Cabinet Chief Executive Mark Prebble fielding questions from the Waitangi Tribunal at the Foreshore and Seabed hearing at Westpac Stadium, Wellington, 2004. Fairfax Media NZ / Dominion Post.

guarantee public access. Alternatively, there were other options, each of them less extreme than the Crown's policy, but Māori consent would still be essential before any of them could be chosen.

The Crown rejected the Tribunal's recommendations. The Foreshore and Seabed Act 2004 was passed soon after. At the same time, the Government did not reject all Treaty claims about the coastal space. In 2004, it committed to settling Māori aquaculture claims, which had been heard by the Tribunal in 2002. The settlement guaranteed coastal tribes an ongoing share (20 per cent) of new space for aquaculture, and 20 per cent (or a financial equivalent) of the space that had been set aside since 1992.

Although aquaculture development was welcomed by the tribes concerned, it did not make up for the loss of foreshore and seabed rights. As is well known, the Māori

Party was formed, and successfully challenged Labour for control of the Māori seats. In 2008, the Māori Party entered into a confidence and supply agreement with a new, National-led Government, which repealed the Foreshore and Seabed Act and enacted the present Marine and Coastal Area (Takutai Moana) Act 2011.

Māori claims about natural resources, including the coastal space, fresh water, geothermal resources, and taonga species, have a long history. They are often based on claims that rights still exist at law, and are challenging not just for the courts but for our whole society to engage with and resolve.

## LANDMARK INQUIRIES: TĀMAKI MAKAURAU



JUDGE CARRIE WAINWRIGHT

Carrie Wainwright was appointed as a judge of the Māori Land Court in 2000. For six years she served as Deputy Chairperson of the Waitangi Tribunal and in 2008-2009 as Acting Chairperson. She served as presiding officer in a number of historical and urgent inquiries. She spoke to Te Manutukutuku about one of her most significant inquiries, which reported in 2007 on claims relating to the Crown's Treaty settlement policy and practice in the Tāmaki Makaurau (Auckland) region.

**P**rior to this inquiry, the Waitangi Tribunal had held inquiries into Crown actions concerning a number of Treaty settlement negotiations. The Office of Treaty Settlements' 'Red Book', its guideline for settlements, was coming under 'quite a lot of scrutiny'. But the Tribunal had to be careful about causing delays because 'on the whole groups are likely to gain more advantage from getting a settlement sooner than they are from the Tribunal insisting on a perfect process at that point'.

Nonetheless, a pattern was emerging of repeated problems in the Crown's approach to settlements at that time. Judge Wainwright explained:

*Some groups didn't feel like they were part of the collective that was being settled with, or had differences with the collective that was being settled with, and the difficulties that the Crown had in dealing with that situation manifested in a number of ways. There was a tendency for the Crown to say to the main groups with whom it was settling, "you go and sort out the problems with other claimant groups". And that was the situation that was presented to us in what became the Tāmaki Makaurau inquiry.*

Judge Wainwright added:

*The Crown's impulse to deal with the large natural grouping was having the effect of first up best dressed. So it was really ending up dealing first with the groups that arguably were the least knocked around by the colonial process, because they were the ones that tended to have the resources and the wherewithal generally to be able to front a Treaty negotiation. The groups who were further back in the process ran the risk that they would only get to the starting line after groups better prepared than them had had the pickings. This was a manifestly unfair situation that we wanted to bring to light.*

The report itself represented a new development in Tribunal reports in terms of both presentation and style:


*The primary job of the Tribunal is to report to the government on what it should do, or what the Tribunal thinks it should do, to rectify the problems that the Tribunal has identified. At that time I was trying to steer the Tribunal in the direction of making its work more accessible to a wider populace. So this report is a smaller volume*

*and it's not only easier to handle, but the text is broken up by more headings, more photographs, more claimant stories and narratives, so that it becomes more of a resource that you can dip into and get a sense of without reading it from go to woe.*

Judge Wainwright also reflected on the similarities between the Tāmaki Makaurau inquiry and the earlier inquiry on the Foreshore and Seabed, over which she also presided:

*In both cases, we embarked on those inquiries on a principled basis. My own thinking was that there may not be much of an audience for the findings and recommendations of the Tribunal at the time, but that in the fullness of time, it was important that posterity saw that there was another train of thought that was abroad and being communicated. Because the Crown put up a very vigorous defence of its process in Tāmaki Makaurau, it seemed that the likely outcome politically would be that the process would continue regardless. But the government didn't continue along the track that we had shown. Instead it pulled back from its proposed settlement with Ngāti Whātua, and set about speaking and negotiating ultimately with the other groups that were the cross-claimants.*

*One of the outcomes of both this urgent inquiry, the Tāmaki Makaurau Settlement Process Report, and the Foreshore and Seabed, was to influence the course of public dialogue about issues of the day. One of the interesting things after*



## **I think that that's one of the Tribunal's important functions, to have a persuasive voice in public discourse**

---

*the Foreshore and Seabed inquiry was that although what the Tribunal said in the report was often not specifically referenced in what people said, you would hear people talking about it and espousing the Tribunal's views as if they were their own. And so it kind of moved the discourse on, in both cases, so that although no doubt what actually ended up happening wasn't perfect from anybody's point of view, it was better arguably informed and more responsive to Māori concerns that had been expressed to the Tribunal than it otherwise would have been.*

*We wanted to be able to pull a whole lot of stuff together and put it in a cogent and compelling way that wasn't easy for the decision makers to just bat off. So I think that that's one of the Tribunal's important functions, to have a persuasive voice in public discourse.*



## LANDMARK INQUIRIES: WAI 262

PAUL HAMER

*Historian*

The Wai 262 inquiry and report defy easy explanation. Often known as the ‘indigenous flora and fauna’ claim, Wai 262 is much more than that, even when the description is expanded to include ‘cultural and intellectual property’.

Indeed, its wide-ranging scope is such that Wai 262 is perhaps the only treaty claim or Tribunal inquiry most commonly known simply by its Wai number.

The Tribunal’s 2011 report on the Wai 262 claim tried to encapsulate that subject matter with its subtitle: ‘A report into claims concerning New Zealand law and policy affecting Māori culture and identity’. This conveyed that the claim concerned much more than treaty rights over native species but rather went to the very heart of what is involved in maintaining Māori culture and identity. The report’s title endeavoured to capture this meaning in just a few words: ‘Ko Aotearoa Tēnei’. At once this was both a simple translation of ‘This is New Zealand’ and also a reminder that this is a Māori country, the only place in the world where Māori culture can be exercised in all its richness.

There are several other descriptors that must be noted. Wai 262 is sometimes referred to as the ‘grandfather’ of all treaty claims, in that it concerns not just the loss of land or other resources but the very essence of being Māori. It is also regarded as the Tribunal’s first ever whole-of-government inquiry, in that it scrutinised the policies and performance of 20 government departments and agencies. The Tribunal’s letter of transmittal was addressed to an unprecedented 19 ministers.

Furthermore, the Tribunal itself made much of Wai 262 being the first ‘post-settlement’ inquiry, in that it focused on the future relationship between Māori and the Crown rather than looking back on historical wrongs. As the Tribunal put it, the Māori cultural renaissance, societal changes, and the looming conclusion of the historical claims settlement process meant New Zealand sat ‘poised at a crossroads both in race relations and on our long quest for a mature sense of national identity’. The Tribunal urged the path of inclusion, not conflict, and the embrace of Māori culture and identity ‘in everything government says and does’.

More specifically, it argued that the role of kaitiaki or guardian communities should be properly recognised in the management or control of taonga species, taonga works, and mātauranga Māori. This, it felt, was the means of capturing rather than squandering Māori potential.

The claim was brought by six iwi: Ngāti Kuri, Te Rarawa, Ngāti Wai, Ngāti Porou, Ngāti Kahungunu, and Ngāti Koata. The report encompassed the issues of taonga works and intellectual property (trademarks and copyright); taonga species and intellectual property (patents and plant variety rights); management of the environment generally (the Resource Management Act) and the conservation estate specifically (the Department of Conservation); te reo Māori (including tribal dialects); rongoā Māori; the negotiation of international agreements; and the Crown’s control or funding of mātauranga Māori across archives, libraries, museums, the regime governing protected objects, education, the arts, broadcasting, and research science.

Because Wai 262 is as much a contemporary as a historical claim, its resolution lacks the structure of the historical settlements process. Its sheer complexity and breadth of focus also creates challenges for a whole-of-government response. There have been some signs of its influence, such as the legislative recognition of Ngāti Toa Rangatira’s interests in the ‘Ka Mate’ haka, as well as the Crown’s acceptance that new measures are necessary to reverse the decline in te reo Māori. But we are yet to see real steps being taken to implement what the Tribunal called its ‘big and audacious vision’.



Keita Walker, panel member; Betty Kearney, former presiding officer Judge Kearney’s widow; and Rose White-Tahuparae, the widow of kaumātua member John Tahuparae, at the handover of the Tribunal’s report on the Wai 262 claim, *Ko Aotearoa Tēnei*, 2011.



# A STAFF PERSPECTIVE



MICHAEL ALLEN

*Principal Historian, Waitangi Tribunal Unit*

The Waitangi Tribunal Unit (WTU) is located across several floors of Fujitsu Tower in downtown Wellington.

**ON** any given day of the working week, staff can be found hard at work helping the Tribunal's various presiding officers and members to run the Tribunal's inquiries. Staff assist at various points of an inquiry's life-cycle: helping to register claims, organise hearings, prepare research evidence, or write reports. If they're not in the office, they'll be out in 'the field', preparing for or attending the many hearings that take place at marae up and down the country throughout the year.

As Principal Historian, my job only really lets me see how the end of the inquiry process works, when a Tribunal report is put together. So I took a tour of the floors to get a sense of what makes staff throughout the WTU tick - what parts of their job they find rewarding, and the unique challenges they face.

Any visit to the Waitangi Tribunal begins on level 7 - the reception desk and the home of the *business support team*. Though a small team, they're at the operational heart of the Waitangi Tribunal - greeting guests, fielding phone calls, and organising many of the day-to-day logistics that help staff and Tribunal members get what they need in order to do their jobs.

Many of the phone calls taken by the reception desk are passed on

to the *registrar's team*. This team is the initial point of contact for people approaching the Tribunal for the first time. As one assistant registrar told me, 'we need to make sure they've got the right information so they know what they can do next'. Alongside helping with the start-up of inquiries, they are also responsible for assisting the registration of claims. This has included progressing the large number of unregistered claims in the wake of the deadline for submitting historical claims in September 2008, when some 1800 were received in a month - today, only a hundred of those claims remain unregistered.

Just along the corridor from the registrar's office is the *claims co-ordination team*. Alongside processing documents, especially for the record of inquiry, staff in this team are responsible for organising the logistics of hearings and other Tribunal events, from arranging appropriate venues to ensuring that catering is taken care of. They can regularly be found out in the field on reconnaissance missions ahead of hearings, or working long hours to keep all in order during the hearings themselves. As one claims coordinator told me, 'getting out into the field is why we do what we do'. All of the claims coordinators I spoke to talked about the rewards they get from developing



Heather Baggott, General Manager Special Jurisdictions, Julie Tangaere, Acting Director, and Waitangi Tribunal staff at the 2014 Members Conference.

relationships - with the claimants and with other members of their team, as well as presiding officers and panel members. Another rewarding aspect of the job is being able to travel to unique parts of New Zealand. 'We get to see what the people there are fighting for.'

Across the hallway from the claims coordinators and on the next floor up is the *research and inquiry facilitation team*. As distinct from the claims coordinators, who do the event management for the hearings, staff in this team are responsible for helping the Tribunal organise how evidence is produced for the various inquiries and how that evidence is heard. The manager of the team, James Mitchell, described the inquiry facilitation aspect of this job as being 'the permanent eyes and ears for the panel on the ground in an inquiry'.

The inquiry facilitators I spoke with described the various rewards and

challenges of the job. As with staff in other parts of the organisation, they talked about the positives that come with being out in the field and seeing people engaged in living history. 'The process brings people a lot of satisfaction - not only in presenting their evidence to the Tribunal, but also in doing so in front of their own people.' Another facilitator told me about the rewards that come with working with Tribunal panels and being part of the discussions they have. 'They are such a diverse group of people. You wouldn't get that kind of experience anywhere else.' The challenge of the job is in managing relationships and keeping everyone involved in inquiries happy - from the panel to the claimants, as well as technical witnesses, lawyers for the claimants and the Crown, and the Crown Forestry Rental Trust.

**The challenge of the job is in managing relationships and keeping everyone involved in inquiries happy**

## Our goal is to help staff and Tribunal members achieve the highest quality work possible

The team is also responsible for research commissioned by the Tribunal. As well as supervising researchers contracted for commissioned projects, team members themselves undertake commissioned research for inquiries. They face a variety of challenges, often working with old archival material, and with preparing for cross-examination at Tribunal hearings as expert witnesses. One researcher told me about her experience so far: 'I've learnt so much, particularly about the Native Land Court and land legislation. What this has shown me is the challenges Māori have faced in dealing with their land. It's been eye-opening.' Another researcher talked about her enthusiasm for the claim issues that are addressed in Tribunal inquiries: 'You get to learn about so much interesting history.'

The work produced by the research and inquiry facilitation team was summed up by one staff member:

*The real reward is in being able to go to hearings, and see its effect on people, and how research is used in hearings, particularly seeing how research is used in cross-examination, and seeing claimants getting into the evidence. It's quite unlike academia. We not only have input into supervising research, we're also able to see it through to cross-examination. It puts into perspective the work that we do.*

One of the upper floors of Fujitsu Tower houses the *report writing team*, who are tasked with assisting panels in turning all of the evidence submitted during inquiries into Tribunal reports. This work presents its own unique rewards and challenges. As one member of the team explained, report writers are privileged in getting to work closely with panel members at hearings and in crystallising their thinking in the form of a report. 'They're all remarkable people in their own right, including many Māori kuia and kaumātua who have been leaders in the Māori renaissance. It's amazing to watch them in their element on the marae.' Another reward, as one report writer explained, is having the 'opportunity to attend hearings and to hear from tangata whenua witnesses directly, and to actually visit some of the sites that you are writing about'.

The *chief historian's team* advises on standards for and the quality of all of the Tribunal's written work, from the research that it commissions to drafts of Tribunal reports. This is the part of the process where I come in. Our goal is to help staff and Tribunal members achieve the highest quality work possible, which is a challenging and rewarding job in equal measure. Our small team assists or undertakes pre-casebook reviews of the research needed for an inquiry and post-casebook reviews of the sufficiency of the assembled evidence for an inquiry to go to hearing. We also provide strategic advice on the development of the Tribunal's inquiry programme to the Director, the Chairperson and inquiry presiding officers.

The *director's office* is located on the other side of the floor from the report writers. Acting Director Julie Tangaere explains that her work is about 'managing the interdependencies between different parts of the process, and the different inquiries that might be on the go at any one time'. This

includes ensuring that the work of the Waitangi Tribunal has visibility to the wider Ministry of Justice, so that the Tribunal is adequately resourced to meet its strategic goals. At the same time, the director's office seeks to ensure that the Waitangi Tribunal Unit is attuned to the broader direction of the Ministry of Justice.

Part of this is ensuring that staff are adequately prepared for attending hearings and other events. Cultural Advisor Patrick Hape explains:

*A big challenge we have in preparing for cultural events is balancing the expectations of presiding officers with what staff can practically do when they go out into the field. The demands of going to remote marae are so much higher than ordinary court rooms.*

As with other parts of the Tribunal, staff in the director's office see the rewards most when they go out into the field, particularly for report handovers. As Julie Tangaere says, 'it's the result of collective efforts across the WTU. To be part of that historical moment in time – when we give the claimants their report – is fantastic.'

The Waitangi Tribunal  
Level 7, Fujitsu Tower  
141 The Terrace  
Wellington  
New Zealand  
DX SX11237  
Tel : 64 4 914 3000  
Fax : 64 4 914 3001  
[www.waitangitribunal.govt.nz](http://www.waitangitribunal.govt.nz)