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Looking Forward

HISTORIANS AND THE WAITANGI TRIBUNAL

IN 2001 BILL OLIVER elegantly described the work of the Waitangi Tribunal as looking backwards towards a 'retrospective utopia', prompting a now lively debate over the value of the Waitangi Tribunal's reports as history.[1] Oliver's intent was not to pen a critical obituary for Tribunal history, but to raise questions. Despite his initial frustration at the slowness of the response, he has been successful, with at least two books and several articles which address the role of the Tribunal as historian.[2] However, the discussion remains caught within the narrow confines of Oliver's original concerns. It is focused on a small number of often relatively old Tribunal reports and on particular aspects of those reports. Largely ignored are the rest of the now more than 30 historical reports released by the Tribunal and the mountain of research from which these reports were constructed.[3] Giselle Byrnes has taken up many of Oliver's reservations, using a wider range of reports and placing the Tribunal's output in a broader international historiography, comparing how the Tribunal writes post-colonial, liberation or post-modernist history with broader debates about how this history can be credible. She too ignores the evidence produced for the Tribunal. Like Oliver she concludes that despite good intentions the Tribunal's history is a 'noble but ultimately flawed experiment', dominated by presentism (the concern to interpret history according to present understandings and agendas) and by counter-factualism (the creation of alternative and mythologized histories resting on idealized and implausible narratives).[4]

Jim McAloon's response to these charges in this volume is a credible attempt to normalize the Tribunal's reasoning and explain how the Tribunal's arguments are subject to the same variations in interpretation as any other area of academic debate. According to this view, the Tribunal's findings on nineteenth-century events are grounded in judgments made by nineteenth-century government officials, from the Colonial Office down. He maintains, with considerable weight, that as a result the Tribunal's reasoning and its criticisms of the past actions of the Crown do not rest primarily on the values and understandings of the late twentieth and early twenty-first centuries, but more usually and more reasonably on contemporary understandings of how government should operate. The Tribunal, he argues, judges the Crown's past actions according to standards rooted in past understandings of its rights and responsibilities.

This article takes a middle ground, accepting much of McAloon's argument, but acknowledging that in key instances the Tribunal has stepped beyond his test of reasonableness.[5] While this can be attributed to the legal and political agendas imposed on the Tribunal, it is argued here that, in many of the key areas that punctuate Oliver's concerns, the Tribunal has stepped outside of

an historical approach, going beyond the evidence before it and deliberately allowing other agendas and values to inform its reasoning. As a result, McAloon's test of reasonableness has been discarded completely or honoured in the breach. These lapses in historical judgment are not simply the result of the failure of a commission of inquiry to write good history. They could equally be attributed to questionable legal judgment, in particular an inability to adhere to a commission of inquiry's responsibility to draw on the evidence before it and to make decisions on the balance of probabilities. The Tribunal has judged the proverbial legal measurement of reasonableness — the common sense of the man on the Clapham omnibus (even if redirected to Johnsonville or Geraldine) — an inappropriate test of the Crown's adherence to indigenous rights. In doing so, the Tribunal has risked its credibility as a commission of inquiry every bit as much as its credibility as an historian, perhaps considering this a risk worth taking. Through examining the Muriwhenua and Taranaki reports, those most criticized by Oliver, it can be shown that the Tribunal could have produced narratives that were more historically sound, according to both Oliver's and McAloon's criteria.

More fundamentally, it is time to move away from the confines of the current debate and look forward to a broader appraisal of the significance of the Waitangi Tribunal's now three-decade long reassessment of New Zealand history. The historical work that has been undertaken for and by the Tribunal since 1985 is substantial and significant. Its nature needs to be much better understood, particularly by historians little versed in Maori, race relations or Tribunal history. Because so many major historiographical issues are intertwined with it, the Tribunal's work cannot be a cul-de-sac as Kerry Howe suggests, although, as he also argues, Tribunal history also needs to be processed 'for non Tribunal purposes'.[6] Failing to understand the nature and importance of the Tribunal's re-representation and reinvention of the past will leave this key field of New Zealand history cut off and limit our ability to understand the way it influences other fields. Emerging Maori histories, for example, are not locked into the Tribunal's way of researching and representing the past, but they are informed by it. Maori scholars such as Te Maire Tau, Charles Royal, Aroha Harris and Danny Keenan offer critical responses to Tribunal research. They are well-versed in its concerns, but also stand apart from its agendas and approaches.[7] The Tribunal's historical research is also influencing popular understandings of New Zealand's past as in the recent work by David Slack and Pat Snedden.[8]

Many of the key debates before the Tribunal also have major significance for broader understandings of the interplay between New Zealand's past and its present. Issues such as the nature and expression of Maori customary interests, Maori accommodation and resistance to colonization, the interrelationship between Maori custom and imported law, and the nature of Maori commercial relationships with settler society are among many historiograpical and evidential questions that are being debated before the Tribunal. These are sophisticated conversations. These critical issues in turn have the potential to inform more general and international debates about the nature of colonization in New Zealand, and the broader literature on the nature of imperialism. Some

historical questions can now be approached with a much greater knowledge of the experience of various Maori communities and a significantly better grounding in indigenous perspectives. The research focus can shift from colonial policy to Maori experience and Maori agency.

The quantity of research that has been undertaken since 1985 is staggering. The average historical report released by the Tribunal is the culmination of several years' historical investigation. Dozens of thesis-length reports are produced covering key aspects of the claims. They often develop intense historical debates that are unparalleled in New Zealand's historical tradition. In Muriwhenua, for instance, where there was an intense debate about the nature of early land transactions, at least a dozen historians and historical linguists contributed. In a relatively limited inquiry such as that into Tauranga lands, even after the major issues of war and confiscation were considered. There are more than 60 additional research reports, the majority in excess of 100 pages, and many several hundred pages, into other aspects of the claim.[9] In recent years, as the Tribunal has drawn many claims together into district enquiries, the length and scope of many historical reports has dramatically increased. While there is a danger that many of the debates are too self-contained and uninformed by broader historical research to have relevance beyond the claim's process, the professionalism of such evidence compares well with other forms of historical work. The process of testing this research for quality should not be dismissed lightly either. Research is extensively peer-reviewed prior to release, is critically reviewed by claimants and their counsel and cross-examined in formal hearings.

It is worth considering the issue of what makes the Tribunal's history different from academic history before examining its wider significance. Legal historians such as Paul McHugh, David Williams, Benedict Kingsbury and Richard Boast have been much clearer on the highly specialized nature of Tribunal reports as history than have other historians.[10] The legal constraints on the Tribunal when acting as historian and the main reasons for distinguishing Tribunal history from other histories have been extensively discussed.[11] The Tribunal deals with evidence as a commission of inquiry, testing 'truth' by judicially determined notions of fairness and by the reputation of expert witnesses, rather than by peer review, conference presentation and publication. The Crown alone can be blamed for historical events and contemporary disadvantage. The Crown's actions are also redeemable, a principle as potentially contentious as Crown responsibility. And as galling as it might be to historians' sense of their own status, their evidence to the Tribunal is often mediated through lawyers' submissions, tested by cross-examination and subordinated to the legal imperatives of a commission of inquiry. When it comes to the negotiations at the end of the process, the Tribunal's reports and historians' evidence are often reassessed by much less qualified state servants on whose opinions hang settlement agreements, the wording of apologies and the parameters of legislation implementing the Tribunal's findings and recommendations. Possibly the most contentious aspect of this process, because it features so strongly in Oliver's criticism, is the Tribunal's need, as laid down in its jurisdiction, to show that claimants are prejudiced in the present by Crown actions in the past. This often

leads to the Tribunal developing a counter-factual narrative, explaining what life could have been like if the 'principles of the treaty' had been honoured by the Crown.

In New Zealand the relationship between law and history has been creative, despite these concerns. Historians play a central role in contemporary determinations of aboriginal rights. In recent Tribunal enquiries the historians have had even more influence over the resulting reports. The dominance of history contrasts with the much more multi-disciplinary or anthropological approaches to enquiries into aboriginal rights in Australia or North America, where demonstrating long association with particular lands is often required. The Tribunal's investigations are dominated by the question of how rights, once recognized by the state, were then lost through sale, confiscation or public works taking. These questions are better answered by historical than by anthropological research. At times in the past historians have come close to controlling the process. In the Ngai Tahu hearings (1997–1990) historical evidence was completed almost immediately prior to being heard by the Tribunal and presented largely without the controlling mediation of legal counsel.[12] The volume of historical evidence (around 26 shelf metres) and the pace of the hearings gave the historians considerable control over the direction of the enquiry. Lawyers are more in control in the Tribunal's recent district enquiries, but the process itself has become even more centred on historical issues since the late 1990s.

Historical evidence still overwhelms all other forms of evidence in the Tribunal's enquiries but, in contrast to the late 1980s, there now exist a specialist group of lawyers experienced in cross-examining historical evidence on its own terms. The political demands to complete the 'historical claims' before some arbitrary and politically derived date, plus the district enquiry model, where all claims in an area are grouped together for enquiry, have given added weight to historical issues and historical research. In the process, the lawyers have become more like historians, rather than the other way round. Historians also administer the funding of research for the Tribunal and by the Crown Forestry Rental Trust. Recent Tribunal reports have been largely written or largely informed by a new wave of historians appointed to the Tribunal, most notably Angela Ballara, Robyn Anderson and Ann Parsonson, and the increasing numbers of 'ghost' report writers who are also trained historians.

Despite the role of the historians, Tribunal history is informed by a narrower set of interpretative responses than curiosity-driven historical research. The extent to which the research agenda is imposed on the historian means it has much in common with other forms of public history.[13] In this case the agenda is set by Section 6 of the Treaty of Waitangi Act 1975, which requires that the Tribunal investigates claims that any Maori or group of Maori 'is or is likely to be prejudicially affected' by the Crown acting at any time since 1840 in a way that 'was or is inconsistent with the principles of the Treaty'. Several aspects of this jurisdiction have proved problematic. The history has to respond to particular claims and statements of grievances, although the requirements of sustainable and final settlements have sent the Tribunal trawling through a wide range of material whether on not it relates to specific claims. Yet while

some aspects of this jurisdiction have restrained historical debate, others have generated highly developed and important discussion on major issues.

One of the most interesting questions to emerge is who has the right to claim on behalf of which group. This has rarely been discussed outside the process, despite being raised in almost every investigation. It is an issue both of standing and mana and bedevils current enquiries. Often more time is spent on issues of mandate, cross-claims and overlapping interests than on the claims against the Crown. As illustrated in my recent book, the reason for this lies in the extent to which the Tribunal is simply one of the most recent in a long line of court or commission enquiries with the power to privilege one Maori community over another. As such the Tribunal finds itself drawn into age-old customary disputes. Yet, while there are persistent claimant pressures on historians to present tribal histories in ways that assert control over neighbours and which impose often artificial and expansive tribal boundaries, the problem of tribal standing has become so vexed that the nature of custom has become one of the most absorbing historical debates before the Tribunal. The settlement of Ngati Whatua's broad-ranging claims to Tamaki, as announced in 2006, may prove much more controversial with their Waikato and Hauraki neighbours than with non-Maori Aucklanders.[14] The historical consideration of custom is also contributing to a much more sophisticated understanding of the work of the Native Land Court in providing a forum for customary disputes.[15]

More limiting on the level of historical debate has been the understandable requirement that claims be against the Crown, since the Crown alone has the power to supply redress. The historical imagination of both the evidence before the Tribunal and the Tribunal reports is severely constrained by this requirement. The broad historical obsessions — class, capitalism, gender or racism — have little relevance as they are unable to compensate claimants for past injustices. The Crown has to be found, if not all knowing and all seeing, at least all responsible. This takes the heat off capitalists, patriarchs and red-necks, transferring responsibility for injustice to a distant and even impersonal abstraction, the Crown. It has other consequences, too. The evidence is inevitably adversarial, even when the quality of research is high for both the claimants and the Crown. Evidence for the claimants must test Crown responsibility and the Crown's efforts are inevitably focused on testing the claimant's case. This has generated some highly sophisticated debates over issues such as the nature of land sales prior to 1840, the extent of Maori agency in the Native Land Court, and the nature of Maori slavery and the Colonial Office's response to it.[16] Unfortunately, these debates also have a tendency to become polarized, given the adversarial nature of the Tribunal's enquiry.[17] As a result, there can often be little opportunity to explore the issues in a more rounded fashion or seek out a middle ground.

The principles of the treaty, as a test of Crown action, could have proved much more of a constraint on both the Tribunal's research and its own reasoning. As Kingsbury has shown, the principles of the treaty, the yardstick by which the Tribunal must measure the Crown's actions, have developed in an arena where understandings of international human rights, and in particular the rights of indigenous peoples, have evolved substantially over the last three decades.[18]

The principles were a creation of the 1975 Treaty of Waitangi Act. They were anticipated rather than called into existence at that time, since the Tribunal was given the responsibility to identify the principles through its investigation of claims. Parliament was aware, thanks to Ruth Ross's 1972 article on the Treaty of Waitangi, that there were two texts and potentially major variations between them.[19] The legislation deliberately gave the Waitangi Tribunal the responsibility of establishing principles which could give contemporary meaning to the treaty itself. The principles were not determined through the investigation of historical claims. Rather they were located and defined by the Tribunal prior to 1985 (when the Tribunal was first given responsibility to investigate grievances prior to 1975) and certainly by 1988 when the Court of Appeal established its own set of principles as a response to Maori challenges to the State Owned Enterprise Act 1986.[20]

As I have argued elsewhere, the historical construct of the 'Treaty of Waitangi', on which current debates about the principles of the treaty are centred, is a very recent invention.[21] It draws on the historical arguments of Ross and Claudia Orange, the new legal histories of David Williams, J.O.C. Brookfield and E.T.J. Durie (soon followed by Kingsbury and McHugh) and Maori political demands for recognition of social, economic and cultural grievances.[22] This treaty has key narrative features that distinguish it from all earlier interpretations, because it brings together longstanding historical uncertainty about whether Maori understood the document with the new legal indigenous history which used the *contra preferentum* rule articulated in the American Supreme Court. This gave precedence to the Maori understanding of the event, whatever that may have been.[23] The *contra preferentum* rule states that indigenous treaties should be interpreted according to the indigenous language document, should there be conflict between the meanings of the two texts. At the same time, the treaty became inevitably entwined in international debates about treaties with indigenous peoples and their rights in the modern world.[24]

As the Treaty of Waitangi became Te Tiriti o Waitangi a very new gloss on the treaty's two texts emerged. British intentions, it was argued, were disguised in the translation (possibly deliberately by Henry Williams, the translator and interpreter of the text at Waitangi). It was not that Maori had never used the treaty to assert a degree of sovereign independence in the past — many Maori communities certainly had, as others had used it to assert their loyalty to the Crown — but they had done so in ways that often varied very extensively from the more recent gloss placed upon it since 1972.

Yet though the principles of the treaty were established through modern claims and a modern interpretation of the treaty, the Tribunal has often been cautious in its reasoning. Research for the Tribunal rarely attempts to test historical events against the principles of the treaty as Byrnes contends.[25] That judgment is left to the Tribunal. McAloon demonstrates that the Tribunal has often been able to draw on strong nineteenth-century statements, by policy makers and critics alike, which apply a high standard of fiduciary responsibility in the Crown's relationship with Maori.

From a legal viewpoint, Lord Normanby's 1839 instructions provide a context

for understanding the Treaty of Waitangi.[26] Because they spell out the Crown's obligations in pursuing Maori well-being and in conducting land transactions, they provide a valuable context for understanding what the treaty drafters had in mind. Given the centrality of the treaty in the Tribunal's role of interpreting claims, the Tribunal has no difficulty in finding Crown officials at fault when they fell short of these high standards. When these Crown officials can be seen to have been the subject of European critics at the time, be the critics Bishop George Augustus Selwyn, Judge William Martin, George Rusden, Octavius Hadfield, or the *Lyttelton Times,* then well and good.[27] However, Normanby's instructions were addressed to appease English rather than colonial or Maori opinion.[28] They were almost immediately superseded by more hardline directions to colonial governors by Lord John Russell and Earl Grey.[29] More importantly, it is difficult to argue that colonization, in any manner consistent with nineteenth-century industrial imperialism, could have taken place at all in a way that reflected the spirit and tenor of the Normanby instructions. And even those later critics of colonial policy and practice — the Rusdens, the Hadfields and the recently rediscovered Dom Felice Vaggioli — need to be placed in their contexts. Their personal and ideological agendas need to be reviewed and revealed so that their opinions make sense more broadly. They were not just impartial critics of government, made reliable simply because they provide European echoes of Maori complaint.[30]

Although generally a separate issue from the question of deciding what actually happened, the need to show that claimants remain prejudiced by past actions of the Crown, once these have been determined, has proven to be the most controversial issue for historians. The Tribunal is often caught in a contentious argument of cause and effect. There is little disagreement about the social, economic and cultural dislocation that Maori face in the present. Maori disadvantage has been discussed in a range of official reports, from Jack Hunn's in 1961 through to *Ka Awatea* in 1991.[31] It has been tempting for both claimants and for the Tribunal to attempt to establish a direct link between nineteenth-century actions — such as inequitable land purchasing or war and confiscation — and this contemporary disadvantage. For many claimants the links are self-evident. Yet in the research undertaken for the Waitangi Tribunal, particularly in papers described as social and economic impact reports, very few historians have been able to show a direct link between Crown activity prior to the Second World War and Maori disadvantage in the post-war urbanized welfare state.[32] For many it may have appeared a truism that stripping indigenous people of their land takes away a resource which otherwise would have ensured a degree of social and economic equality with colonizers in the present. However, access to substantial resources has not ensured social and economic success in the present, and there is little evidence that tribes who lost all of their land are significantly worse off than those who retained a significant proportion to the present.[33] Despite this, the Tribunal has to make findings about contemporary prejudice. How it does this can be more or less credible to historians.

Reading Tribunal history requires an appreciation of the multi-layered nature of the Tribunal's reports. They are products of the Treaty of Waitangi Act

1975 and commission of inquiry findings based on a legal test of the principles of the Treaty of Waitangi. Using the Tribunal's historical resources is not straightforward, and not simply because many of them are difficult to access. The Tribunal process, in its insatiable demand for evidence, throws up a huge range of material. To assess the Tribunal's impact on New Zealand history we need to understand how this evidence is collected, filtered, received, tested, and ultimately adopted or rejected by the Tribunal acting as a commission of inquiry. This means appreciating the extent to which Maori relationships with courts and commissions of inquiry have been ongoing and intense and are built on a Maori determination to assert customary relationships every bit as much with each other as with the Crown. The history produced by the Waitangi Tribunal is also part of an extensive and very significant tradition of historical writing that has played a key role in New Zealand's race relations, and in mediating and negotiating the pasts of both Maori and Pakeha over many generations. Only when these contexts are understood is it possible to read the Tribunal reports, and the evidence created for them, critically and to access them as history.

Such an approach goes beyond the parameters of those already asking questions of Tribunal history. Oliver's concerns were raised largely in the context of two major claims. Most other approaches have drawn, however narrowly or broadly, on selected examples, usually using quotations from reports, often taken out of context and ignoring the very different authorship of the different Tribunals. Authorship is itself a major problem in assessing work that is ascribed to a single institutional author, but written by different combinations of an ever-changing Tribunal membership and an unknown number of ghost writers. Despite this a coherent view is too often assumed of the Tribunal's view of its role as post-colonial historian or its treatment of Maori agency. Treating Tribunal reports as if they were a single work has the danger of simultaneously ascribing to Tribunal history a coherence it does not and cannot have while also damning it for its inevitable contradictions.

There is also the problem of selection to contend with. There are now over 30 large historical reports. Byrnes criticizes the Tribunal for its polarized view of history, its narrow view of Maori agency, and its tendency to fall back on determinist 'fatal impact' theories to explain Maori disadvantage. Yet most of her examples are simply unexceptional statements that Maori *were* disadvantaged, statements that could have been drawn from any academic history of New Zealand's race relations written during the last half century. The Tribunal's view that Maori may have viewed the world differently than non-Maori — hardly a radical position from the perspective of modern historical and anthropological scholarship — is dismissed as evidence of simplistic and polarized history. Her discovery that the Tribunal treats Maori historical figures more roundly and effectively than Europeans is not justified by the evidence she produces. Indeed, her criticisms could apply to almost anything any of us has written on Maori or race relations history, including her own work on surveying, where Maori and European geographic knowledge could be seen as polarized and where the replacement of Maori place names with European is evidence of the fatal impact of colonization.[34]

It is necessary to review whole enquiries not just dip into a miscellany of reports, as Byrnes has done. Examining enquiries also means reviewing those that preceded them rather than simply deconstructing a particular Tribunal report. The way that claims were articulated, the decisions of courts and the findings of earlier enquires are as important as the evidence that was prepared for the current enquiry. Understanding what the Tribunal did requires us to reconstruct narratives of the enquiries themselves. As history, it is important to understand how each Tribunal deals with the historical narratives presented to it. As a legal inquiry it is equally important to understand the way each Tribunal builds its report from the evidence and submissions presented to it. In this way it is possible to reassess the Muriwhenua and Taranaki enquiries, albeit briefly.

The Muriwhenua claim was made on behalf of five highly interconnected groups from the Far North: Te Rarawa, Te Aupouri, Ngati Kahu, Ngati Kuri and Ngai Takoto.[35] Opening in 1986, it was the first enquiry to hear evidence on grievances relating to pre-1975 events, although the Tribunal was soon diverted into hearing the fisheries aspects of the claim, and it was not until the early 1990s that the hearings recommenced into the historical grievances.[36] At issue was the validity of 'sales' of land by ancestral leaders, many even before the Treaty of Waitangi was signed. Much of the land involved in these transactions had been later awarded to Europeans or simply transferred to the Crown. The Crown argued at the time that if the land had been sold it was no longer Maori land, no longer subject to the promises of article two of the treaty, so it was up to the Crown to determine how much should go to European purchasers or their successors and how much it would retain as 'surplus land' for later on-sale or other purposes.[37]

The Crown's policy was based on a standard reading of international common law at the time and was primarily aimed to contain European settlers on limited estates rather than to acquire Maori land. However straightforward the policy, in practice its implementation was greatly influenced by local conditions. Maori resistance, intertribal conflict, administrative ineptitude, later Crown purchasing of the same land and the two decades it took to identify clearly what land was the Crown's, what reverted to Maori and what was awarded to settlers, all compounded the confusion. The chief areas affected were the Bay of Island, the Hokianga and the Far North, although these Old Land Claims, as they became known, were also found as far south as the bottom of the South Island.

There was a long history of Maori criticism over the Crown retaining 'surplus land'. Panakareao, the leading Muriwhenua rangatira of the 1830s and 1840s, complained that land not given to purchasers should have been handed back. The Crown had not paid for it, why should it keep it? While this was the main Maori criticism of the policy, it was not the only one. Some argued that land had not been sold, others that the land had been sold by the wrong people; some maintained that the land had been returned by the purchaser. Initial investigations into the 'sales' were completed between 1841 and 1862, but Maori complaints overlaid later Crown purchase negotiations and also strayed into the Native Land Court. These complaints forced the government

to investigate further. Robert Houston was commissioned to produce a report in 1907 and the issue was referred to the Sim Commission into confiscated lands in the mid-1920s. Sim refused to hear the claim, denying that the land has been confiscated. Finally, at least until the Tribunal became involved, Sir Michael Myers led a Royal Commission which reported in 1948 on the questions of 'surplus lands'. Despite the commission being divided, the report led to a settlement which established the Tai Tokerau Maori Trust Board as well as providing cash payments to other tribes further south.

Although it took a little while to emerge, the central issue argued before the Muriwhenua Tribunal was different from anything that had been argued before. While earlier claims had centred on 'surplus land' or specific issues relating to individual blocks, the Muriwhenua claimants and some Tribunal historians transformed the issue into a debate over Maori understandings of the original transactions. Drawing on recent anthropological scholarship, they argued that Maori participation in these early transactions was on Maori terms and did not involve the permanent alienation of interests in land.[38] The approach was Maori-centred, and assumed a high level of difficulty in undertaking cultural exchanges on the frontier, something quite consistent with a good deal of historical and anthropological literature. This argument was also relied upon to explain the alienation of much of the remaining good land in the area by Crown purchase prior to 1863.

Much of the argument was legal and linguistic. The term for 'sale' used in most of the deeds was 'tuku whenua'. Claimants contended that these transactions were gifts, and their meanings located in Maori customary understandings of gift exchange. A gift did not transfer all rights permanently, so it was argued, but required that the land be returned to the donor when it was no longer needed. This was not a new idea; it had formed the basis of the Wi Parata case against the Bishop of Wellington in 1877, and in 1987 the Tribunal had explained the gifting of land at Orakei for a church in similar terms.[39] The Crown responded with a wide-ranging, extensive and often convincing body of evidence. This showed Maori historical understandings of these transactions from the 1840s and 1850s to have accommodated European notions of sale and a realization of how permanent sale to Europeans could be.[40] Linguistic evidence produced by the Crown also undermined the claimants' arguments that 'tuku whenua' meant 'gift' in the Maori sense, arguing that it could only mean that the land was 'given up'. What this meant in practice would have to be read from the context of the transaction or from other evidence.

It was at this point that Oliver became involved, invited by the Crown Forestry Rental Trust, which was funding the claimants, to provide greater historical weight to an argument that was heavily linguistic, but had been countered by some substantial pieces of historical research. Oliver immediately recognized that the claimants had been seriously disadvantaged in these early transactions and that they had a strong case before the Tribunal, but he was quickly convinced that the tuku whenua argument made little historical sense, particularly when used beyond the very earliest transactions. He advised the claimants that the Tribunal could not accept a position so strongly undermined by Crown historical evidence and based on the idea that Maori were unaware

of the consequences of entering into sale agreements with Europeans and especially with the Crown. This led to a serious rift with the claimant researchers. Strategically, however, his advice proved worthless because the Tribunal, much to his embarrassment, appeared to accept the claimants' position that the early land transactions, and even the Crown purchases, were conditional gifts, and therefore should have been returned.

A closer reading of the Tribunal's report, however, shows that its findings were not made on an assessment of the comparative merits of the claimants, and the Crown's historical evidence. The Tribunal was reluctant to make a decision one way or the other on the evidence presented before it. This was despite a large two-volume summary of the evidence put together by Evelyn Stokes, one the Tribunal's members.[41] Stokes's summary, which discusses in some depth the evidence presented by both sides, could have assisted the Tribunal to make its mind up one way or the other. But the Tribunal report makes little attempt to assess the comparative merits of the historical evidence. Rarely are the protagonist historians mentioned by name.

The Muriwhenua Tribunal expressed some scepticism on the value of the historical evidence, accusing it of biases and silences that limit its ability to project Maori historical voices adequately:

> Indeed, there are problems with the surviving documentary record. Its one-sided nature has hindered a bicultural understanding of the societies that existed at the time. Further, the documentary record may be given a higher status than it deserves. Since the authors cannot be cross-examined, their opinions may appear more reliable than they are, and views may be perpetuated that in fact reflected personal agendas, temporary aberrations in public opinion or individual eccentricities. In addition, the pervasive written account presents only a European view. The understandings, the thinkings and the arguments are European, the chronicling of events is self-serving, and the repetition of opinions may be confused with corroboration. The general assumption has been that the future debate will likewise be on European terms.[42]

Perhaps unable to make up its mind because of this, but more likely because it had another target, the Tribunal shifted its attention from the history to the law. It argued that it mattered little whether Maori learned the new ways of trading in land being introduced by Europeans; this was not part of their custom and therefore not part of their law. Maori law prevailed until 1840 and under the treaty was to be protected and observed after 1840:

> Essential to understanding the issues affecting the early land transactions is a fact so obvious as to be easily overlooked: that at all times before, during, and after the land arrangements in question, 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 and had no reason to think that, when they entered into the transactions, those transactions should be seen on other than Maori terms or would somehow threaten their independent existence. Likewise, and contrary to the assumptions of some of the early Europeans, Muriwhenua Maori had no cause to consider that their ancestral laws should be abandoned. Although the hapu were later obliged to accept Western law, their own traditions and values were not forsaken and survive today.[43]

The Tribunal's target was not so much the historians who argued that Maori sold land, but Chief Judge Prendergast, who dismissed Maori as having nothing to sell, for they had no property and no law to protect that property. However much Maori may have been allowed to sell land, to do so would be to act against the fundamental principles of Maori custom and therefore be illegal. This was a departure from the views expressed in the Orakei report, where pre-emption was used to argue that Maori could sell land to the Crown so long as there were benefits to the sellers and sufficient land remained to maintain the tribal estate.[44] In identifying what were the basic principles of Maori law, the Tribunal looked at the values of Maori giving evidence in the 1990s.[45] Maori law, so the Tribunal argued, had been cherished and preserved over the generations and continued in the present. If Maori land in the present could not be sold according to Maori law, then this was no less true in the 1830s or the 1850s.

The adversarial nature of presenting evidence, with the claimant or Tribunal researchers making a case and the Crown's witnesses testing it, pointing out inconsistencies and locating contrary evidence, polarized the Muriwhenua debate, blighting the chance of any middle ground emerging. In avoiding a detailed assessment of the evidence, wanting to bury Prendergast and revive Maori law, the Tribunal found itself making historical findings that made little sense. On historical grounds, the only way to assume that Maori were freely entering into conditional gifts as late as the 1850s was to assume that local Maori had failed to notice anything that had gone on around them for two decades, and this was clearly not the case. The Tribunal's commitment to an unchanging Maori legal order rooted in the present as much as the past meant that the opportunity to explore a much more interesting historical past, which demonstrated the intelligence and creativity of Panakareao's response to contact with the European world, was lost.

Panakareao's approach to dealing with Europeans' technology and ideas, including Christianity and law, was creative and reflected a narrow window of opportunity. In dealing with land, he neither sold land nor simply granted limited user rights. On the one hand, the boundaries and prices appear to have been the subject to multiple interpretations and renegotiations. Maori occupation continued in many cases on the same land and the transaction was clearly aimed at bringing resources into the Muriwhenua communities in ways that required a continuing relationship with the 'purchaser' and the land. On the other hand, Panakareao's policy in negotiating these agreements demonstrates that much more was involved than finding a few acres to locate a mission, a trading station or a subsistence holding. The land was reserved for a higher class of settler, missionaries, their families and larger entrepreneurs. The purchasers were sometimes given discretion over which Maori could use the land, were forced to take much larger areas than they wanted or even thought appropriate and were used as buffers between rival tribal groups, and to resolve issues of tribal conflict. They were acknowledging Panakareao's mana, but they were also being acknowledged themselves as having new power over the land. None of this can be reduced simply to a land sale or a 'tuku whenua'.

Despite some well-argued pieces of research on both sides, none of the more interesting aspects on cultural exchange were explored in the final report.

The situation in Taranaki could not have been more different. There, the Tribunal heard only evidence it commissioned (largely from its own staff) and from claimants. The Crown chose not to call evidence. As a result, while the hearings were tense, there were no grand historiographical debates before the Tribunal. The evidence was mostly prepared prior to hearing, drawing on a 140-volume document bank of primary sources that the Tribunal collected for all the confiscation enquiries.[46] The Tribunal's enquiry covered the war and confiscations, including their aftermath and Parihaka. However, the investigation traversed ground well beyond this familiar historical territory. It included the transmutation of lands returned after the confiscation into settler farms as Maori reserved land, still at the time of hearing largely inaccessible to the Maori owners because of the perpetual nature of the leases imposed on them without Maori consent. The period before the wars was also examined in detail, including the tortuous history of the Wakefield's Taranaki purchase, Williams Spain's investigation of it, and the piecemeal Crown purchasing of land leading up to the crisis over the Waitara in 1859 and 1860. Research on the twentieth century was focused on the search for redress, particularly through the Sim commission and the various negotiations that followed, and on Maori reserved land. Unlike later enquires, there was no broader socio-economic review of Maori life in Taranaki beyond the confiscations in the second half of the twentieth century. Research was conducted in a patch-work fashion without any great sense of an overall design.

The investigation of the Taranaki claim was markedly different from almost all of the Tribunal's enquiries in that there was a ready-made historiography which could inform its deliberations. Historians had already asked several of the key questions: why did government land purchase policy lead to war over the Waitara in 1860, how important was land or sovereignty in the causes of the war, how did Parihaka emerge as a centre of resistance and why did its existence prove intolerable to the government in 1881?[47] There was a reasonable if dated historical review of Pai Marire and the course of the wars had been reviewed in detail twice.[48] Equally important, events surrounding the causes of the wars and the invasion of Parihaka were publicly debated at the time they occurred, unlike Ngai Tahu and Muriwhenua, where the conflicts over land were rarely part of a broader public debate and never at a national level. Because the Anglican divines — Hadfield, Martin and Selwyn — had so roundly condemned the invasion of the Waitara and the *Lyttelton Times* and Rusden the treatment of Te Whiti o Rangomai and Tohu at Parihaka, there was already a counter-narrative, and one drawn on by Taranaki iwi as they sought redress.[49] Even before Keith Sinclair's work of the 1950s, the counter-narrative had prevailed on these two events.[50] Grey's skilful repudiation of the first Taranaki campaign may not have conceded the case made by the divines but it clearly strengthened their arguments, while Parihaka had been reduced to the image of John Bryce on his white charger being welcomed by singing women and children. By the time of the Sim commission's opening in 1927, Sir William Sim convinced himself of the Crown's culpability for both the first and second Taranaki wars within

a few hours of the hearing.[51] Sim's report would add to the counter-narrative. Claims that the Crown, or Pakeha society, had somehow suppressed the history of Parihaka or the Waitara were nonsense, as was the belief that Te Whiti and Wiremu Kingi had been edged out of history.

Although providing a great deal more detail and some new insights, the research presented to the Tribunal did not challenge the basic form of the existing counter-narrative. This narrative argued that the Waitara fiasco occurred because the government, led by Thomas Gore Browne and Donald McLean, set out to impose an individualized view of Maori customary rights to land against the wishes of the tribal majority, as expressed by the leading rangatira of Te Atiawa, Wiremu Kingi. In the Parihaka research, Hazel Riseborough's published doctoral thesis provided new insight into the political decision to invade Parihaka.[52] Her work illustrated the contribution to the affair of the tense relationship between the government and the governor, Sir Arthur Gordon. Gordon's opposition to the government's action of arresting without trial Parihaka's passive resisters helped force the government into its invasion plans. Riseborough's work only reinforced the prevailing view of Parihaka as a pacifist community doing its best under enlightened leadership to pick itself up from the devastation of unprovoked invasion and confiscation. A debate over the coherence of Te Whiti's prophetic vision was ignored.[53]

There was also a good deal of new research on topics which had not previously been of much interest to historians. Ann Parsonson explored the 1840–1860 struggle between the government and Taranaki Maori over how much land could be sold to the Crown for settlement.[54] The way that the land returned by Francis Dillon Bell in 1881 was lost to Maori through its transfer first to the Public Trustee and then into perpetually renewable leases was fully explored. The most dramatic new research was on the period 1860–1881, piecing together the patchwork of broken promises, bribery and confusion that accompanied the government's attempt to implement its ill-advised confiscation policy. Much of this had never been examined before, partly because the Sim commission had regarded all land that had been paid for, in whatever manner, as not confiscated. Much of the land was acquired through what was called tai koha, little more than a bribe to acquiesce in the confiscations.

Despite the Crown's decision not to bring evidence, the Tribunal had an impressive body of evidence on which to construct its report. Other factors influenced its deliberations. Some of the hearings and all of the report writing were undertaken at a period of heightened tension and uncertainty following the release of the Bolger National government's 'Fiscal Envelope' policy, which aimed to contain the treaty settlement process.[55] Maori hostility to the policy clearly overshadowed the Tribunal's thinking and exacerbated tensions. When all the evidence was put together, the patchwork quilt assembled presented a pattern much more disturbing than its parts. While the wars, confiscations and invasion of Parihaka were already part of a popular counter-narrative, the Tribunal's version showed Maori resistance to an increasingly strident demand by the state to sell land prior to the Waitara purchase and the extent that this demand destabilized Maori politics in Taranaki. The evidence of chaos rather than just confusion in the application of the confiscations showed loyal Maori

deprived of their land, both rebels and loyal Maori continually being promised the return of land, settler contempt for loyal and rebel Maori alike and the underhanded process of buying out the confiscation by appeasing Maori with tai koha payments and inappropriate land purchasing.

To top all this off, the report showed that when land was finally returned it was done in a fashion which meant that it went into the hands of settler farmers, well poised to take advantage of the new refrigeration-based economy. Settler occupation of the land was made permanent by being granted 21-year leases on fixed rentals, with a perpetual right of renewal.[56] None of this had the approval of the Maori owners. Taranaki Maori called this the raupatu, reserving the term muru for the confiscations under the New Zealand Settlement Act. Despite recognition of the injustice of this, compounded by the impact of decades of inflation on rentals that could only be renewed once every 21 years, nothing had been finalized to resolve the problem.[57] The evidence of the post-Sim period, limited though it was, showed an ongoing and deeply felt resentment at the failure of successive governments to deal with the permanent and debilitating consequences of the confiscation.[58] There was little problem here in identifying the continuing prejudicial effect of the confiscations. Maori had, for the most part, little chance of occupying what land they still owned, and were receiving in many cases little more than peppercorn rents for their land.

The Tribunal, at one level, did little more than put all this together. There was little that was new in retelling the causes of the wars or in the invasion of Parihaka, although it did attempt to resurrect the idea of a land league, from the grave where it had been buried by Sinclair. If anything, the Tribunal appeared cautious not to undermine the strength of the counter-narrative or the strongest of the Sim commission findings, as if this could compromise its own arguments.[59] The new research greatly strengthened the ability of the Tribunal to accuse the Crown of engaging in a 'war without end' from 1840 to the present. There were certainly some areas that could have been better handled. The Parsonson evidence would have allowed some revision of the causes of the Waitara crisis, but the Tribunal generally stuck to the more orthodox view of Wiremu Kingi's relationship with the land-selling Te Teira. Pai Marire was particularly badly handled and its dramatic influence on Maori thinking in Taranaki discounted completely. The Tribunal also refused to accept that there were any grounds for settler fears of the settlement at Parihaka, real or imagined.

With these findings the Tribunal could have written a hard-hitting report laying out the framework for the negotiation of a generous settlement. However, it chose to go further. On Parihaka it found that: 'the invasion and sacking of Parihaka, must rank with the most heinous action of any government, in any country, in the last century. For decades, even to this day, it has had devastating effects on race relations. There was not a tribe in the country that did not learn of it, for Parihaka had been open to them all.'[60] It also described the combination of the muru and the raupatu as 'the holocaust of Taranaki history'.[61] The first statement was historically inept; the second, a politically naïve comment, although one more justified by the evidence. The 'holocaust' reference undermined public confidence in the report and

deflected attention from the extent that the report rested on pre-existing and relatively uncontroversial scholarship. The Tribunal went still further in its assessment of how conflict could have been avoided. It argued that the only way that the colonial government could have treated Taranaki fairly was to acknowledge their complete constitutional autonomy and allow each of the Maori communities of Taranaki to decide their own way of selling land (or not). This is the retrospective utopia Oliver finds so disturbing. He was correct in seeing such an approach as impossible and not just, as he explained, because the fledgling colonial government was incapable of implementing such a policy. Taranaki Maori were too divided and too scattered across the southern North Island, the northern South Island and the Chatham Islands to have created a unified polity, and in the 1840s the question of what demands Waikato could make on the Taranaki iwi were unanswered.

The Tribunal's reasoning was, however, not founded on utopian confidence. In the Taranaki report there is almost a complete absence of any of the confidence required of a commission of inquiry that the problems of Taranaki could be resolved in the future or were resolvable in the past. The Tribunal retreated from the language that it had created over two decades for discussing claims. Gone was the language of partnership and good faith, gone were the suggestions that all could be resolved if only the Crown recognized its past iniquities. The Tribunal even hinted that the grievances were so vast that a fair settlement was unlikely. The very bleakness of this report undermined any real confidence that recognition of Maori autonomy in the first days of the Crown colony could have set Taranaki on a road of harmonious and productive development on Maori terms.

In both these reports the Tribunal had good evidence and in much of its treatment of the evidence before it drew on this evidence sensibly. Where it departed from its assessment of the historical material or evidence before it, as in Taranaki, or avoided deciding on the evidence, as in Muriwhena, it did so because it deliberately chose to make another point. Apart from the necessity to blame the Crown and to find that the claimants were treated prejudically, it was not so much constrained by its legal role as by the political role it chose for itself. The principles of the treaty and their presentist origins had little effect on these outcomes, because the Tribunal dwelt little on them, preferring more broad-brush criticisms of the Crown's actions. If the results were poor history, they were also poor law. And yet at the same time these are amongst the most interesting and vital of the Tribunal's narratives. They illustrate the brilliance and fluency of the Tribunal's most creative and influential chairpersons, E.T. Durie.

Durie's creative flair runs through all of his major historical reports, including Orakei and the Chatham Islands not discussed here.[62] While Keith Sorrenson contributed much of the text, most of the crucial and controversial argument was Durie's. However, the Tribunal has moved on. Attention needs to shift to the increasing number of other reports, and their evidence, where the historical reasoning has been more prosaic and less subordinated to political opportunity. The Te Whanganui a Tara (Wellington), Turanganui a Kiwa (Gisborne), Ahuriri (Napier), Tauranga, Kaipara and Hauraki reports are more conventional

history.[63] The historians' success in taking over the process is unfortunately also an indication of the extent to which the Tribunal has been politically contained in its own cul-de-sac. The history has been allowed to become more dominant because the Tribunal is no longer as influential or troublesome to government than it was when dealing with fishing or state-owned enterprise issues. Becoming more historically respectable is unfortunately associated with becoming more marginal.

Strangely enough, the more serious problem may not be persuading historians that the Tribunal writes history, but educating the lay reader to read the Tribunal reports as history. As the result of commissions of inquiry and as part of a process aimed at producing 'full and final settlements' of Maori claims against the Crown, there is a clear expectation that all documents and other evidence will be examined, that all questions will be asked and answered and that the narratives produced will be definitive, transcend the limitations of time and be applicable forever in the future. There is a tolerance of the Tribunal's work by many who are otherwise unimpressed by Maori demands for contemporary recognition of cultural difference.[64] As reports of a commission of inquiry the findings are authoritative, if not binding, and carry the imperator of absolute truth . As history, the reports are much more tentative, their flavour more complex and elusive. Like all historical writing they rely on the current state of historical research, reflect the abilities and concerns of their authors, and mediate and represent the past to the present. They tell a story, but not *the* story.

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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, pp.9–29.

2 W.H. Oliver, *Looking for the Phoenix: A Memoir*, Wellington, 2002, pp.168–9; Giselle Byrnes, *The Waitangi Tribunal and New Zealand History*, Auckland, 2004; 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*, Melbourne, 2004; 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; Michael Belgrave, *Historical Frictions: Maori Claims and Reinvented Histories*, Auckland, 2005; Kerry Howe, 'Two Worlds?', *New Zealand Journal of History* (NZJH), 37, 1 (2003), pp.50–61.

3 All reports are available from the Waitangi Tribunal's website, although the format varies. Some are available in a single PDF file, others are available piecemeal. Reports can also be searched, see http://www.waitangi–tribunal.govt.nz/

4 Byrnes, p.1.

5 The major arguments and evidence for this position can be found in Belgrave, *Historical Frictions*.

6 Howe, pp.51, 58.

7 See, for instance, Aroha Harris, *Hikoi: Forty Years of Maori Protest*, Wellington, 2004; Te Maire Tau, 'Matauranga Maori as an epistemology', in Sharp and McHugh, pp.61–73; Charles Royal's many tribal histories in *Te Ara: The Encyclopedia of New Zealand,* http://www.teara.govt.nz/; Danny Keenan, 'Haere Whakamua, Hoki Whakamuri. Going Forward, Looking Back: Tribal and Hapu Perspectives of the Past in 19th-Century Taranaki', PhD thesis, Massey University, 1994.

8 David Slack, *Bullshit, Backlash & Bleeding Hearts: A Confused Person's Guide to the Great Race Row*, Auckland, 2004; Pat Snedden, *Pakeha and the Treaty: Why It's Our Treaty Too*, Auckland, 2005.

9 See the casebook review of the evidence, Michael Belgrave, 'Tauranga Stage 2 Case Book Review', unpublished report, Waitangi Tribunal, Wellington, 2006.

10 P.G. McHugh, 'Law, History and the Treaty of Waitangi', NZJH, 31, 1 (1997), pp.38–57; R.P. Boast, 'Lawyers, Historians, Ethics and the Judicial Process', *Victoria University of Wellington Law Review*, 28, 1 (1998) pp.87–112.

11 For a summary of these see Oliver, 'The Future Behind Us', p.22 and Byrnes, ch.3. Many others have contributed to the discussion, including J.G.A. Pocock, 'Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi', *McGill Law Journal/ Review de Droit de McGill*, 43 (1998) pp.481–506; Andrew Sharp, *Justice and the Māori: The Philosophy and Practice of Māori Claims in New Zealand since the 1970s*, 2nd ed., Auckland, 1997, and Belgrave, *Historical Frictions,* 'The Tribunal and the Past', 'Something Borrowed, Something New'.

12 Evidence was sometimes first seen by counsel on the day of the hearing. Shona Kenderdine, Crown counsel, deliberately and sensibly in this early testing of the tribunal's retrospective jurisdiction allowed the Crown historians considerable discretion in responding to the claimant evidence.

13 This was well explored in Dalley and Phillips, eds, *Going Public*.

14 The Agreement in Principle can be found on http://www.ots.govt.nz/ (viewed 23 June 2006). See also, Chris Barton, 'The Battle for Auckland', *New Zealand Herald,* 29 July 2006 (http://www.nzherald.co.nz/search/print/c.fm?c_id=&story id=0005FFBC–C73F–14CA).

15 Some of the major debates on the Native Land Court can be found in Fergus Sinclair, 'Fergus Sinclair on the "1840 Rule"', unpublished report, Crown Law Office, Wellington, 1995, Wai 64, G11; D.M. Loveridge, 'Evidence of Donald Loveridge Concerning the Origins of the Native Land Acts and Native Land Court in New Zealand', unpublished report, Crown Law Office, Wellington, 2000, Wai 686, P1; Bryan D. Gilling, 'By Whose Custom? The Operation of the Native Land Court in the Chatham Islands', *Victoria University of Wellington Law Review*, 23, 3 (1993), pp.45–58; David V. Williams, *'Te Kooti Tango Whenua': The Native Land Court 1864–1909*, Wellington, 1999; Grant Young, Michael Belgrave and Tom Bennion, 'Native and Maori Land Legislation in

the Superior Courts, 1840–1980', New Zealand Law Foundation/School of Social and Cultural Studies, Massey University, Albany, North Shore City, 2005; Grant Young, 'Nga Kooti Whenua: The Dynamics of a Colonial Encounter, 1862–1928', PhD thesis, Massey University, 2003.

16 On slavery, for instance see, Michael King, *Moriori: A People Rediscovered*, Auckland, 1989; Grant Phillipson, 'Report to the Waitangi Tribunal on Matters of Relevance to the Chatham Islands Claims Wai 64, Including the Intervention of the Government in the Affairs of the Maori Land Court', unpublished report, 1994, Wai 64, A16; Britson Mikaere and Janine Ford, 'A Preliminary Report to the Waitangi Tribunal on the Claims Relating to the Chatham Islands, Lodged under Section 6 of the Treaty of Waitangi Act and Registered as Wai 54, Wai 64, and Wai 65', unpublished report, 1994, Wai 64, A8; Ashley Gould, 'Te Iwi Moriori Claim: Rekohua/Wharekauri: Chatham Island: Evidence of Ashley Gould', unpublished report, Crown Law Office, [Wellington], 1994, Wai 143, F3; Ashley Gould, 'Further Historical Evidence of Dr Ashley Gould', unpublished report, Crown Law Office, [Wellington], 1995, Wai 64, G6.

17 For examples of this see the Waitangi Tribunal's discussion over the nature of the Native Land Court in Waitangi Tribunal, *Turanga Tangata, Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, Wellington, 2004, ch.8.

18 Benedict Kingsbury, 'The Treaty of Waitangi: Some International Law Aspects', in I.H. Kawharu, ed., *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi*, Auckland, 1989, pp.121–57.

19 R.M. Ross, 'Te Tiriti O Waitangi: Texts and Translations', NZJH, 6, 2 (1972), pp.129–57.

20 For an account of the development of the principles of the treaty in different jurisdictions, see Ministry of Maori Development, *He Tirohanga O Kawa Ki Te Tiriti O Waitangi. A Guide to the Principles of the Treaty of Waitangi as Expressed by the Courts and the Waitangi Tribunal*, Wellington, 2001.

21 Belgrave, *Historical Frictions*, ch.2.

22 David V. Williams, 'The Use of Law in the Process of Colonization: An Historical and Comparative Study with Particular Reference to Tanzania (Mainland) and New Zealand', PhD thesis, University of Dar es Salaam, 1983; F.M. Brookfield, *The Constitution in 1985: The Search for Legitimacy*, Auckland, 1985; P.G. McHugh, 'The Constitutional Role of the Waitangi Tribunal', *New Zealand Law Journal*, 233 (1985), pp.224–5, 233; Claudia Orange, *The Treaty of Waitangi*, Wellington, 1987.

23 Associate Justice John McLean's concurring opinion in *Worcester* v. *The State of Georgia*, 315 US 515 (1832).

24 P.G. McHugh, 'Living with Rights Aboriginally — Constitutionalism and Maori in the 1990s', in Belgrave, Kawharu and Williams, pp.283–307.

25 Byrnes, p.54.

26 Normanby to Hobson, 14, 15 August 1839, CO 209/4, 157–63, 251–82; Orange, pp.28–31.

27 Selwyn attacked Earl Grey's 1846 apparent repudiation of Maori title and Selwyn, Martin and Hadfield were the principal critics of the government's actions on the purchase of the Waitara Block: William Martin, *The Taranaki Question*, 3rd ed., London, 1861; Octavius Hadfield, *One of England's Little Wars: A Letter to the Right Hon. The Duke of Newcastle, Secretary of State for the Colonies*, London, 1860. Rusden and the *Lyttelton Times* were the chief critics of John Bryce and his invasion of Parihaka: George William Rusden, *Aureretanga: Groans of the Maoris*, London, 1888, George William Rusden, *Tragedies in New Zealand in 1868 and 1881, Discussed in England in 1886 and 1887*, London, 1888. See also Hazel Riseborough, *Days of Darkness: Taranaki, 1878–1884*, 2nd rev.ed, Auckland, 2002.

28 For the best recent account of the politics of aboriginal rights in the Colonial Office, see Mark Hickford, 'Making Territorial Rights of the Natives: Britain and New Zealand, 1830–1847', DPhil thesis, University of Oxford, 1999.

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30 Felice Vaggioli and John Crockett, *History of New Zealand and Its Inhabitants*, Dunedin, 2000, first published in 1896.

31 J.A. Hunn, 'Report on the Department of Maori Affairs with Statistical Supplement', *Appendices to the Journals of the House of Representatives* (AJHR), Wellington, 1961; Ministry of Maori Affairs, *Ka Awatea: A Report of the Ministerial Planning Group*, Wellington, 1991.

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34 Giselle Byrnes, *Boundary Markers: Land Surveying and the Colonisation of New Zealand*, Wellington, 2001.

35 Waitangi Tribunal, *Muriwhenua Land Report*, Wellington, 1997.

36 Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim, Wai 22*, Wellington, 1988.

37 This position was clearly outlined by Myers's minority report in Michael Myers, Hanara Tangiawha Reedy and Albert Moeller Samuel, 'Report of Royal Commission to Inquire into and Report on Claims Preferred by Members of the Maori Race Touching Certain Lands Known as Surplus Lands of the Crown', AJHR, 1948, G–8.

38 Margaret Mutu, 'Tuku Whenua or Land Sale?', unpublished report, Waitangi Tribunal, [Wellington], 1992, Wai 45, F12; Philippa Wyatt, 'Crown Purchases in Muriwhenua, 1850–1865', unpublished report, Waitangi Tribunal, [Wellington], 1993, Wai 45, H9; Philippa Wyatt, 'The "Sale" of Land in Muriwhenua: A Historical Report on Pre-1840 Land Transactions', unpublished report, Waitangi Tribunal, [Wellington], 1992, Wai 45, F17; Barry Rigby, 'The Muriwhenua North Area and the Muriwhenua Claim', unpublished report, Waitangi Tribunal, [Wellington], 1990, Wai 45, B15; Barry Rigby, 'A Question of Extinguishment: Crown Purchases in Muriwhenua, 1850–1865', unpublished report, Waitangi Tribunal, [Wellington], 1992, Wai 45, F9.

39 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) (SC) 72; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim (Wai 9)*, Wellington, 1987.

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41 Evelyn Stokes, *A Review of the Evidence in the Muriwhenua Lands Claims*, 2 vols, Wellington, 1997.

42 Waitangi Tribunal, *Muriwhenua Land*, p.2.

43 ibid., pp.1–2.

44 Waitangi Tribunal, *Orakei*, ch.11 discusses pre-emption as a reciprocal duty.

45 The claimants' primary oral evidence, presented by Rima Edwards, was seen as no more definitive than the European written evidence: Belgrave, *Historical Frictions*, p.127.

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57 A settlement did follow with the passing of the Maori Reserved Land Amendment Act 1997.

58 Cathy Marr, 'An Overview of the History of the Taranaki Confiscation Claims 1920–1980s: From the Sim Commission to the Submission of Taranaki Claims to the Waitangi Tribunal', unpublished report, [Wellington], 1993, Wai 143, I16.

59 For instance, it cautiously rewrote the reasons for the outbreak of the second Taranaki war in 1863, but in a way that did not disrupt Sim's overall findings that the cause of the second Taranaki war lay in the first transgression by the Crown at Waitara. This was important because it was the second Taranaki war that provided the justification for the confiscation of 'rebel' Maori land: Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi (Wai 143): Muru Me Te Raupatu, the Muru and Raupatu of the Taranaki Land and People*, Wellington, 1996, p.102.

60 Waitangi Tribunal, *The Taranaki Report*, p.309.

61 ibid., p.312.

62 Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands*, Wellington, 2001; see also Belgrave, *Historical Frictions*, ch.6; Waitangi Tribunal, *Orakei*.

63 Waitangi Tribunal, *The Whanganui River Report (Wai 167)*, Wellington, 1999; Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*; Waitangi Tribunal, *Te Raupatu O Tauranga Moana: Report on the Tauranga Confiscation Claims (Wai 215)*, [Wellington], 2004, *(Wai 215)*; Waitangi Tribunal, *The Kaipara Interim Report (Wai 674)*, Wellington, 2002; Waitangi Tribunal, *Te Whanganui a Tara Me Ona Takiwa: Report on the Wellington District*, Wellington, 2003; Waitangi Tribunal, *The Mohaka Ki Ahuriri Report*, Wellington, 2004.

64 This is also true in Don Brash, 'Nationhood: An Address by Don Brash, Leader of the National Party', Orewa Rotary Club, 26 January 2004, http://www.national.org.nz/Article.aspx?ArticleID=1614 (viewed 13 August 2006).