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By Which Standards?

HISTORY AND THE WAITANGI TRIBUNAL

THIS PAPER engages with criticisms advanced by W.H. Oliver and Giselle Byrnes of the Waitangi Tribunal's historiographical practice.[1] Those criticisms, appearing first in an article by Oliver and then in a book by Byrnes, have become influential. Kerry Howe, for instance, refers to the Tribunal's 'projection of today's moralities on to unsuspecting peoples of the past', alluding to, and joining with, the criticisms advanced by Peter Gibbons of New Zealand historians as irretrievably provincial.[2] Oliver's arguments quickly entered the political arena, finding their way via the journalist Chris Trotter into Don Brash's well-known January 2004 Orewa speech in which the National Party leader launched a comprehensive attack on 'separatism' and 'Maori privilege', reviving the party's lagging fortunes.[3] Although a number of reflections on Tribunal historiography have appeared in the past 15 years, it is noticeable that, while earlier discussions were more tentative, preferring to emphasize the merits of reflection on the practice of history in a quasi-judicial forum, in their most recent works Oliver and Byrnes are quite uncompromising.

The Tribunal began to make its presence felt with the 1983 Waitara case in which Te Ati Awa claimed that aspects of the synthetic petrol plant at Motunui — a major project in the government's development strategy — interfered with traditional fishing rights and practices. Surprisingly, for some observers, the Tribunal agreed. In 1987, Keith Sorrenson argued that the Tribunal was engaged in a radical revision of New Zealand history.[4] Alan Ward, in 1990, canvassed the nature of the evidence presented in Tribunal hearings and the potential for certainty. While noting the problems inherent in quasi-judicial history, he believed that '[i]f the research has indeed been exhaustive, and the wider contexts in which the evidence was created are known and understood, we get closer to concepts of truth'.[5] Ward also detected a willingness by many participants, despite sometimes vigorous exposition of a case, 'to move to a more reflective stage, in which various perceptions can be shared, discussed, and negotiated about, rather than that parties stick with adversarial arguments'.[6] Perhaps this was optimistic. Ward certainly agreed with Sorrenson that the Tribunal had 'brought to the fore the largely overlooked Maori dimension. This challenge to established history has provoked enquiry of unprecedented range and depth, and interaction between the historians representing all participant groups. That can only be healthy.'[7]

In 2001 Michael Belgrave drew attention to the potential for expert witnesses to be captured by 'their' side, noting wryly that 'the legal imperatives of claim and response seem to have remarkable impact on the evidence'. The real problem was the nature of the process: 'evidence serves a legal process aimed at a political end' and thus the history practised in the Tribunal is not

academic history.[8] Yet, as Belgrave noted, historians involved in the process 'have tended to seek out evidence and to provide an analysis of this evidence according to standard historical tests of significance' leaving 'the question of whether the Crown actions involved breached the "principles of the Treaty" to the parties through their counsel and for the Tribunal to decide'.[9] Moreover, 'all participants are involved in a general shift in the more popular interpretation of New Zealand's race relations. The collective contribution to this new history is more important than differences over detail.'[10] Belgrave has lately appeared more sympathetic to academic criticisms of the Tribunal, although he continues to note that without the Tribunal 'there may have been almost no Maori history or race relations history written over the last fifteen years. Even more damaging, our understanding of New Zealand history as a whole would have looked pale and grossly unbalanced as a result.'[11] Such reflection on the nature and writing of Tribunal history is all to the good, and Oliver and Byrnes among others have done much to encourage that reflection.

While Byrnes's work is more wide-ranging, she and Oliver share three main contentions; Byrnes herself has described Oliver's article as 'perhaps the most trenchant and thoughtful criticism of the Tribunal's methods of history writing'.[12] It is those central criticisms with which I propose to deal. First, that the Tribunal views the past entirely in the light of present concerns and agendas; second, that law and history are conflicting disciplines because lawyers want certainty and historians deal in nuance, and the approach of one is therefore inimical to the other; and third, that Maori are cast as victims, and settlers or the Crown (the terms are conflated) as villains, and a perspective is expounded which is overly concerned with simplistic binarisms and grievance rather than co-operation and interaction. For Oliver, particularly, the Tribunal is engaged not only in establishing what went wrong but in arguing that it might not have gone wrong: that what the Tribunal thinks the Treaty should have achieved might have been achieved — hence the term 'retrospective utopia'.[13]

In contrast I argue that where the Tribunal finds that the Crown should have acted otherwise than it did, that finding is based upon sources and material that were available at the time in question. The Tribunal, therefore, is not so much imposing present agendas on the past as emphasizing arguments or perspectives that were evident in the nineteenth century and which were at the time marginalized. Moreover, the Tribunal's accounts of historical events and circumstances in many cases do not radically differ from mainstream historiographical treatment.

On one level it is a commonplace that the past is understood from present perspectives. It is difficult to imagine, for instance, that Norman Davies's *The Isles* or Linda Colley's *Britons* could have been written in any other context than one in which Britishness or Englishness had become problematic.[14] Similarly, the themes with which the Tribunal is concerned were unlikely to have featured in the historiography until Maori dispossession and grievance impinged on the academic consciousness. This, of course, was not a situation created by the Tribunal.

Oliver criticizes the Tribunal's frequent reference to 'Treaty principles'. In addition to being ahistorical, they are the creation of 'judicial activism'.[15] As

Oliver also notes, principles were referred to in the statute which established the Tribunal, so strictly speaking principles are not the creation of 'judicial activism' but of legislative innovation. Clearly, however, they are a fluid body of doctrine, which emerges from various decisions of superior courts, and from Tribunal decisions themselves.[16] Oliver identifies two main principles: tino rangatiratanga and active protection. Tino rangatiratanga, however, is in the very wording of the Treaty, so it can hardly be argued that the term is a modern creation of activist judges. As Oliver reads the Tribunal, tino rangatiratanga 'obliged the Crown to recognise and support the traditional structures of tribal government and to accept the sole authority of these institutions over land transactions'. It could be suggested, given Oliver's apparent preference for black-letter law over 'judicial activism', that this is a fairly literal reading of Article Two.[17] Even though the meaning of tino rangatiratanga has evolved considerably in the past two decades — 'the result of a reinterpretation of the nature of indigenous rights'[18] — when the Tribunal judges history, as opposed to present issues, it does so in light of nineteenth-century contexts. Active protection was emphasized by the Court of Appeal in 1987, and while its meaning has also evolved, it is certainly possible to understand the way in which the Treaty was portrayed to signatories in 1840 as implying something of the sort.[19] The Tribunal noted that active protection was implicit in Secretary of State Lord Normanby's instructions to Lieutenant Governor William Hobson: all land dealing had to be 'conducted on principles of sincerity, justice and good faith' and 'Maori must not be allowed to enter into any contracts which might, through ignorance or unintentionally, prove injurious to them'.[20]

Certainly the Tribunal gives Oliver some ammunition. Against a suggestion by Crown counsel that state actions 'should be seen in the light of the standards of the day' the Tribunal countered that 'they must also be assessed by the principles and the standards . . . established in the Treaty of Waitangi'. The implication is that such were not part of 'the standards of the day', an implication reinforced by the Tribunal's observation that 'the canons of justice and protection apply to all ages'.[21] This is, of course, an extremely risky observation as it implies that what 'justice' consists of is unchanging in all details from ancient to modern societies. As Oliver says, this appeal to timelessness implies narratives of Fall and Original Sin.[22] As I shall suggest, however, the Tribunal is usually more attuned to context than these references suggest. Moreover, while the term 'principles' is a modern one, in 1843 William Spain, the commissioner investigating the merits of the New Zealand Company's land claims, was quite happy to refer to 'the spirit of the Treaty of Waitangi'.[23]

Oliver devoted considerable attention to the Muriwhenua land report, arguing that the Tribunal essentially ignored substantial Crown evidence that Muriwhenua Maori understood a deed of sale to imply permanent alienation.[24] This was a central issue in that inquiry; the Tribunal supported its finding by a lengthy discussion of how Muriwhenua Maori acted with regard to the occupation and use of land after 1840. It does not seem that the Tribunal simply dismissed Crown historians' evidence.[25] On the face of it, though, Oliver is correct to suggest that the Tribunal expects far too much in terms of what 'should' have happened to ensure Maori survival and prosperity. As

Oliver distils the Tribunal's view, 'Government should have informed itself as to the "administrative structures necessary for tribal management and individual operations" and should have made provision for "agricultural training" and "development assistance"'.[26] This would have been on a much larger scale than 'a few mission farms', and implied 'an extremely busy state, highly bureaucratic, very well informed, and, further, subject to something that sounds like judicial review . . . possibly a politically independent protectorate is envisaged . . . "Active protection" entails a kind of judicial activism devoted to Maori well-being and the preservation of traditional society. This anachronistic vision locates an idealised late-twentieth-century state in the mid-nineteenth-century.'[27]

But does it? Normanby had insisted on an independent protectorate in 1839; Grey abolished it. One wonders, too, how much of an administrative structure would have been required: it would not have been established across the country all at once, since land-buying was not envisaged across the whole country all at once. And the nineteenth-century state was very bureaucratic in any case: there was a considerable bureaucracy devoted to the *acquisition* of Maori land.[28] This administrative structure entailed considerable knowledge of Maori society if only for the purpose of undermining it. Much of the Tribunal's point about land loss in Muriwhenua is simply that officials deliberately left only small areas in Maori ownership: the agenda of title extinction dominated. Too seldom did officials consult Maori on their own perception of their needs.[29]

Like Oliver, Byrnes thinks that the Tribunal's history is irretrievably presentist. She also locates the source of this problem in the Tribunal's constituting legislation, but at the same time she suggests that the Tribunal disregards that legislation. Byrnes argues that 'Tribunals have also gone beyond the strict terms of their legislative [sic] role to adopt the rule of *contra preferendum*, where, in the event of ambiguity between different language versions of the same treaty, any provision should be construed against the party that drafted the . . . treaty'.[30] *Contra proferentum* (as the term is) is an old principle in international law and in using it the Tribunal was taking an entirely orthodox approach to discharging its responsibility. The Tribunal's first reference to the principle was in *Waitara*, and it relied on Department of Maori Affairs submissions based largely on McNair's *Law of Treaties*, an eminently orthodox British text. Those submissions recalled that the House of Lords had determined that exactly such principles of treaty interpretation should be applied where a treaty or convention is incorporated in a statute.[31] Suggestions, therefore, that in relying on *contra proferentum* the Tribunal exceeded its powers are distinctly ill-founded.[32]

Against the argument that the Tribunal retrospectively applies present standards to the past, I suggest that the Tribunal tends to rely on views and arguments that were unsuccessfully advanced in the past. This is, of course, a politically charged approach but it is not therefore ahistorical. In suggesting that the Crown should have negotiated in Muriwhenua over fisheries management, the Tribunal thought that 'a partnership in development may have resulted, *but that is to apply concepts in vogue today that may not have been thought of at the time*'.[33] The Tribunal found considerable evidence of nineteenth-

century Maori seeking, usually unsuccessfully, to have their views taken into account regarding fisheries management.[34] Ngai Tahu clearly wished to retain considerable mahinga kai resources and yet engagement with European settlement meant, or should have meant, compromise, effectively agreeing to let some resources go and maintaining others.[35] Again, this is what Ngai Tahu *on the evidence* wished to do, for Kemp's Deed (as the 1848 agreement by which Ngai Tahu were deemed to have sold a vast tract of land from Kaiapoi in the north to Otago in the south became known) explicitly reserved mahinga kai and stipulated additional reserves. In 1847 Governor Grey himself noted that Maori life relied extensively on hunting and gathering.[36]

Henry Tacy Kemp, the negotiator from whom Kemp's Deed derives its name, was instructed to set aside ample reserves and mark them out before buying the remainder, but he did not do so. The Tribunal calls this 'the real vice of Kemp's conduct'.[37] If Kemp had followed his instructions 'there would have been ongoing dialogue between him and the various hapu of Ngai Tahu. The interests of each hapu would have been ascertained. Kemp would have learned what land they wished to keep and what they were prepared to sell, he would have ensured they retained ample land for their present and prospective wants. Boundaries would necessarily have been defined with more particularity'.[38] The Tribunal goes on to emphasize that the real problem was that Walter Mantell, the Crown commissioner charged with allocating the reserves, 'failed so lamentably' although he was given ultimate discretion. It is abundantly clear from contemporary documentation that Mantell refused to accept Ngai Tahu specifications on reserves and that his progress down the South Island was one bitter argument after another. It is equally clear that although Mantell obfuscated, his specifications were approved of by Governor Grey and Lieutenant-Governor Eyre. When Ngai Tahu complained they were told that the matter could not be reopened.[39] In October 1849 the Moeraki chief Matiaha Tiramorehu wrote to Eyre:

> These are my reasons for writing to request of you that the boundaries of Moeraki may be extended, that we may have plenty of land to cultivate wheat and potatoes, also land where our pigs, cattle, and sheep can run at large; it will not be long before we purchase both cattle and sheep, and what land have we now in the small pieces which are reserved by Mantell for us fit for such a purpose; each allotment which Mantell has set aside for the Maoris is about as large as one white man's residence. We are conjecturing who could have given Mantell his instructions so to act; do you, Governor Eyre, think that I should tell him to reserve for the multitude a piece of land only large enough for one man? No; moreover the Natives will never consent to it. There are many people, and but a small quantity of land for them . . . . The white man's transactions are bad, there are in consequence great disturbances already amongst the Natives of this Island; therefore I earnestly request that some person may be sent here directly to alter all the boundaries, Moeraki included; that there may be a large block reserved for us, is the constant topic of our conversation. Extend the boundaries at Moeraki.[40]

Eyre replied that he could not 'now consent to reopen or alter any arrangement relative to the reserves at Moeraki. I have examined into the matter, and find that the reserve made there contains 500 acres, which is considerable for the

very few Natives resident there.'[41] Here Eyre contradicted his own earlier instructions to Mantell: 'you may inform them that the Crown will hereafter mark out for them such additional Reserves as may be considered necessary for their future wants' — in addition, that is, to the reserves which Mantell had laid out in 1848–1849.[42] In 1851 Mantell claimed with some pride that 'I allotted on an average ten acres to each individual, in the belief that the ownership of such an amount of land, though ample for their support, would not enable the Natives, in the capacity of large landed proprietors, to continue to live in their old barbarism on the rents of an uselessly extensive domain'.[43]

By which standards of the past do we judge these events? The standards of Eyre and Mantell, or those of Tiramorehu? On one level it may be presentist to assess these transactions through a modern grid of 'Treaty principles' but on another it is not: Ngai Tahu rights to retain that land which they wished to retain and would require for their future prosperity were asserted by their rangatira at the time.[44] Even if Kemp could be excused by virtue of being under-resourced, subsequent events demonstrate Crown officials' refusal to leave Ngai Tahu with considerable reserves or to engage in ongoing dialogue.

Similarly, if the Muriwhenua Land Tribunal's account of the stipulations and promises made at Waitangi is correct — Waka Nene stressing that 'You must preserve our customs and never permit our lands to be wrested from us' and Willoughby Shortland, Hobson's assistant, emphasizing that 'The Queen will not interfere with your native laws or customs' — again there are grounds to argue that more than one standard of conduct existed in the early 1840s.[45] When it came to Crown officials assuming in Old Land Claims enquiries that any land not granted to the claimants should be alienated to the Crown and not revert to the hapu, Nopera Panakareao, a prominent Christian leader of Te Rarawa who had sponsored missionary activity and supported the Treaty, pointed out that his people expected to retain such land.[46] Hobson had promised as much; Normanby took the same view, but George Gipps, the governor of New South Wales, and Hobson's immediate superior, advocated alienation to the Crown even as he enjoined the commissioners to establish 'proof of conveyance according to the custom of the country'. Governor Robert FitzRoy warned that anything other than allowing the land to revert to the hapu, whatever English law might suggest, would be bitterly resented.[47] Again, 'the standards of the past' are neither uniform nor monolithic.

In Taranaki, the Tribunal's account begins with William Wakefield attempting to pre-empt the Treaty through the Ngamotu deed. In simple terms, William Wakefield had led the New Zealand Company expedition of 1839 which aimed to secure deeds to land in New Zealand before the likely establishment of direct Crown authority. The Ngamotu deed was signed on 15 February 1840 and like earlier Company transactions was intended to strengthen the Company's position against the Crown's sole right to acquire land from Maori. The Colonial Office made generous recognition of the Company's claims arising from deeds signed before Hobson's arrival at the end of January 1840, but this did not apply to Ngamotu. It became evident that the hapu involved in the Ngamotu transaction had a very different understanding from what the Company claimed. A particular problem was the Company having negotiated

only with people resident in the locality at the time, ignoring the rights of those absent elsewhere. While FitzRoy tended to take a view favourable to Maori on the matter, Grey took the opposite position.[48] But it cannot be denied that Wakefield's actions were illegal at the time. Edward Shortland, who had been a sub-protector of aborigines and interpreter for investigations into pre-1840 South Island land claims, knew that non-residents could have rights to land, so it is not unreasonable to criticize Spain for taking another view.[49] Nor is it unreasonable to suggest that the Spain commission was 'the remarkable spectacle of an English lawyer deciding who of Te Atiawa had land rights according to Te Atiawa custom, with Te Atiawa making submissions, when the matter was most within the competence of Te Atiawa to determine and it was their God-given right to decide'.[50] While it would be preferable to leave the Almighty out of the matter, it does not seem strange to suggest that if Maori were capable of signing the Treaty they were capable of discussing the development of settlement. As the Tribunal put it, it was 'plain good manners and common sense to treat with the leaders of a place before entering it'.[51]

It is well known that the government's decision to undertake the Waitara purchase in 1859 was the immediate cause of the wars of the 1860s. It cannot seriously be suggested that Crown officials were unaware by then that alienation rights rested in the tribe, not in individuals. Donald McLean, the sub-protector of aborigines stationed in Taranaki in the mid-1840s and later Chief Land Purchase Commissioner, was one of 27 witnesses who gave evidence in 1847 to the Board of Native Affairs. Asked: 'Has a native a strictly individual right to any particular portion of land, independent and clear of the tribal right over it?', he answered in the negative.[52] In 1856 a board appointed by the governor advised that 'there is no such thing as an individual claim, clear and independent of the tribal right'.[53] Having been thus informed, it is not presentist to describe as foolish and mistaken Governor Gore Browne's declaration that 'William King shall not sell his property as he pleases . . . . Teira's title to the land is a good title, and William King and you all know that it is so', unless judgement of any sort is inappropriate.[54] In that case history becomes mere chronicle.[55]

Nor is it being presentist to emphasize Wiremu Kingi's eloquent and well-known declaration of 1859:

> The boundary of the land which is given for ourselves is at Mokau. These lands will not be given by us into the Governor's and your hands, lest we resemble the seabirds which perch upon a rock, when the tide flows the rock is covered by the sea, and the birds take flight, for they have no resting place . . . My word is not a new word, it is an old one . . . You, Mr McLean, are aware of that word of mine when you first came here and saw me, you heard the same word from me, 'I will not give the land to you'.
>
> I have therefore written to the Governor and you to tell you of the Runanga of this new year, which is for withholding the land because some of the Maories still desire to sell land, which causes the approach of death; it is said that I am the cause, but it is not so, it is the men who persist; they have heard, yet they still persist. If you hear of any one desiring to sell land within these boundaries which we have here pointed out to you, do not pay any attention to it, because that land selling system is not approved of.[56]

It is not as if this declaration was obscure: Parliament ordered it to be printed. Even allowing for a good deal of complexity it is not unreasonable to suggest that at the very least the governor and his officials should have proceeded with much more caution.

On Parihaka, it is hardly original to observe that the Native Minister John Bryce 'had clearly retained his relish of warfare and . . . saw the exercise of power as the solution to problems'. Bryce is distinguished from his predecessor John Sheehan, 'who had at least sought to discuss matters with Te Whiti', and from his successor William Rolleston, 'who was probably more concerned than anyone with establishing dialogue'.[57] From George Rusden in the 1860s to Hazel Riseborough a century later there has been a consistent criticism of Bryce and the Parihaka affair. And if Rolleston, in September 1881, could describe Parihaka as 'thoroughly pacific and good tempered' and 'engrossed in agriculture' then clearly there was an alternative to Hall and Bryce conspiring with Chief Justice James Prendergast, who was deputising for Governor Sir Arthur Gordon, to reinstall Bryce as native minister and march on Parihaka.[58] Delicate sensibilities might be affronted by the Tribunal's language — 'a government so freed of constitutional constraints as to ignore with impunity the rule of law, make war on its own people, and turn its back on the principles on which the government of the country had been agreed' — but it is not unjustified by the evidence available in 1881.[59]

On many other points, too, the Tribunal relies on established scholarship. In Muriwhenua Fishing, what is recounted is a gradual decline of the Maori position — a decline discussed by Buck half a century ago.[60] The overfishing which the Tribunal identified as dating from the 1960s had been discussed by many writers on recreational fishing.[61] A modern generation might well regard it as a retrospective utopia to describe a society in which 'snapper was the main catch of fishermen of all periods'.[62] In Taranaki, Byrnes apparently criticizes the Tribunal's emphasis on tribal autonomy.[63] The Tribunal, in referring to the centrality of 'the relationship between governments and indigenes', is in fact simply revisiting the old argument about whether the wars were about land or sovereignty, and saying no more than had been said by Alan Ward or James Belich.[64] In referring to the bush war of the later 1860s, 'Not all the pa stormed were hostile, not all the villages destroyed were fortifed, and not all the Maori slain were armed, but the devastation was just the same. This was the terrible strategy known as "bush-scouring" — sudden attacks on soft targets, even deep in the bush', the Tribunal was not using its own language but, again, Belich's.[65] Likewise, in the Whanganui River report, the Tribunal emphasized tribal mana regarding the river[66] and noted that the local Maori retained considerable autonomy until the 1870s. We may again quote Belich: 'Between 1840 and 1872, and a number of years thereafter, the history of Maori–Pakeha relations is the history of the two independent zones or spheres'.[67] On conflict in Heretaunga (the Hutt), the Tribunal argues that Matthew Richmond, as superintendent of the Southern Division, 'displayed a limited knowledge of customary tenure'.[68] In support of this it quotes extensively from Ian Wards, who wrote 35 years ago and who has not usually been seen trading in presentism or retrospective utopianism. On the argument

between the Colonial Office and the New Zealand Company, particularly over the waste lands doctrine, the Tribunal relies to a considerable extent on Peter Adams, who published in 1977.[69]

Oliver suggests that the Tribunal is fond of 'elevating, as less prone to error, the oral over the archival record'.[70] In the Ngai Tahu report, the Tribunal relied on the documentary record to find that there was no promise of 'tenths' in the Otakou purchase.[71] Indeed the Tribunal suggested that later claims regarding the tenths were based on Ngai Tahu in the 1870s reading things backwards.[72] The Tribunal also comprehensively dismissed the Ngai Tahu claim that their signatories to Kemp's Deed had only understood the sale to extend to the foothills of the Southern Alps, not right across the island to the West Coast. The Ngai Tahu claim was based on recorded oral evidence given 30 years later by participants in the deeds, and the Tribunal's dismissal of that argument is a model of orthodox scepticism of oral accounts. The Tribunal thought that these claims amounted to a retrospective explanation:

> As settlement progressed Ngai Tahu saw pastoral runs, each of thousands of acres, occupied by settler families while they were forced to subsist on a few acres. Steadily their access to mahinga kai was curtailed. They fretted at their inability either to maintain their earlier mode of living, free to forage and hunt at will, or to emulate the new settlers by grazing sheep and cattle on the extensive lands they had expected to retain. They came to realise by 1868, if not earlier, that the Crown did not intend to honour its obligations under Kemp's deed. By the early 1870s they were forced to reassess the parlous situation in which, through no fault of their own, they now found themselves. Those who had participated in the sale were called on to justify and explain how Ngai Tahu, in so short a time, had been reduced to circumstances of poverty and virtual landlessness. In the knowledge that they had not agreed to part with almost all their land, and reflecting on the discussions with Grey and his officials in 1848, they concluded the western boundary was not that contended for by the Crown but should be redefined as running from Maungatere to Maungaatua. In this way substantial areas of land would be restored to them. And so Te Kerema evolved.[73]

More recent reports do not seem to privilege oral evidence to any greater extent. What they do, notably in Muriwhenua and Taranaki, is use oral evidence to elucidate matters of custom or tradition. On strictly historical matters oral evidence is treated with the greatest caution.

Oliver and Byrnes devote considerable space to the difference between lawyers' world views and those of historians. In general terms, a contrast is drawn between lawyers' predilection for certainty and historians' emphasis on context and nuance. Oliver thinks the Tribunal asserts certainty where there is less than certainty because otherwise 'its political effectiveness would have been severely curtailed. The number of "don't know" responses would have limited the Tribunal's usefulness for those who want a firm decision rather than an inconclusive, even if an enlightening, analysis.'[74] In the Taranaki report, however, the Tribunal itself noted that 'though questions of law require another standard of evidential proof, now hampered by lapse of time, we think it probable, on the historical record . . . that the confiscation of north Taranaki was unlawful'.[75] The Tribunal also noted, 'with such a lapse of time as now

prevails, one cannot be certain of all the facts, but the historical record certainly suggests that the whole or at least the greater part of northern Taranaki was invaded, occupied and finally confiscated without any act of rebellion having taken place'.[76] Many historians are no more cautious than this.

Byrnes devotes a good deal of space to this issue, relying heavily on the French historian Henry Rousso. Rousso was writing in the context of criminal trials arising from the Second World War, particularly the Holocaust and the role of the Vichy regime. There has been 'an increasing judicialisation of history, wherever historians and their work have been pressed into the service of legal forms of judgment'.[77] This is to be deprecated because 'the match between law and history necessarily produces a hybrid product, a manner of historical writing that is more concerned with the present than the past'.[78] This comes close to asserting that there is only one way to do history; Richard Evans has described Rousso's view as a 'rather simplistically scientistic view of the historian's enterprise'.[79]

Although historians and lawyers do approach things differently, it is also usual to assume that things actually happened in the past and that we can attain some knowledge thereof. As Evans noted, the defence in one Holocaust-denial defamation trial amounted to the proposition that history is 'an unending debate in which nothing could ever be proven for certain'.[80] If this argument is taken to its logical conclusion, we can know nothing about the past and even in an ordinary murder trial 'we cannot know for sure' whether the accused committed the alleged crime 'and whether the alleged crime was committed a year ago or fifty years ago really makes no difference'.[81] Richard Vann agrees: the proposition that moral judgement must be eschewed because we can never know everything is a nonsense and 'would stop historians making any judgements at all, for every judgement — or, for that matter, every theory in the natural sciences — must be made in the awareness that subsequent generations will know more'.[82] Much indeed is uncertain, but I do not think Oliver would accept that nothing is, in historical terms, provable despite his observation that 'a firm conclusion' is 'non-academic'.[83] As Beverley Southgate notes, although it is now abundantly clear that history may be written in many different ways, it is 'not possible, without denying the standards of evidence by which we live as both historians and human beings, to deny that something (that we can now refer to as the Holocaust) did happen'.[84]

In relying on Rousso, Byrnes falls into a fundamental error. Rousso's criticism is directed at historians being involved in criminal trials, where individuals are on trial for their role in certain crimes. Moreover, in the cases of which Rousso wrote historians were merely being conscripted 'to lend academic respectability to a case that had already been formulated'. He and Evans largely agree in regarding criminal jurisprudence as problematic for historians, not least because evidence is presented not with attention to context and nuance, but in a form determined by lawyers' questions.[85] Evans's view reflected his own experience in the Lipstadt trial.[86] There, he had no problem appearing as an expert witness for the defence, partly because the trial was about how the history of the Holocaust should, or could, be written, not about individual criminal acts. More importantly, Lipstadt was not a criminal but a

civil trial. Thus 'the outcome rested not on proof of guilt beyond reasonable doubt but, — *as in history* — the establishment of a case on the balance of probabilities'.[87] And that is exactly the standard the Tribunal observes, a point which escapes Byrnes, who baldly declares that lawyers approach things 'beyond reasonable doubt', and that the Tribunal finds a claim is made out 'beyond reasonable doubt'.[88]

The appropriateness of moral judgement in historical narrative is endlessly debated. A traditional view regarded history as moral exemplar,[89] and some Tribunal passages are written in this vein. As Byrnes notes, the Tribunal regards history as 'an abstract chronology of causes, events, and outcomes, which can instruct, teach and reward those who choose to listen'.[90] At least from the mid-twentieth century historians were enjoined to eschew moral judgement and be content with explanation, although there are coherent suggestions that moral judgement can be necessary if risky. Even the way in which a story is told can imply a moral judgement; a different message is conveyed by saying that the Romanovs were 'murdered' by the Bolsheviks than is conveyed by saying they were 'killed' or 'executed'. While accepting moral judgements as risky if necessary, Vann suggests that the alternative — history devoid of moral reasoning — is worse.[91] A distinction should be made, too, between 'feelings of rage or horror, or moralizing outbursts, [and] dispassionate moral judgements'.[92] While some argue that guilt or innocence are 'alien to the historian, who does not typically engage in the making of moral judgments',[93] historians at the least do explain cause and effect. It is not a moral judgement if an historian says Tainui lost vast areas of land through confiscation and that the evidence available to settler politicians and the governor did not support the justification for confiscation, nor is it a moral judgement if a historian says that Ngai Tahu sought to retain much more land than they were allowed to do.

In any case the Tribunal is not unaware of context and nuance. In Whanganui a Tara, the claimants alleged that the Crown contravened the Treaty by not having a presence in Wellington until mid-1841. The Tribunal had 'difficulty in finding that the Crown, in the circumstances . . . may realistically be found to have acted in breach of the Treaty. Hobson was based more than 400 miles to the north, and he was for a time seriously ill' and anyway he sent his deputy down for some months in the middle of 1840.[94] In Muriwhenua, the Tribunal observed that 'there was no concerted plan of action to determine what Maori might need to keep for themselves as reserves, where those reserves should be located, or how they should be constituted, managed, or retained in Maori control'.[95] Given that Normanby's instructions had been explicit that the Crown was not to enter into contracts which might be injurious to Maori, the Tribunal's observation does not seem ahistorical. In discussing protection, the Tribunal explicitly referred to past context: 'it would be consistent with Maori custom if Maori had seen matters in terms of honourable conduct rather than protection. Either way, however, the outcome is the same'.[96]

In Ngai Tahu, the intellectual context was alluded to. The Tribunal referred to official 'arrogance, condescension and at times aggressiveness' but also 'on occasions . . . a sense of responsibility'. It further noted that 'Europeans widely believed that the Maori were dying out [which] . . . almost certainly conditioned

officials' assessments' as did a belief in the necessity of individualization of land and lifestyle.[97] The Tribunal also referred to expectations of 'an ongoing relationship with the Crown and with the new owners of the land'.[98] Although the phrasing might be modern, we have some idea of what that meant to Ngai Tahu. Tiramorehu wrote in 1856: 'We have not been pleased with Captain Cargill, with Macandrew's set, with all the men of Scotland. Though seven years have passed they do not know anything of us, nothing at all of the Maori from Murihiku to Waitaki. There is but one white man whose house we enter, the Magistrate Chetham (Strode) is the only one, he speaks to us and we speak to him.'[99]

Oliver and Byrnes also criticize the way in which the Tribunal portrays mid-nineteenth-century Maori society. Oliver refers to the Tribunal's account of the pre-Treaty past as one which 'strenuously depicts Maori as a numerous, resourceful, prosperous and formidable people. Far from being primitive, their ways of regulating their lives were "law" and their institutions "polities".'[100] The Muriwhenua Land Tribunal indeed used these terms to highlight their point that 'Muriwhenua Maori had their own world-view. They maintained a distinctive social and economic order, which had evolved through a millennium of experience and which was settled and regularly maintained. Accordingly, they enjoyed an independent polity … had no reason to think that [land transactions]… should be seen on other than Maori terms or would somehow threaten their independent existence.'[101] They had 'a distinctive tenure system and a substantial culture'.[102] Oliver continues his own summary: 'This pre-European golden age could have been preserved and strengthened by a self-regulated injection of new economic opportunities and skills. Maori accepted from settlers new forms of economic enterprise and practised them with conspicuous success. At most, they sought no more than assistance in making the transaction to a capitalist market economy.'[103] Oliver seems to have a problem with emphasis on 'the continuing vitality of pre-modern tribal polities and the values they express'. His tone implies the absurdity of such an approach. What is more questionable is the assumption that tribal polities are static and as such defy 'change'.[104] One recalls Harry Morton's observation that 'European influences operated upon an effective society, which had mores and customs as strong as those impinging upon it. Maori culture has survived because Maori adaptation to European ways was selective from the beginning.' Morton emphasized 'the wisdom and resilience of an indigenous culture strong enough to have preserved an identifiable society to this day'.[105]

Oliver's criticism is that the Tribunal's expectations of what might, and should, have happened are unrealistic. The Tribunal's real point is that officials at the highest level seldom, after 1845, considered that there was any alternative to rapid and comprehensive land purchase and the assertion of English law and custom. Alan Ward argued as much 30 years ago.[106] Grey's peremptory tone in 1847 with reference to Wiremu Kingi is all too instructive. Kingi, as a senior chief of Te Ati Awa, was intending to return from Waikanae to Waitara in order to support his people as they attempted to maintain their land against settler and government pressure. Grey threatened: 'Tell him that I say he is to remain at Waikanae, and that I will place him under guard; and that if he

dares to remove to Waitara without my permission, I will send the steamer after him, and destroy all his canoes.'[107] It is impossible to know what would have happened if the attempt had been made to deal with tribal structures and leadership as if they were competent. Tribal structures showed themselves capable of adaptation, in the formation of runanga and komiti in the 1850s, and in the pan-tribal movement that became the Kingitanga.[108] It was a question of commitment rather than resources: the full panoply of representative institutions, at provincial and central level, was established easily enough in 1853 along with a judiciary and a bureaucratic establishment.

Byrnes suggests that the Tribunal is caught in a paradox, of on the one hand seeking to show Maori as 'active agents rather than as passive victims in the past, [but] the procedural constraints of the wider Treaty claims process necessarily designate Maori as "victims"'.[109] Might this not have something to do with historical reality as well — that Maori did exercise considerable agency, but in the end were unable to maintain their position — were, well, victims? Following Belich she argues that 'in historical scholarship outside the Treaty claims process, "fatal impact" interpretations have largely been abandoned in favour of analyses constructed around the premise of indigenous agency'.[110] It might be suggested that Byrnes's own argument is constructed around a simple binarism of fatal impact or agency. While 'recent' historiography 'at least since the 1960s' has been critical of 'a wholly fatalistic approach, and has instead emphasized the subtleties of colonial encounters and the importance of the *perceptions* of these encounters',[111] the work of Sorrenson, Ward, Wards, Claudia Orange, Atholl Anderson and Harry Evison has all in the end related considerable Maori disadvantage by the last third of the nineteenth century.[112] Even work which Byrnes regards as 'exemplary', such as Paul Monin's fine study of Hauraki, includes an acknowledgement that 'dual agency', which 'emphasises bilateral "outcomes" rather than unilateral "impacts", where ultimately Maori and Europeans share in the development and responsibility for certain developments' does not mean that Maori and Europeans always had equal power to determine the course of such developments.[113]

For Byrnes, the Tribunal's portrayal of Maori agency, post-dispossession, is essentially a portrayal of protest, 'nor does it differentiate "Maori agency", according to traditional Maori custom and practices, from those actions which clearly involve the adoption of European values and forms of expression, such as, say, individualism. In other words, the Tribunal fails to draw a distinction between Maori agents utilising their own cultural resources and those who co-opt or borrow European methods of protest, agency and assertion.'[114] This is a curiously static view of 'Maori custom', implying that any borrowing by Maori of European practices or technology compromises an idealized 'Maoriness'.

Byrnes also criticizes the Tribunal for depicting settler officials, like Maori, 'in rather stereotypical terms . . . . largely as one-dimensional individuals . . . . in a fairly cursory manner . . . . [with] vague and rather thin depictions of Crown officials; the negation of difference within the European settler community, and the assumption that all settlers thought and therefore acted in the same manner; the polarisation of Maori and European world-views and habits of thought as mutually exclusive; and finally, the passing of moral judgments and

the creation of "good" and "bad" characters.'[115] In Taranaki 'European officials are frequently mentioned in vague and partial terms and with only minimal contextual description'. Indeed 'Crown officials' are often not named but 'appear as fleeting and transitory ghosts'. Major figures like Grey and McLean 'are frequently depicted in a wholly one-dimensional fashion'.[116] The Tribunal describes McLean as achieving his land purchase goals 'largely by personal influence . . . . He respected Maori rank and protocol but, like Grey, was a paternalist who could be deliberately calculating in achieving his goals. He had an imposing, dignified presence, and unlimited patience.'[117] Byrnes thinks this demonstrates the Tribunal's 'contempt' for McLean. It is also apparently contemptuous to describe Grey as 'the most important figure who acted vice-regally in New Zealand . . . . Autocratic by nature, Grey kept a tight control over the parliamentary grant and made sure that his lieutenant-governors' powers were more formal than real. Grey was a most effective politician, undermining the authority of any group, Maori or Pakeha, which could threaten control over government.'[118] I am not sure why repeating an orthodox historiographical view of either McLean or Grey demonstrates 'contempt', unless hagiography is now required.[119]

Byrnes also argues that the Tribunal polarizes 'Maori and European perceptions, cultural attitudes, and value systems'.[120] The Manukau report 'declared that Maori customary law was the complete antithesis of English common law'.[121] The Tribunal thought that 'Ngai Tahu . . . saw amalgamation in quite different terms from Europeans'.[122] It is apparently also creating 'binarisms or polarities' to point out that Maori and European expectations of land transactions were different.[123] Here one might quote the following: 'The moving spirit of English colonization is that of absolute individuality. It is unwilling in its contact with foreign nations to acknowledge any other system but its own, and labours to enforce on all who are under its control its own peculiar principle.' That observation was made by Ernst Dieffenbach, the radical young German doctor who served as naturalist in the New Zealand Company's first New Zealand expedition in the 1840s.[124]

As far as stereotypes of bad settlers and good Maori are concerned, Taranaki provides ample refutation. The Tribunal emphasized 'the war was not a war between Maori and Pakeha. There were Maori on both sides, and many Pakeha advocated a Maori point of view', instancing former Chief Justice Sir William Martin, the Anglican Bishop George Selwyn, and the Wellington missionary, and later bishop, Octavius Hadfield, all of whom wrote against the government's conduct.[125] The Tribunal noted that the New Zealand Settlements Bill was comprehensively supported in Parliament, but gave considerable space to the opposition expressed by the Canterbury politician James Edward FitzGerald, and the legislative councillor and former Attorney-General William Swainson. It can hardly be presentist to quote from FitzGerald: 'a repeal . . . of every engagement of every kind whatsoever which has been made by the British Crown with the Natives . . . contrary to the Treaty of Waitangi, which has distinctly guaranteed and pledged the faith of the Crown that the lands of the Natives shall not be taken from them except by the ordinary process of law'.[126]

The Tribunal is also careful to note that 'there were occasions when the Maori response, though justified, was not strictly limited to self-defence and that therefore there was a rebellion in terms . . . . acts of aggression well beyond self-defence came later in response to the confiscations and other Government action'. The Tribunal stresses that the legacy of the Taranaki wars was to poison perceptions and relationships on both sides — Pakeha images of Maori were often 'unwholesome' and 'for Maori the picture of Pakeha was little better. Recollections of atrocities were passed down.'[127]

Oliver and Byrnes agree in maintaining that the Tribunal's account of what might have happened is unconstrained by reality and is thus ahistorical. Oliver discerns a consistent Tribunal view that 'the Treaty guaranteed a major continuing function to traditional tribal structures, and that the Crown acknowledged through the Treaty that its own authority would be limited by that function'.[128] As well as the exercise of state power being thus qualified, there is another constant theme in Tribunal reports: that in buying land the state should have followed Maori law and dealt with the collective tribal interests and representatives.[129]

Oliver quite correctly identifies the real problem: if this had been the policy, 'land would have been available for settlement only if and as autonomous Maori authorities provided it; colonisation would have been controlled by the indigenous people exercising authority through their traditional structures within distinct territorial realms. It can hardly be supposed that a large and increasing settler population and an expanding capitalist economy would have tolerated such controls . . . . New Zealand . . . would not have been a colony in any real sense of the word, and certainly could not have been what it quickly became, a colony of settlement.'[130] If the Tribunal had followed this logic then the 'credibility' of its conclusions would have been 'undermined'.[131] The Tribunal's desirable past 'is admirable, but it is not, and has not ever been compatible with colonisation'.[132] It is not only the Tribunal which needs to examine its logic with a view to considering whether the credibility of its conclusions might be undermined: Oliver is essentially arguing that colonization was inevitable, and perhaps justified by its inevitability. It is certainly an appeal away from idealism and towards *force majeure*.[133] Does he wish to base settler society and its descendant on such a foundation? The political implications are risky.

The Tribunal's historiography does highlight issues of objectivity and partisanship. In this regard Evans stresses self-consciousness and self-criticism: 'a detached mode of cognition, a faculty of self-criticism and an ability to understand another person's point of view. This applies as much to politically committed history as it does to a history that believes itself to be neutral. Politically committed history only damages itself if it distorts, manipulates or obscures historical fact in the interests of the cause it claims to represent.' Against the relativizing tendencies of extreme postmodernists Evans argues that he 'will look humbly at the past and say despite them all: it really happened, and we really can, if we are very scrupulous and careful and self-critical, find out how it happened and reach some tenable though always less than final conclusions about what it all meant'.[134]

Byrnes's characterization of the Tribunal's approach as liberation history

may well be appropriate. Certainly it is politically charged. That does not mean that it is therefore ahistorical, any more than any other form of history which is written out of strong political commitment, or even that which simply addresses new themes — not always previously regarded as proper fields of enquiry — is ahistorical. One might here instance women's history, labour history, or environmental history — or even, two generations ago, New Zealand history. In all cases, the challenge is to combine commitment with a proper respect for the evidence. Eric Hobsbawm, while stressing the importance of 'sceptical, if committed, inquiry' also notes that 'partisan intellectuals may be the only ones ready to investigate problems, or subjects which (for ideological or other reasons) the rest of the intellectual community fails to consider'.[135] Commitment can be useful, as long as it is leavened by a willingness to be proven wrong, not to mention absolute respect for the evidence, but 'the obvious dangers and disadvantages of partisan scholarship hardly need stressing. Its less obvious advantages do.'[136]

Perhaps more generally, while the precept that the past should not be judged by present standards is admirable, it should not be taken to mean that there was only one standard of conduct in the past.[137] To say that historical situations should be judged by the standards of the time begs the question: which standards? There were a number of views of the transactions between Ngai Tahu and Kemp and Mantell in 1848–1849, and certainly more than one view, even among settlers, of events in Taranaki in the 1850s and 1860s. Tiramorehu and Kingi's voices were marginalized for long enough; Hadfield and FitzGerald may be slightly better remembered. It would be a shame if the scepticism proper to historical enquiry were overdone to the extent that such voices were again forgotten or marginalized. Above all, to not judge the past by the standards of the present should not be a euphemism for simply perpetuating the dominant discourses of the past.

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NOTES

1 W.H. Oliver, 'The Future Behind Us: The Waitangi Tribunal's Retrospective Utopia', in Andrew Sharp and Paul McHugh, eds, *Histories, Power and Loss: Uses of the Past: a New Zealand Commentary*, Wellington, 2001, p.10; Giselle Byrnes, *The Waitangi Tribunal and New Zealand History*, Auckland, 2004. I am indebted to various colleagues inside and outside the academy who have discussed these issues with me, and particularly to the History Programme, Massey University, for inviting me to give a seminar of which this paper is a longer version. I thank Professor Keith Sorrenson for helpful comments and the two anonymous referees whose comments contributed to the final version. I also acknowledge the many people of Ngai Tahu and many scholars (called by various parties) with whom I have worked on Tribunal claims at various times over the past 18 years. The views expressed herein, it should be emphasized, are my own.

2 K.R. Howe, 'Two Worlds?', *New Zealand Journal of History* (NZJH), 37, 1 (2003), pp.56–57.

3 Gilbert Wong, 'I Have a Nightmare', *Metro*, April 2004, pp.72, 74; Chris Trotter, 'Putting the Past on Trial', *Independent*, 28 May 2003, p.11.

4 *Report of the Waitangi Tribunal on the Motunui/Waitara Claim (Wai-9)*, Wellington, 1989; M.P.K. Sorrenson, 'Towards a Radical Reinterpretation of New Zealand History: The Role of the Waitangi Tribunal', NZJH, 21, 1 (1987), pp.173–88.

5 Alan Ward, 'History and Historians Before the Waitangi Tribunal', NZJH, 24, 2 (1990), p.155.

6 ibid., p.162.

7 ibid., p.163.

8 Michael Belgrave, 'Something Borrowed, Something New: History and the Waitangi Tribunal', in Bronwyn Dalley and Jock Phillips, eds, *Going Public: The Changing Face of New Zealand History*, Auckland, 2001, p.103.

9 ibid., pp.104–5.

10 ibid., p.107.

11 Michael Belgrave, 'The Tribunal and the Past: Taking a Roundabout Path to a New History', in Michael Belgrave, Merata Kawharu and David Williams, eds, *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, Auckland, 2004, p.45.

12 Byrnes, p.18.

13 Oliver, 'Future Behind Us', p.10; Byrnes, pp.1, 2, 4.

14 Norman Davies, *The Isles: A History*, London, 1999; Linda Colley, *Britons: Forging the Nation 1707–1837*, London, 1992.

15 Here I note the definition of this phenomenon, which I and the chief justice arrived at independently of each other: it is any decision with which one disagrees. The chief justice discussed the matter in her 2004 Neil Williamson Memorial Lecture, and as she notes, the accusation of judicial activism amounts to accusing a judge of disregarding the oath of office. Sian Elias, '"The Next Revisit": Judicial Independence 7 years on', Neil Williamson Memorial Lecture, typescript, 30 July 2004, p.11.

16 Oliver, 'Future Behind Us', pp.11–12.

17 ibid., p.13.

18 A point made by Belgrave, 'The Tribunal and the Past', p.38.

19 A good example of the evolution is in the *Te Reo* report, where the Tribunal held that although there was no conceivable need for the language to be actively protected in 1840, changing circumstances since then imposed some obligation on the Crown in this area. The Court of Appeal was deciding the State Owned Enterprises case, properly known as *NZ Maori Council v. Attorney-General*; reported in *New Zealand Law Reports*, 1987, vol.1, from p.641.

20 Quoted in *The Ngai Tahu Report (Wai-27)*, Wellington, 1991, p.831. See also Claudia Orange, *The Treaty of Waitangi*, Wellington, 1987, chs 3–4.

21 Cited Oliver, 'Future Behind Us', p.12.

22 ibid., p.13.

23 In the context of his observation that granting land to the New Zealand Company, 'without obliging it to prove the extinction of the native title, would have been a direct contravention of and in utter opposition to the spirit of the treaty of Waitangi', Spain, 12 September 1843, quoted in *Te Whanganui a Tara me ona takiwa: Report on the Wellington District (Wai-145)*, Wellington, 2003, p.114. It is not suggested that the 'spirit' of 1843 is the same as the 'principles' of the 1990s, but Spain's wording is still striking.

24 Oliver, 'Future Behind Us', p.25. See also W.H. Oliver, *Looking for the Phoenix: A Memoir*, Wellington, 2002, p.170.
25 *Muriwhenua Land Report (Wai-45)*, Wellington, 1997, pp.181–204, 208–9.
26 Oliver, 'Future Behind Us', p.18.
27 ibid., p.19.
28 Michael Bassett, *The State in New Zealand 1840–1984: Socialism Without Doctrines?*, Auckland, 1998.
29 *Muriwhenua Land*, pp.182, 207, 208, 279.
30 Byrnes, p.42.
31 *Report of the Waitangi Tribunal on the Motunui/Waitara claim (Wai-9)*, Wellington, 1989, para.10.1.
32 It could be suggested that the Court of Appeal had ample opportunity in the SOE case to criticize the Tribunal on this point if it objected to the Tribunal's approach. No such criticism was made and the Court referred in positive terms to the Tribunal's exposition.
33 *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim, (Wai-22)*, Wellington, 1988, p.217. Emphasis added.
34 For instance, *Muriwhenua Fishing*, pp.85, 87.
35 *Ngai Tahu*, p.212.
36 ibid., p.493.
37 ibid., p.455.
38 ibid., p.456.
39 ibid., pp.477–88.
40 Tiramorehu to Eyre, 22 October 1849, quoted in *Ngai Tahu*, pp.487–8.
41 Eyre to Kemp, 13 June 1850, quoted in *Ngai Tahu*, p.488.
42 Eyre to Mantell, 4 October 1848, quoted in *Ngai Tahu*, p.484.
43 Mantell to Domett, 13 March 1851, quoted in *Ngai Tahu*, p.592.
44 McHugh suggests that presentist assessments are made in his 'A History of Crown Sovereignty in New Zealand', in Sharp and McHugh, *Histories Power and Loss*, p.191.
45 Quoted in *Muriwhenua Land*, pp.113–14.
46 ibid., p.135; see also pp.155–6.
47 ibid., pp.169, 175–6.
48 *The Taranaki Report: Kaupapa tuatahi (Wai-143)*, Wellington, 1996, pp.23, 29, 34.
49 ibid., p.31.
50 ibid., p.36.
51 ibid., p.55.
52 ibid., p.79.
53 ibid., p.68.
54 ibid., p.77.
55 As Richard Evans has suggested in *In Defence of History*, Cambridge, 1997, p.225.
56 Quoted in *Taranaki*, p.52.
57 ibid., p.201.
58 ibid., p.205.
59 ibid., p.206.
60 *Muriwhenua Fishing*, p.112.
61 ibid., p.116; R.B. Doogue, *Hook, Line and Sinker*, Wellington, 1967.
62 *Muriwhenua Fishing*, p.40.
63 Byrnes, p.111.
64 *Taranaki*, pp.7, 83; Alan Ward, 'The Origins of the Anglo–Maori Wars: A Reconsideration', NZJH, 1, 1 (1967), pp.148–70; James Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict*, Auckland, 1986, p.80.
65 James Belich, *I Shall Not Die: Titokowaru's War, New Zealand, 1868–1869*, Wellington, 1989, p.8, quoted in *Taranaki*, p.98.
66 *The Whanganui River Report (Wai-163)*, Wellington, 1999, p.2
67 James Belich, 'The Governors and the Maori', in Keith Sinclair, ed., *The Oxford Illustrated History of New Zealand*, Wellington, 1990, p.81, quoted in *Whanganui River,* p.109.
68 *Whanganui a Tara*, p.207.
69 ibid., pp.244–8.
70 Oliver, 'Future Behind Us', p.25.

71 *Ngai Tahu*, pp.294, 299, 300, 311–12.
72 ibid., p.314.
73 ibid., p.515.
74 Oliver, 'Future Behind Us', p.21.
75 *Taranaki*, p.102.
76 ibid., p.95.
77 Byrnes, p.64.
78 ibid., p.65.
79 Richard J. Evans, 'History, Memory and the Law: The Historian as Expert Witness', *History and Theory*, 41, 3 (2002), p.326.
80 Evans, 'History, Memory and the Law', p.329. See also Evans, *In Defence of History*, pp.238–43.
81 Evans, 'History, Memory and the Law', p.333.
82 Richard T. Vann, 'Historians and Moral Evaluations', *History and Theory*, 43, 4 (2004), p.18.
83 Oliver, 'Future Behind Us', p.21.
84 Beverley C. Southgate, *Postmodernism in History: Fear or Freedom?* London, 2003, p.55.
85 Henry Rousso, *The Haunting Past: History, Memory and Justice in Contemporary France*, Philadelphia, 2002, p.86, cited in Evans, 'History, Memory and the Law', p.338.
86 Richard J. Evans, *Telling Lies about Hitler: The Holocaust, History and the David Irving Trial*, London, 2002. Most will recall that this case involved the British writer David Irving suing an American historian, Deborah Lipstadt, for defamation after she described him as a Holocaust-denier. Irving lost.
87 Evans, 'History, Memory and the Law', p.340. Emphasis added.
88 Byrnes, pp.80, 110. Evans also noted with reference to one of Rousso's concerns that in Lipstadt the experts presented reports first, and were then cross-examined upon them. The experts were free to discuss context and nuance, and 'mature reflection on the issues was therefore a given'. Tribunal processes are therefore close to Evans's criteria for allowing the responsible participation of historians. Evans, 'History, Memory and the Law', p.340.
89 For instance, David Harlan, *The Degradation of American History*, Chicago, 1997.
90 Byrnes, p.67.
91 Vann, 'Historians and Moral Evaluations', pp.6–7, 10, 16 and passim.
92 Jonathan Gorman, 'Historians and their Duties', *History and Theory*, 43, 4 (2004), p.117.
93 Byrnes, p.80.
94 *Whanganui a Tara*, p.88.
95 *Muriwhenua Land*, p.279.
96 ibid., p.390.
97 *Ngai Tahu*, p.822.
98 ibid., p.823.
99 Tiramorehu to Browne, 18 January 1856, quoted in *Ngai Tahu*, p.934.
100 Oliver, 'Future Behind Us', p.26.
101 *Muriwhenua Land*, pp.1–2.
102 ibid., p.12.
103 Oliver, 'Future Behind Us', p.26.
104 ibid., p.25.
105 Harry Morton, *The Whale's Wake*, Dunedin, 1982, pp.210, 224.
106 Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland, 1973, pp.45, 86.
107 Quoted in *Taranaki*, p.43.
108 Ward, *A Show of Justice*, pp.96–101.
109 Byrnes, p.110.
110 ibid., p.113
111 ibid., p.112.
112 M.P.K. Sorrenson, 'Land Purchase Methods and their Effect on the Maori Population, 1865–1901', *Journal of the Polynesian Society*, 65, 3 (1956), pp.183–99; Ward, *A Show of Justice*; Ian Wards, *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand 1832–1852*, Wellington, 1968; Orange, *The Treaty of Waitangi*; Atholl Anderson, *The Welcome of*

Strangers: An Ethnohistory of Southern Maori AD 1650–1850, Dunedin, 1998; Harry C. Evison, *Te Wai Pounamu/The Greenstone Island: A History of Southern Maori during the European Colonisation of New Zealand*, Wellington, 1993.

113 Byrnes, pp.113–14; Paul Monin, *This Is My Place: Hauraki Contested, 1769–1875*, Auckland, 2001.

114 Byrnes, p.121.

115 ibid., p.122.

116 ibid., p.123.

117 *Te Whanganui a Orotu Report (Wai-55)*, Wellington, 1997, p.37, quoted in Byrnes, p.123.

118 *Ngai Tahu*, pp.250–1, quoted in Byrnes, pp.123–4.

119 Alan Ward, 'McLean, Donald 1820–1877'; Keith Sinclair, 'Grey, George 1812–1898', both in *Dictionary of New Zealand Biography, vol. 1*, Wellington, 1990. See also Ward, *A Show of Justice*, p.94.

120 Byrnes, p.124.

121 *Report of the Waitangi Tribunal on the Manukau Claim (Wai-8)*, Wellington, 1989, pp.33–34, cited in Byrnes, p.125.

122 *Ngai Tahu*, pp.274–6, quoted in Byrnes, p.125.

123 Byrnes, p.126.

124 Ernst Dieffenbach, *Travels in New Zealand, volume 2*, London, 1845, p.172, quoted in *Whanganui a Tara*, p.85.

125 *Taranaki*, p.92.

126 *New Zealand Parliamentary Debates, 1861–1863*, p.783, quoted in *Taranaki* p.111.

127 *Taranaki*, pp.102–33, 105. Emphasis added.

128 Oliver, 'Future Behind Us', p.13. One might recall that the New Zealand Constitution Acts of both 1846 and 1852 provided for Maori districts, which amounted precisely to allowing 'a major continuing function to traditional tribal structures'.

129 Oliver, 'Future Behind Us', p.15.

130 ibid., p.16.

131 ibid.

132 ibid., p.17.

133 That such a revolutionary seizure of power took place is the argument of F.M. Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation*, Auckland, 1999. Brookfield nevertheless argues strongly for reparation.

134 Evans, *In Defence of History*, pp.252–3.

135 E.J. Hobsbawm, *On History*, London, 1997, pp.133–4.

136 Hobsbawm, p.138.

137 On this point see Vann, pp.25, 26.