Law, History and the Treaty of Waitangi

IN 1989 an important essay by Keith Sorrenson drew attention to the historiographical issues underlying contemporary Maori claims. That essay also noted the contribution of lawyers to the politics of the historiography of Maori claims, especially as presented before the Waitangi Tribunal.1 The political landscape has changed much in the space of a few years but the themes identified by Sorrenson about the role of history in the claims’ process have, if anything, become more accentuated.2 There can be no doubt that within this context the writing of history is a politically charged exercise, where the pressure to service the needs of the present is felt as strongly as any inclination towards preservation of the integrity of the past. In this setting the role of the historian is, as Sorrenson rightly saw, problematic. He further argued that this issue was aggravated by the presence of lawyers with an agenda of their own. This paper is an attempt to explore those themes first raised by Sorrenson about the politics of historiography in a context of post-colonial inter-cultural encounter where law has become the dominant idiom of discourse.

It is a history of the production of history within the polity of the Anglo-settler state of New Zealand in response to the claims made by its indigenous tribal people, the Maori. The paper considers the ways in which the narratives of state authority have been revised and rewritten during the past two decades in the face of those claims. It examines how these narratives have been tested by a particular area of state activity which has necessitated a rise in historical awareness and critical ability as a result of efforts to legitimize and understand the state’s existence as a continuous political structure.3

A certain type of history is under discussion — history which has a legitimating function in relation to the state. This type of history, which explains and

justifies a polity's presence in time and location, is associated with the constitutional form through which the instrumentalities of state power draw their claim to authority. 'History' became the primary means during the mid-1980s for the reorientation of the legitimating account of the Anglo-settler state in the face of traditional historical and legal accounts with their untenable marginalization of Maori. This pressure on 'history' for a newer, incorporative narrative of state origins was accentuated by the inability of the juridical account to provide an historically validated account able to incorporate the Treaty of Waitangi.

In the mid-1980s the Whig trappings of Anglo-settler history and law in New Zealand reflected the political circumstances of the time. This was an era in which claims were being raised but where the substantial settlements of the 1990s were at best conjectural. This environment of claims against the Crown focused upon the verticalized aspect of Crown-(Maori)subject relations. The explanations of state authority generated during this period had scant option but to resort to central elements of the Whig tradition which was their intellectual inheritance. During the past five years, however, it has become plain that Maori claims have moved into a new political sphere — what might be called 'the politics of settlement' — and that movement has had necessary consequences for the discourse of the Anglo-settler state, including its historiographic mechanisms. The historiography that is presently arising in state-centred discourse is more contingent and necessarily less reassuring than the earlier Whig axis.

The change in political climate, which has encouraged what for the contemporary Anglo-settler state (though not for Maori) is a new, emergent historiography of national political power, has been substantially the result of judicial intervention in the claims' process. Though the common law has remained outside 'history', from the late 1980s the courts have resorted to devices which have left the vertical and constricting parameters of their Whig constitutionalism. They have devised doctrine which puts Crown-tribe relations into a horizontalized context designed to facilitate negotiated settlement. The contemporary historiography of the Anglo-settler state therefore reflects the change in political circumstances which occurred in the late 1980s. We see histories of contest and competition between autonomous political entities with judges framing legal principles and doctrine so as to order and, increasingly, to ritualize the relations of these entities (Crown and tribes), locked into inescapable co-existence.

In closing, it is speculated that this historiography of contest, co-existence and contingency shows how Anglo-settler state discourse has moved towards a Maori epic of political life on the New Zealand islands, with its emphasis upon the competition for mana. The Whig narratives, which for so long have anchored the Anglo-settler state's historical and juridical accounts of itself, have been fatally weakened if not severed by force of Maori claims (and other national circumstances). New Zealand may be producing an historiography required by its demography and geography — an indigenization of discourse.

This paper is presented, then, as an enquiry into the way in which a political society — the Anglo-settler state of New Zealand — has generated explanations of its existence in time and particular location.

The first reminder to be made is that the political discourse of the state
explaining its power over Maori tribes is not only one deploying the state’s historical memory but one involving the encounter with another, competing historical memory — that of the tribes themselves. This encounter is, more accurately, a series of encounters wherein tribal histories interact with that of the state (as well as among themselves) and so generate another broader history, an overarching pan-Maori ‘history’. Thus it is possible to have a number of histories occurring within various sites in the region known as a ‘state’, though not all can or will lay claim to a public space. Tribal histories will have, at most, a semi-public presence, a focus on the marae as the motor of history. The incursions of the Anglo-settler state will be occasional, perhaps jarring, experiences in that history, but Pakeha cannot make the chauvinist assumption that such encounters will represent the whole or even a significant portion of post-Treaty tribal histories. Indeed the speculative conclusion of this essay is that, in the end, it is the Maori historiography which has been the more adaptive. Its present vitality indicates that rather than an Anglo-centric, metropolitanized Whig narrative, the Maori historiography of political power may be the more suitable historiography of encounter and national experience.

History which is labelled ‘Whig’ is state-centred and celebrates the growth of parliamentary institutions, seeing Westminster democracy as the Darwinian evolutionary endpoint of constitutional growth. It is essentially a tale vindicating parliamentary democracy and the rule of (the common) law. Whig history acquired a new, reinvigorated lease of life in the colonial setting. ‘Whig’ colonial history became the tale of how a fledgling colony gradually acquired full constitutional maturity with representative institutions of its own released from the imperial apron-strings. Underlying this celebration of constitutional form is the fundamental belief that governance is essentially consensual in character. Representative government is regarded by the Whig as embodying the consent the individual has given to the form of government.

The contractual origins of Crown sovereignty are most often associated with Locke and Hobbes, whose contracts are in character quite different. But, for the moment, whatever their differences, the Lockean and Hobbesian contracts occurred in a vertical situation to explain the relation of ruler (Crown) and subject. However, during the nineteenth century contractual doctrine moved into a horizontalized context of the relations between autonomous, and notionally equal, political entities. The post-Congress of Vienna system of states’ relations, with its Vattelian suppositions of equal and independent state sovereignty, and,
in England, the newly flourishing common law doctrine of contract⁶ signalled the movement of contract from the constitutional sphere. Contract thence became associated with the relations of independent and equal, rational actors concerned with and making formal arrangements about their own (private) interests — contract as Bentham’s self-legislation.

That individualized conception of contract became engrained in legal consciousness during the nineteenth century, its purchase inversely commensurate with the vigour with which the vertical (or constitutional) concept had been discarded. Today the legal phenomenon of contract is located in an horizontalized context of rational individuals transacting to their mutual advantage. Meanwhile, the verticalized relations of Crown and subject remained cradled by the Burkean and Whig framework of the Crown’s ancient and immemorial sovereignty.

As it matured during the first half of the nineteenth century, Whig history became the legitimating account of the state itself and, in justifying the institutions of state governance, became an essential, ideological (if not propagandist) element in nation building. Events and individuals became described and assessed in terms of progress towards an eventual and inevitable constitutional form.⁷ The past, being an embryonic version of the present, was reported in a way which made it seem an harmonious progression towards the present. And so the individual of bygone days could be ‘imprisoned within a destiny in which he himself has little hand, fixed in a landscape in which the infinite perspectives of the long term stretch into the distances behind him and before’.⁸ This, it will be argued, is the type of history which has flourished in post-war New Zealand.

By the end of the nineteenth century one could say that the English Whig tradition had diverged into two forms, one variety juridical and ahistorical, the other historiographical. The immediate popularity of Albert Venn Dicey’s book, *The Law of the Constitution*, published in 1885, signified the mastery held by the juridical account within the public domain, although that alone did not necessarily cause (but it certainly allowed) the historiographical form to expire. The modern nation-state assured, and its empire booming, the means of reporting British history could move into a Namierite⁹ world of ‘Great Men’, a more contingent environment where individuals were unshackled from Whiggish laws of history and were invested with a greater capacity to shape the world about them.


It might be said, then, that twentieth-century Anglo-settler explanations of state power inherited the two forms of the late nineteenth-century Whig tradition, which upon colonial transplantation became hybridizing continuations from the tradition’s own history: one, a legal and ahistoricized account of state power distinct from the second — an historiographical tradition which by the mid-nineteenth century transmitted ‘the’ history of the English people. The accounts of the state in New Zealand and other Anglo-Commonwealth states have tended towards that bifurcated character. In short, they take either a juridical or historical form, whilst being derived from the Whig tradition of English history.

In New Zealand, historians such as W.P. Morrell and A.H. McLintock represent what might be called an ‘old Whig tradition’ of history. This approach is the one which the constitutional historians of New Zealand (so much as they exist) also take, straddling, in an uncomfortable and uncomprehendingly self-conscious way, the juridical and historical accounts of state authority. By adopting the old Whig account of the Anglo-settler state’s history, these constitutional lawyers and historians establish the conditions in which the juridical Hobbesian account can flourish. In other words, and in some cases for no more than a page or bare chapter, they adopt the historiographical style which flourished in England during the mid-nineteenth century before ‘law’ and ‘history’ separated, so that in the accounts they then give of the New Zealand constitution that separation can be ensured.

These Whig histories are accounts of the progress of the New Zealand state from fledgling Crown colony to mature constitutional form, signified by New Zealand’s adoption of the Statute of Westminster in 1947. That act provides an evolutionary endpoint towards which the momentum of colonial history is channelled. Those individuals who stand in the path of that history are blackened and those who vindicate the representative principle are lionized. Nothing can stop the antipodean Leviathan.

McLintock’s book *Crown Colony Government in New Zealand* (1958) is a paradigmatic Whig text. Sir George Grey is vilified for his opposition to the establishment of a representative legislature during the late 1840s as though he were a cynical Tudor wielding executive power by Divine Right. Like the Whig historiography of the mid-nineteenth century from which it springs, this type of history is not concerned with examining the constitutional origins of the Anglo-settler state. The Crown’s sovereignty ‘is’, and it does not arise from some foundation particular to the New Zealand-Aotearoa setting. The Burkean mist over the realm has become an antipodean long white cloud from which emerges the Anglo-settler Leviathan in its transhemispheric, linear and progressive glory.
The Crown’s sovereignty over New Zealand becomes moored to the immortal continuity of the English constitution itself.

Whig histories of New Zealand are so tied into the Anglo-centric momentum that the Treaty of Waitangi cannot be seen as the moment of constitutional origin. These histories depict the Treaty and the question of native representation and participation in the colonial polity as no more than soil-clearing in character. They marginalize Maori and regard their presence and the Treaty as no more than hiccups in the path of eventual, mature constitutional form.

This type of history with its umbilical connection to an Anglo-centric tradition fell from favour during a period which saw United Kingdom entry into the European Community, the growth of pan-Maori protest (of which one might take Maori resistance to the 1967 legislative reforms as pivotal) and as the Commonwealth itself experienced the pressure of decolonization. The Whiggish theme of the colonial replication of Westminster democracy under devolving Crown sovereignty lost power as an historiographical imperative of Commonwealth history.

In the face of pressing Maori claims, the question of the origins of the New Zealand state became a matter of national concern in the 1980s. National discourse required an account of state power which reversed the Whiggish marginalization of Maori. The distinction between a juridical and historical account of Crown sovereignty was tested during the 1980s as Maori issues neared the top of the nation’s political agenda.

A new approach to the legal history of New Zealand was hailed as ‘revisionist’ because here at last was an approach which seemed to put Maori rights at its centre. That the common law doctrine of aboriginal title had important consequences for contemporary Maori claims, notably the coastal fisheries dispute of the late 1980s, gave it added potency. Also, the history of the doctrine at judicial and legislative hands, the tale of Maori common law rights subverted by settler-state authorities, coincided with more general histories of marginalization and oppression, such as Alan Ward’s *A Show of Justice* (1973) and Claudia Orange’s *The Treaty of Waitangi* (1987). Yet this legal approach to Maori rights failed to achieve anything more than a kind of argumentative availability.

The common law doctrine of aboriginal title holds that the land rights of the indigenous tribes survive the sovereignty of the Crown and that the Crown’s ultimate title to land becomes ‘burdened’ by the aboriginal title. That title can only be extinguished through the Crown, either by voluntary relinquishment or statutory expropriation. This depiction of the effects of Crown sovereignty on Maori rights characterizes the Treaty of Waitangi as no more than declaratory of

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common law rights which would have arisen in any event. Those rights derive from the tribal occupation of ancestral lands 'since time immemorial'.

The Whig elements of this common law doctrine soon became apparent despite the usefulness of the doctrine in relation to customary property rights, most especially fishing. The doctrine’s treatment of tribal dominium was premised on Crown imperium and so avoided the more fundamental issues about state power. According to the common law doctrine, Maori rights against the settler-state do not need the Treaty text, but instead have absorbed key common law notions of custom and immemoriality for their legal viability. Not being a ‘Treaty-driven’ approach to New Zealand constitutional history, the common law doctrine was, at best, no more than a partial kind of the incorporative approach. The doctrine avoided any question of origins, and did not give the Treaty any foundational status; indeed its recognition of Crown sovereignty made it complicit in what was at dispute.

At the same time as the doctrine of aboriginal title was exciting interest within New Zealand of a kind similar to, albeit not as dramatic as, the later Australian experience with Mabo v Queensland (No.2) (1992), another juridical account of Crown and tribe relations — one more concerned with constitutional origins — was being attempted. The inaugural lecture and subsequent work by Professor J. Brookfield addressed, but in the end no more than highlighted, the incapacities of the common law. Brookfield argued that though Crown sovereignty over New Zealand may have been usurpatory in origin the passage of time had endowed it with legitimacy. Ultimately this was not an account of constitutional origins, for although his argument tried earnestly to give the Treaty of Waitangi foundational status it could not. What he called ‘time’ amounted to a localized sense of ‘immemoriality’ and, essentially, replayed the limitations of the juridical paradigm: the settler state’s authority simply ‘is’ because it is taken by the common law imagination to have always been there. In the end, despite his critical stance, Brookfield was too much the inhabitant of the orthodox legal paradigm.

16 Te Weehi v Regional Fisheries Officer, [1986] 1 New Zealand Law Reports (NZLR), p.682 Supreme Court (SC), and see Andrew Sharp, Justice and the Maori. Maori Claims in New Zealand Political Argument in the 1980s, Auckland, 1990, pp.82-85.


While lawyers seemed unable to give an account of the state wherein the Treaty of Waitangi had any foundational status, important histories were being written at arm’s length from old Whig historiography. The most remarkable, because influential, example of this new history was Claudia Orange’s *The Treaty of Waitangi*. This book did not purport to be a legal text. Indeed it almost studiedly avoided a legal aspect, unwittingly thereby demonstrating that a juridical history of the Treaty of Waitangi was not possible. Orange’s history is essentially a history of the Anglo-settler state, despite being billed as a ‘Maori history’ of the Treaty of Waitangi. To be sure, the author revealed the tribal discourse(s) within Maori society, sparked by the ceremonies of signature in 1840. In that regard, though, she failed to distinguish what occurred in 1840 from its ‘afterlife’ — the former being an event, the latter a history of discourse or, in other words, the history of the Treaty as an ‘idea’. Yet the yardstick against which that discourse was constantly set was that of the Anglo-settler state. Certainly Maori were depicted as actors able to affect the drift of events — but only to a limited extent. Underlying the book was a clear doom-mongering theme that the history being given had no possible outcome other than the continual marginalization and oppression of Maori. This was a linear tale about the Anglo-settler state’s progressive ‘civilisation’ of the New Zealand wilderness and accompanying failure to include Maori. Maori became supplicants knocking at a door which has been slammed shut in their face. Orange’s history can only be described as ‘alternative’ in being a tale of Maori exclusion and Pakeha guilt.

Other features of Orange’s book, besides its state-centred character, signalled the silent grasp of Whig historiography. First, her history was a ‘presentist’ one — that is, she saw the past through the lenses of the present: namely the state ascendant. In her eyes the past had no option but to produce the present, yet it was simultaneously rebuked for taking that path. History became the means of clubbing the conscience of the contemporary state, as the title of the author’s final chapter, ‘A Residue of Guilt’, made plain.

In the end, *The Treaty of Waitangi* could not slip the strong grasp which Whig historiography had exerted on the New Zealand historical imagination whenever it tried to deal with the origins of the state. Firmly rejecting the old Whig version which, we have seen, foreclosed any possibility of a tale of state origins incorporating the Treaty, Orange could only step backward in (Whig) historiographical time. Not wanting the perpetual linearity of the traditional histories of New Zealand, yet wanting to locate the origins of the state in some form of consent, Orange put pre-colonial Maori society in another ahistorical state — the Lockean state of nature, the time ‘before history’.

In terms of the historiographical tradition, her step was not unpredictable. Tackling the historical origins of the Whig Anglo-settler state, in terms of the historiographical tradition which stood behind her, a resort to contract and the state of nature was to be expected. This step required a form of ahistoricity, but one different from the lawyers’ abeyance of temporality. It was the (Whig) time *before* as opposed to a (common law) time *without* history. The history of Orange’s state originated with the Treaty of Waitangi. The Treaty thus became the Anglo-settler state’s historical beginning: a beginning in contract.
Founding the colonial state in the Treaty of Waitangi, Orange then set about relating its history in terms of its origin. What necessarily followed and that which indeed eventuated was contractarian history. The Crown's performance in relation to the contract of governance became the book's narrative beacon, the means of bringing the state to account. As in the Lockean account the contract presupposes one, and only one, sovereign, by Orange's presentist account that can only be the Crown. Her history of Crown-tribe relations is a vindication of that status.

As must any doctrine of power, Whig ideology lays claim to the future. It supplies a text which provides reassurance about the future. There may be necessary qualifications, a menu of 'ifs' and 'buts', but the underlying assertion is that the future (like its past) is manageable and can provide the harmony (Whig history) and exorcise the guilt (Orange) of the past. Just as the present has controlled Orange's reading of the past, so too will it determine the future.

Orange did not spurn the Whig tradition so much as reorient its axis. This, I suggest, is why her book was able to strike such a populist chord. It was and remains a way of writing history in a narrative form deeply familiar to Anglo-settler culture. Instead of the nineteenth-century Whig approach tying the Crown's sovereignty to notions of immortal continuity, she replaced that complacency with a contractarian account of the origins and measure of state legitimacy.

This contractarian theme became the dominant approach in Anglo-settler discourse of the 1980s. But as a theme it contained more argumentative possibilities than the diluted Lockean version of Orange and the Waitangi Tribunal. The Treaty of Waitangi could also be depicted as a Hobbesian contract between Crown and subject, by which the cession of sovereignty in 1840 could be seen as a full and final giving up, rather than a conditional surrender of authority. This was the version of contract which the so-called 'white backlash' favoured, for whilst it did not ignore the Treaty altogether, its result — the Treaty's contemporary irrelevance — was the same as the orthodox historical and juridical forms derived from nineteenth-century Whiggism. In other words, the Treaty could have a place only in momentary time and, thereafter, with its cession of sovereignty, it became an historical curiosity bereft of any presence beyond its spent moment. This, essentially, is the argument of those (many Pakeha or Anglo-New Zealanders) who say that the events of 1840 cannot have relevance one and a half centuries later. It is an argument against the historicity of the Treaty text (contract) and has been discussed in Andrew Sharp's account of the 'vulgar' Pakeha histories of the contemporary New Zealand state.

However, in the early- to mid-1980s, the Waitangi Tribunal had also been developing the contractarian, verticalized version of Crown-tribe relations in a manner similar to Orange. That quasi-Lockean approach must now be considered.

21 A high-profile example of the 'vulgar' form has been S.C. Scott, The Travesty of Waitangi — Towards Anarchy, Dunedin, 1995, a popular book almost entirely bereft of any scholarship.
The Waitangi Tribunal’s jurisdiction was first defined in section 6(1) of the Treaty of Waitangi Act, 1975. This section prevented the Tribunal investigating ‘historic’ claims, its jurisdiction being limited to any policy, practice or act of the Crown for the time being in force or proposed to be adopted by the Crown. The Tribunal was not given adjudicative power but was required to make recommendations to the Crown ‘that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future’ (section 6(3)). The long title of the Act further required the Tribunal to make recommendations on claims relating to ‘the practical application of the Treaty’.

The jurisdiction of the first Tribunal was deliberately not retrospective, the wording of section 6(1) carefully referring to Crown measures ‘for the time being in force’. Paradoxically, however, its jurisdiction required assessment of that present in terms of the ‘principles’ of a text then nearly 150 years old. From the start, the Tribunal’s jurisdiction required it to resolve the problems of the present through the past. This was more than an invitation; it was a clear summons to use the presentist method of the common lawyers who dominated the first Tribunal.

The Tribunal’s early proceedings adopted the legal trappings of its majority, but barely scratched the surface of its jurisdiction. A fuller exploration of its possibilities eventuated when Chief Judge E.T.J. (Taihakurei) Durie took the chair and the Tribunal released its Motunui Outfall Report in 1983. There followed a sequence of reports dealing with the Kaituna River, Waiheke Island, Te Reo Maori and the Manukau Harbour from which a distinctive ‘Treaty jurisprudence’ began to emerge. These features of its jurisprudence were considerably amplified by the second, reconstituted Tribunal reborn with retrospective powers in 1985.

Of the first Tribunal’s reports its Finding ... on the Manukau Claim (1985) is regarded as the most elaborate early signpost of its jurisprudence. The Tribunal found that in the Manukau, ‘the tribal enjoyment of the lands and fisheries has been and continues to be severely prejudiced by compulsory acquisitions, land development, industrial developments, reclamations, waste discharges, zonings, commercial fishing and the denial of harbour access’. The Crown had omitted to protect the tribes against those things and this was contrary to the principles of the Treaty of Waitangi. However, the Tribunal attributed that contemporary omission to the continuation of a historic pattern of neglect: ‘The act of omission began last century with policies that led to war and the confiscation of tribal territories. It was continued in this century by a failure to give adequate protection to or recognition of Maori rights in the acquisition of lands or

23 Treaty of Waitangi Amendment Act 1985, section 3 repealing the old and substituting a new section 6(1) in the principal Act giving the Tribunal jurisdiction to inquire and report its recommendations regarding ‘any act done or omitted at any time on or after the 6th day of February 1840, or proposed to be done or omitted, by or on behalf of the Crown’.
24 See Sharp, Justice, pp.125 ff. discussing the first Tribunal’s ‘jurisprudence of retrospection’.
25 Finding of the Waitangi Tribunal on the Manukau Claim (Wai-8), Wellington, 1985, para. 6.4 and 9.2.1.
26 ibid., para. 6.3 and 9.2.1.
proposals for major works. It is reflected after 1975, from whence our jurisdiction begins, in an omission to recognize or give appropriate priority to Maori interests in laws and policies. In linking contemporary Crown acts and omissions to past policies, the Tribunal was insisting that the tribal present could not be severed from the past as neatly as section 6(1) of the 1975 Act appeared to contemplate. Yet the Tribunal related that past in a manner which left history with little option other than to produce the present — loss of mana over the Manukau.

If that seemed to reduce Maori capacity as historical actors it was because this was a state-centred history, as the Tribunal’s statutory jurisdiction made plain. It is the Crown’s conduct which is the focus of Tribunal investigation. As with Orange’s history, the measure remained the linear path described by Anglo-settler society, its growth and progress at cost to the Maori tribes. What made that history damning in the eyes of the first Tribunal was not that trajectory itself, so much as its failure to include Maori.

Ten years on, the *Manukau Report* seems to have something of the same golden innocence it attributed to the prosperous era of Crown-tribe relations in the Manukau. Its conciliatory recommendations lacked the boldness more characteristic of the reconstituted Tribunal. The politics of Crown-tribe relations became markedly different after the mid-1980s. Much of the *Report*, its cautious and measured, almost complacent tone, the careful recommendations and naive historiography now seem quaint and innocent.

The first Tribunal adopted an approach which explicitly tried ‘to move beyond guilt’. Although the way in which the Tribunal recounted the past in the *Manukau Report* ensured that the guilt was never far from the surface, the outcome was a history which was more pointedly state-centred than Orange’s. She had hitched her contractarian history to the Anglo-settler state but by keeping so doggedly to a theme of guilt she was at least able partially to distance herself from the state. This distance enabled the book simultaneously to claim exposition of the ‘Maori history’ of the Treaty whilst also being state-centred. As a body constituted by the state under its supreme sovereign legislative power with the express purpose of using the past to resolve the problems of the present, the Tribunal could not and cannot maintain such ostensible distance from the state. Indeed the Tribunal’s organic implication in the apparatus of Anglo-settler governance brings it even nearer to a Whig core than Orange’s ‘state’ history. So far as the latter is concerned, the possibility of Treaty justice is attended by the experience of history, and so is surrounded by qualifications and a variety of ‘ifs’, ‘but’ and ‘perhaps’. However, moving ‘beyond guilt’, the first Waitangi Tribunal eschewed the cautiously conditional. The *Manukau Report*, in common with all the reports of the first Tribunal, proclaimed the possibility and achievability of Treaty justice. Imbued with this capacity to deliver secular redemption, to recreate a vanished golden age, the state acquired a transcendence which is utterly Whig.

27 ibid., ch.v, paras 6.1, 6.2, 6.3 and 9.2.1.
Both Orange and the reports of the first Waitangi Tribunal placed themselves outside the strict constitutional paradigm with its incapacity to deliver an originating and limiting account of Crown sovereignty over Maori. Their response to the old Whig strictures of ‘orthodox’ state-centred histories and constitutionalism was to step further backwards in ‘Whig’ historiographical time. Short of a crass Marxian style, there was probably little other methodological option. Both returned to a contractarian account of Crown sovereignty — a polite Lockean setting where the Treaty could act as the enduring basis and yardstick of Crown legitimacy.

By the mid-1980s, public lawyers, when they considered Crown-subject relations, were so indoctrinated with Diceyan premises that they could not look at Crown-tribe relations in any way other than in a vertical aspect. There was for them no possibility of a step back in historiographic time, for lawyers have scant sense of history, much less of its techniques and tradition of reporting. Yet, paradoxically, that incapacity did not leave the lawyers uninfluential or impotent in the face of Maori claims, in that the Court of Appeal was given the means of escaping the blinkered, verticalized means of depicting Crown-tribe relations. By leaving the regimented context of sovereignty-talk, the Court was able to reveal the dynamic qualities of the common law. Within a few years of Orange and the Waitangi Tribunal producing their histories for a political environment of claims against the Crown, the Court of Appeal began creating the circumstances for another form of history.

It should be said at the outset that the Court of Appeal’s means of producing history lay in the classic common law denial of any such role. Instead, the Court placed the Treaty of Waitangi in common law time — time without history — and imbued the Treaty with seemingly ageless ‘principles’. The enduring character of those principles placed the Crown’s relationship with Maori in an eternal present through which incidents of five, 50 or 100 years could be viewed without regard for time. Such presentism is archetypally Whig but it is an attribute which the common law continues to hold apart from, though complicit in, that tradition. By taking the assessment of Maori claims out of a Whig-like trajectory, which stressed the verticality of Crown-subject relations, into a horizontal one, the conditions for a new form of history and political experience were being created. The Court of Appeal, unwittingly to be sure, was generating a new historiography of co-existence, dialogue and negotiated, ritualized contest. To gain momentum this was a historiography which needed to emanate from within the state itself. And that is the significance of the Court of Appeal

29 Kelsey, A Question of Honour?, is a leading example of this approach.
judgments during the past decade: through its courts the state is transforming the historiography of itself.

The remainder of this paper is an exploration of that transformation and the more perplexing aspect it gives to political conditions. No longer is the state sponsoring an historiography of harmony and progress: instead one of contest and dialogue is emerging. This is a more fitting historiography of cultural encounter. Also, it will be suggested, it is one more attuned to the conditions of organized human life in New Zealand.

The State-Owned Enterprises Act 1986 was an important part of the Labour government’s economic strategy. The Act ‘corporatised’ various government departments to whom state assets were to be transferred or vested. Maori feared that this transfer of assets to the new state-owned enterprises would jeopardize the claims’ process then proceeding under the Waitangi Tribunal. Maori were concerned that the Crown might be unwilling or unable to negotiate a purchase of settlement assets back from the various state-owned enterprises and that, in any event, they might dispose of the land. An interim report of the Waitangi Tribunal resulted in the insertion into the Bill of what became section 9. This hastily inserted section provided that nothing in the Act should permit the Crown to act in a manner that was ‘inconsistent with the principles of the Treaty of Waitangi’. The Court of Appeal’s interpretation of that provision — as dramatic as it was unexpected — and its elaboration in a series of subsequent cases transformed the character of Crown-tribe relations.

The Court’s judgments31 carefully stress that their approach to Crown-tribe relations is licensed by section 9 of the Act and, in that sense, bounded by Diceyan orthodoxy.32 However, section 9 becomes, in effect, an invitation to step outside the vertical confinement of Crown-tribe relations into an horizontal one. The Court uses language and concepts drawn from the common law of private relations — notably contract, partnership and fiduciaries — to elaborate ‘the principles of the Treaty of Waitangi’ which have been given paramountcy in the statutory scheme. In this way the Court’s treatment of the Treaty replays the history of the doctrine of contract two centuries earlier: it is moved from a spent verticalized realm and put into a horizontalized context equipped with the doctrinal means of dealing with parties locked in a disputatious, ongoing relationship, underlaid by suppositions of self-regarding rationality and equality. In other words, sovereignty has been removed from (or at least significantly backgrounded from) the arena of Crown-tribe relations.


32 In the Tainui case ([1989] 2 NZLR, p.513, at p.529) Cooke P. stated that ‘[i]n the end only the Courts can finally rule on whether or not a particular solution accords with the Treaty principles [embodied in section 9]’. Prime Minister Palmer initially interpreted that reference to the orthodox position that courts adjudicate upon the legislative will of parliament as amounting to a challenge to it: speech at Te Awamarama Marae, Tuakau, 24 November 1989, The Capital Letter, 12 (1989), 45/1.
The predominant principle identified by the Court is that of partnership. This involves a commitment to biculturalism as well as a common enterprise involving Maori and Pakeha. These dual themes require compromise and cooperation between the Treaty partners as the country deals with past breaches and moves on to honour the Treaty in the future. Partnership places a responsibility on both partners to act towards each other reasonably, honourably, and with the utmost good faith. That relationship, which "creates responsibilities analogous to fiduciary duties" requires the Crown actively to protect Maori interests as well as responding reasonably to Tribunal recommendations as part of its duty to remedy past breaches of the Treaty.

These are principles for the management of an ongoing relationship, but they are those of a private rather than a public sphere. The Court’s approach required the Crown and Maori to negotiate an arrangement by which the policy of the State-Owned Enterprises Act could be realized with accompanying safeguards for the Treaty claims' process. In other words, the Court was not making a ruling so much as setting out the parameters for the relationship between Crown and tribe. Partners must talk, negotiate and through constant dialogue and adjustment agree the means of living with one another.

The outcome of the first Maori Council case was the Treaty of Waitangi (State Enterprises) Act 1988. The Court’s judgments had established a principle of partnership and negotiated co-existence and had ensured that the promise of settlement of Treaty claims would not be illusory. It is inconceivable that the sizeable settlements being concluded today would have resulted without the realignment of Crown-tribe relations accomplished by these Court of Appeal judgments.

Thereafter direct negotiation between Crown and tribe became a new and prominent feature of Maori claims. Two major outcomes have been the multi-million dollar Sealords fisheries agreement and the Waikato-Tainui raupatu (confiscation) claims' settlement. Later in 1996 the Crown also reached agreements (to be confirmed) with Ngai Tahu and Whakatohea. The Waitangi Tribunal has reoriented its approach in response to the principle of partnership and has followed claimants' request that it make findings of fact and Treaty interpretation only as a basis for negotiations with the Crown. Similarly the government has recently reorganized its Treaty of Waitangi Policy Unit into an Office of Treaty Negotiations. The political environment has moved from the politics of claim, a vertical relationship, to the politics of settlement. The historiographical implications of that movement — one largely precipitated by the Court of Appeal judgments — will be explored.

33 [1989] 2 NZLR, p.513, at p.530 per Cooke P.
35 ibid., p.664 per Cooke, P.
36 ibid.
The *Ngai Tahu Report* (1991) represents the Tribunal’s most exhaustive investigation of an historic claim. This was a comprehensive claim brought by the tribe claiming ancestral rights over most of the landmass of New Zealand’s South Island (Te Wai Pounamu). During its extensive hearings a large number of claims and ancillary matters were brought before the Tribunal, which soon identified ‘Nine Tall Trees’, that is nine major claims, which lay at the heart of the Ngai Tahu claim. The Tribunal produced a substantial three-volume report on those claims, a subsequent report on the sea fisheries’ claim, and a third report on the ancillary ‘undergrowth’ claims. After a turbulent stop-start period the Crown finally reached a multi-million dollar agreement with Ngai Tahu late in 1996.

It is, however, the historiographical features of the *Ngai Tahu Report* which are of interest here and in that regard it can be said that the Tribunal can be seen to have followed the lead of the Court of Appeal. It is now drawing more explicitly on common law principles governing the relations of parties in a horizontal rather than vertical setting. The Tribunal is regarding its role not as determinative, but as ensuring the framework within which the parties, Crown and tribe, can reach agreement.

The Tribunal’s account of the historical circumstances giving rise to the Ngai Tahu claim occupy the second and third volumes of the *Report*. The opening chapter of volume two is entitled ‘Ngai Tahu before the Treaty’. Although this chapter gives some account of the genealogy of Ngai Tahu from Tahupotiki and the tribe’s pre-contact and early-contact experience, that, the Tribunal explains, is another history. It is tribal history but it is neither Treaty- nor state-related history and hence not relevant to the Tribunal’s deliberations.

The period before 1840 is a period before the ‘history’ which the Tribunal is about to report, the Lockean time before contract. But when the Tribunal comes afterwards into contractual time, it is not to give effect to a vague Lockean contract (as in the Manukau Report) but to one steeped in the common law analogies of contract, partnership and fiduciary duties.

The Tribunal then gives an account of the ‘principles’ of the Treaty of Waitangi, synthesizing and elaborating earlier efforts in that regard by the Tribunal itself as well as the Court of Appeal. The principles identified are not explicit in the Treaty text and in that sense have an existence independent of the Treaty. Yet the principles are seen by the Tribunal as implicit in the very nature of the engagement between Crown and tribe and subsequently in the report are depicted as immanent in Crown-tribe relations since the Treaty. The ‘principles of the Treaty of Waitangi’ are thus imbued with a timeless and historically-validated normative quality. It is no coincidence that these chapters of the report were written by the Tribunal’s (common) lawyers for the technique being used here is the common law in its archetypal Whig form. The chapter in which the Tribunal elaborates ‘the principles of the Treaty’ contains sleights of time which are at once unwitting and characteristic of common law method, though probably infuriating to any historian seeking an historicized account. The chapter jumps,

for example, from the question of the juridical status of the Maori tribes in 1840 to contemporary rules of international treaty interpretation. The connection makes sense in terms of the Tribunal’s jurisdiction and function but it does not, nor is it intended to, provide an historicized account of the Treaty of Waitangi’s meaning in a mid-nineteenth century Anglo-settler world.

Looking more closely at the Tribunal’s identification of the Treaty principles, it can be seen that the Tribunal aligns the facts of the claim so as to enable resort to horizontalized doctrines of partnership, contract and the like. As the Tribunal looks at each of the purchases of Ngai Tahu land by Crown representatives between 1844 and 1864 one finds continual themes recurring. These themes are:

1. the imbalance of the parties: the Tribunal noted the weakened state of Ngai Tahu as a result of ‘civil war, invasion and imported diseases’. Not only was the tribe physically weakened but the Crown’s agents held a superior knowledge of the terminology and character of the transaction. This gave the Crown a bargaining advantage. Tribunal references to the *contra proferentem* rule of contract, the rule that a document should be interpreted against the party which drafted it, also show explicit account being taken of the Crown’s superior negotiating position.

2. the Crown’s agents’ failure to explain the terms and consequences of the sale: the vulnerability of the Ngai Tahu was aggravated by the failure of the Crown’s representatives to explain fully the nature of the transaction. In some cases the Crown representative actively misrepresented the situation to the tribe.

3. the non-provision of independent advice: the Crown was under a duty not only to explain matters fully to the tribe but, given its conflict of interest, was obliged to ensure they were given independent advice in the form of some external representation. This was a role which the Protectorate department notionally (and unsuccessfully) took in relation to the Otakou negotiations and purchase (31 July 1844), but thereafter the protection of tribal interests was dependent upon the goodwill and ability of land purchase officers.

4. the conclusion of terms of manifest disadvantage to the tribe: the Tribunal noted that by these transactions the Crown obtained virtually the whole of the South Island for white settlement on terms which were significantly weighted in its favour.

5. failure to keep the terms of the agreement: some of the land sales stipulated the reservation of certain land for Ngai Tahu, the exception of certain land or the provision of schools and medical facilities. More often than not those terms were not kept. The Tribunal’s report stressed not only the imbalances of the contractual process itself but the Crown’s subsequent failure to keep to the terms which it had so advantageously secured for itself.

Those recurrent features of the South Island purchases have an inescapable presentism. The imbalance in relative power and knowledge at the time of the

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40 ibid., p.277.
41 For instance Walter Mantell, Commissioner to extinguish Maori claims (1848-1854) and Commissioner of Crown Lands in Otago (1851-54), *Ngai Tahu*, II, p.315.
42 ibid., pp.633-5.
transactions would not necessarily be important were that imbalance not being seen in the light of its historical outcome, namely the economic marginalization and impoverishment of Ngai Tahu. Those themes, too, are virtually identical to the central elements of the contemporary doctrine of contractual unconscionability being developed by Anglo-Commonwealth courts. That similarity with the contemporary law of contract is so close as to be more than merely coincidental.

The _Ngai Tahu Report_ did not issue any recommendations on the question of remedies. In keeping with the Treaty principle of partnership, this was left to direct negotiation with the Crown. The approach taken by the second Tribunal has been to see its role mainly as one of fact-finding and providing guidance on Treaty interpretation from where the Crown and tribe can move to settlement.

By the mid-1980s the Whig seam of New Zealand's national historiography had exhausted itself. New Zealand common law could not provide a narrative of constitutional origins which incorporated Maori and the Treaty of Waitangi. It remained wandering in a Burkean mist wherein the Crown's sovereignty was immemorial and beyond any requirement of historical proof. This added to the burden on historians anxious to replace the older Whig accounts of the New Zealand state with a narrative focused upon Maori. That old Whig style of history was fixated with the institutional growth and form of the Anglo-settler state and had marginalized the role and status of the country's indigenous people. The histories of Orange and the first Waitangi Tribunal were reactions against that marginalization whilst still being located squarely in the Whig tradition. They produced presentist, state-centred histories with the Treaty of Waitangi as a Lockean contract of governance setting up the ongoing measure of the legitimacy of state relations with Maori. History here had no possibility other than the eventual marginalization of Maori, which is depicted as though it were a 'law' of history. This was history written in — and for — the claims-based character of Treaty discourse of that period.

In that sense the histories written by Orange and the Waitangi Tribunal were didactic — injunctions that the state revise its narratives of authority and, by so doing, unshackle itself from the 'law' of its own past. Like the old Whig histories against which they were reacting, these were histories asserting the redemptive capacity of the state albeit in the new orientation of Maori claims. Further, like the older style of history they were attempting to counteract, the redemptive theme gave these histories an idealism which implicitly extended into the future — a latter day version, perhaps, of the colonial Arcadian dreaming captured by Miles Fairburn in _The Ideal Society and its Enemies_.

These features of Orange's book and the reports of the first Waitangi Tribunal

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44 M. Fairburn, _The Ideal Society and its Enemies: The Foundations of Modern New Zealand Society 1850-1900_, Auckland, 1989, describes the atomized character of Anglo-settler society during the nineteenth century and its self-visualization as an Arcadia, a society free from excessive organization as a result of its natural abundance and its people's innately moderate desires. Idealism seems to be a strong theme of Anglo-settler discourse in New Zealand in both its (nineteenth-century) atomized and (twentieth-century) state-centred forms.
made their histories utterly of their time and political context. Their viability and popularity lay in their very contemporaneity and implicit, though revised, defence of state authority. This historiography fitted the claims-based character of Treaty discourse in that period where the vertical character of Crown-(Maori)subject relations was under examination. The underlying fiction of that historiography, like that of the form against which it was reacting, remained one of harmony — an old Whig narrative of growth into independent nationhood remoulded into a newer one of biculturalism under a facilitative state. Yet that fiction of harmony was discredited by the very history it related and, besides, it locked Maori into the vertical relationship which was at the heart of political contest. If by nothing else than its very inflexibility, the legal account of Crown sovereignty demonstrated that brute truth. Through the late 1980s it was becoming clear, then, that both the legal and (the more recent as well as older) historical narratives were tales of Maori as supplicants under an Anglo-settler state invested with a redemptive character.

Try hard as they might, the histories given by Orange and the Waitangi Tribunal were unconvincing in their idealism. The idea that thenceforth national history could be written as the attempt to make race relations ‘meet the one nation ideal’, to paraphrase Orange, has become difficult to swallow in the tumultuous political climate of contemporary New Zealand. A Whiggish fiction of harmony is hard to maintain in a political culture where the embodiment of Westminster democracy, parliament, has fragmented into the cynical deal-making and overt political opportunism of proportional representation and where Maori claims have a such strong separatist (in the sense of independent sovereignty) element. The circumstances of contemporary New Zealand are such, then, that a historiographical and constitutional ethos of difference may be more suitable than a severely cracked facade of harmony and secular redemption. Paradise is not attainable. Living together on small islands is constant hard work. Encounter entails competition. It requires a responsive historiography attuned to the enduringly contingent character of national life, one which does not subsume that encounter in a frontier dream of a naturally abundant Paradise.

Paradoxically, the more suitable historiographical form which Anglo-settler discourse may presently be assuming seems already strongly evident in Maori historiography. Tribal history, we have been told, is based upon the pursuit of mana within a highly competitive, tribalized Polynesian society. What we know of tribal historiography seems to reflect that competitiveness. Certainly it is one which animates the history of what appears to be an Anglo-settler institution, the Maori Land Court. Historically this court has been as important a forum for inter-tribal competition as an instrument for Anglo-centric assimilation. Maori have demonstrated that they have been perfectly capable of appropriating the devices of another culture and injecting their own history into

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it. That is precisely what one would expect from such an intensely competitive and adaptive culture.

One senses that Maori historiography (at least from the mid-nineteenth century) with its accounts of competition and ritualized conflict has a robust and pragmatic sense of the opportunistic character of political life, a Namier-like quality alien to Whig history with its narrative momentum, its 'tide of events', grand sweeps, normative principles and historical 'laws'. Recently Maori representatives have talked freely about taking settlements as 'a tide that had to be taken at the flood', with an eye towards commercial opportunities. They acknowledge an opportunistic element in their relations with the Crown brazenly and unabashedly, in a way which Pakeha politicians committed to notions of 'principled' politics and the redemptive state try to avoid. The overt opportunism of Maori claims may make Pakeha bristle yet it may be no more than a reflection of qualities inherent in Maori political discourse, an expression of the jockeying character of competition for mana. The Treaty discourse, after all, is one which straddles culturally-specific sites such as the marae and the court room and one must expect features intrinsic to those sites to filter into the wider, public discourse. Maori leaders such as Sir Tipene O'Regan and Sir Robert Mahuta are canny as well as charismatic men with the sharpness to regain and enhance tribal mana as the opportunities arise.

In the encounter between Anglo-settler and Maori cultures and their histories there has been an unspoken, chauvinistic Anglo-centric tendency for the former to see itself entirely in its own terms, as unaffected by the encounter of the past 150 years. The Treaty-settlement process has been presented (and to make it politically palatable it may well need to be) as a predetermined outcome of an Anglo-settler history which is exorcized as the state returns to holiness through the claims' settlement process. In other words one may ask if the state is able to construct a history of itself and encounter other than one which is solipsistic and, as such, a carry-over from the imperial mindset.

One can turn to histories of the mid-1980s other than those of Orange and the first Waitangi Tribunal to see, however, the seeds of a new emergent national historiography. James Belich's book *The New Zealand Wars* (1986) insists that the wars between the Crown and North Island tribes during the 1860s were between two virtually equal powers. Instead of presentistly seeing as inevitable the Crown's vindication of its Hobbesian sovereignty over New Zealand (a Whig account of the wars), Belich shows those wars in the more pragmatic light of a struggle for political control between or even amongst politically autonomous groups. This is unsettling history, showing a past as racked by uncertainty as the

46 The phrase used by the Maori negotiators to justify the $NZ150 million Sealord Deal (1992). See Justine Munro, 'The Treaty of Waitangi and the Sealord Deal', p. 389 which analyses the fisheries' settlement as a pragmatic arrangement incompatible with the judicially and Tribunal articulated 'principles of the Treaty of Waitangi'. This article highlights the differences in the ethos of settlement from that of the 'principled' context of claims.

47 Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict*, Auckland, 1986, p.306: 'Thus, in the late nineteenth century, an independent Maori state nearly two-thirds the size of Belgium existed in the middle of the North Island. Not all historians have noticed it.'
present, a past incapable of Whiggishly assuring (and reassuring) the present. As such, it is hardly the kind of history upon which the Anglo-settler state would want to stamp its imprimatur. Yet that is the kind of historiography which may be more suitable for contemporary New Zealand as it looks at its past — its very recent past included. It is an historiography about the politics of mana.48

One cannot help connecting Belich's historiographical themes of competitive political authority and the ritualization of contested relations as a means of containing that competition with the similar themes of the Court of Appeal judgments in the state enterprises cases. Certainly their dominant theme is that of the contingency of national political life and the search for means of accommodating distinct political entities. This is more truly an historiography of encounter and one more attuned to the circumstances of contemporary New Zealand political life than one which assimilates Maori into submissive, supplicant status. It is also, as I have suggested, a tendency drawn more from Maori than Anglo-settler historiography.

The paradox is that a highly influential internal source of this new, emergent national historiography has, for Anglo-settler discourse at least, come from an idiom — the legal one — which itself is disengaged from history. There is a point, however, where law and history reconverge and that is on the contestability of interpretation of the past. In redefining the legal means of assessing that contest — the encounter between Crown and tribe — the Court of Appeal did not purport to be giving an historicized account of Crown-tribe relations but it fostered the reordering of those relations in which alternative narratives of political authority co-exist and engage in dialogue.

In the longer term, the persuasiveness of Anglo-settler discourse to its own as well as to a non-Pakeha constituency — the imaginative hold commanded by its history and its law — may require absorption of elements of the tribal discourse(s). My suggestion is that that process of absorption is already underway and that Anglo-settler discourse is too accustomed to its discourse of domination to realize the transformation into an indigenized form. Lawyers talk of the 'constitutionalisation' of the Treaty of Waitangi,49 but that is perhaps a patronizing perpetuation of an imperialist mentality of domination. Perhaps we should be thinking in terms of the 'indigenization' of the constitution50 and the Anglo-settler historical memory?

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48 Binney, Redemption Songs, is another example.
50 Scott, Travesty, p.106 cites with apparent horror Mr Justice Temm's comments to a New Zealand Law Society seminar on the Treaty of Waitangi: 'As we approach the next century assimilation seems to be the ultimate result, but not the way our grandfathers foresaw it; it is likely that instead of the pakeha assimilating the Maori, it will turn out that the Maori might assimilate the pakeha.' Scott confesses an inability to share the speaker's 'mild chuckle'. Perhaps the vulgar historians are more aware of indigenization than the academy?