New Zealand Journal of History, 41, 1 (2007)

A Reply To Jim McAloon

MUCH OF JIM McALOON'S CRITICISM of my essay, 'The future behind us', is intended to show that I was wrong in describing the Waitangi Tribunal's historical practice as unempirical. He brings forward examples that show the Tribunal using evidence empirically in arguing for a particular conclusion, for example, those relating to Taranaki and other localities.[1] But, with respect, I do not find such criticism to be particularly relevant. I was well aware that in the two reports I was examining the Tribunal frequently proceeded in a straightforwardly empirical manner, and I said so. Nor is it much to the point for him to show that other (earlier or later) reports do not show the presentist characteristics I found in the Muriwhenua and Taranaki reports. I was not conducting a review of the Tribunal's entire historical output but an examination of aspects of two particular texts. And perhaps it is worth noting, in response to Michael Belgrave's commentary, that at the time of writing these two reports were not 'relatively old' but relatively recent.[2] I was not concerned with how another historian might make a better case than the Tribunal had made, but with the case that the Tribunal had in fact made. While I set out to say something about 'the Tribunal' as 'author', I made it clear that there was reason to think that the influence of its Chief Judge, E.T.J. Durie, was reflected in the two texts under consideration.[3]

On the first page of my essay I wrote: '*most* of the Tribunal's energy has been devoted to "telling it as it was". Its reports . . . exhibit a curious mix of a commonsense respect for "the evidence" and, paradoxically, an instrumental presentism which is remarkably evidence-free'.[4] On the next page I noted that while the Tribunal has devoted a good deal of attention to jurisprudence, its historiography must be constructed from 'a seemingly haphazard and certainly unsystematic collection of statements'. Later I noted that the passages under discussion 'take up only a few of the more than 800 pages' of the Muriwhenua and Taranaki reports.[5] I made it clear that I was concerned with the historiography explicit and (more often) implicit in these passages and not, for example, with whether the Tribunal had made a good case in considering the way in which a particular block had passed from Maori to Crown possession. That the Tribunal often argues from evidence in matters of this kind was too obvious to need more than the opening remark I have already cited. My discussion of the instances where it takes an entirely different approach and exhibits a wholly unempirical way of arriving at conclusions is not called into question by a demonstration that other kinds of historical argument are to be found elsewhere in the reports.

I went on to an analysis and critique of the Tribunal's treatment of some important historiographical issues, as exemplified in these two reports. Specifically, I was concerned with the way the Tribunal dealt with government

land policy and administration from the 1840s to the 1860s. In both reports, the Tribunal held the Crown to be in breach of the Treaty for failing to do things which, I argued, it could not reasonably have been expected to do, because they were beyond its capacity or its awareness or both. I was concerned to characterize and criticize statements in these reports that indicated, though they did not elaborate, a particular approach to major historical issues — and to note that similar approaches were apparent in other reports. These Tribunal statements, taken together, amounted to a way of constructing early New Zealand history in terms of a particular ideology, one that had a recognizable political function in the present.

The Tribunal held that the government should have undertaken a detailed programme of enquiry and investigation before purchasing land from Maori owners, a task by no means limited to establishing who had a right to sell and who had not, but one that would have required a survey of the current situation and future prospects of prospective land sellers. The Tribunal also contended that government should have acknowledged that tribal authorities possessed a power of veto over all land transactions affecting them, a delegation which, in effect, would have put them in a position to permit or prevent settlement and colonization.

McAloon appears to agree with the Tribunal that such policies should have and could have been implemented by colonial governments from the 1840s and the 1860s. I argued that, in the circumstances of the times, both in relation to governmental resources and to prevailing ideas as to the proper functions of government, no such policies and administrative activities could be expected of the colonial state. It is highly improbable that the colonial government of the 1840s would have (or could have) set up the machinery needed to discharge the functions required of it by the Tribunal and completely implausible to suppose that it should have delegated the control of colonization and settlement to the people being colonized. I cannot call to mind any example of a colonizing power doing that. Colonization, surely, has always been about taking power and not about sharing it.

I did not (and do not) consider this to be admirable. But, to respond to McAloon's query — 'Does he wish to base settler society and its descendant on such a foundation?'[6] — I would sooner accept that what he calls *'force majeure'* underlay the foundation of settler New Zealand than, for example, an 'explanation' which supposes that colonization occurred as a consequence of the consent of the indigenous inhabitants conveyed through a treaty. That way of interpreting the past strikes me as wholly unhistorical. An explanation which accepts that an essential element in the origin of present-day New Zealand lies in the successful effort of non-indigenous people to take it over may well be burdensome to the conscience but it has the merit of authenticity. It does not whitewash the past and it does not eliminate the need for reparative justice. If anything, it accentuates it.

McAloon puts a good deal of emphasis on the variety of values and beliefs current in New Zealand at the time when the alleged breaches of the Treaty occurred. He raises an interesting possibility by relating the ideology and the achievements of the Tribunal to a tradition of dissent persisting within the

range of those conflicting ideologies and value systems. Two questions are suggested by this proposition. Why did all the politically effectual responses to the questions raised by colonization come from the pro-colonizing and not (until recently) from the dissenting side? To what extent may one see the Waitangi Tribunal as the direct heir of that tradition? On the one hand, the paternalism of the so-called 'philo-Maoris' and the Tribunal emphasis upon tribal autonomy do not seem to have a great deal in common. Still, the Tribunal doctrine of 'active protection' has paternalistic overtones; it would have involved a good deal more state intervention than present-day affirmations of tino rangatiratanga might find acceptable.

The first of these two questions — why has dissent been ineffectual for the greater part of our history? — goes directly to the heart of New Zealand's colonizing history. McAloon notes that the colonial government chose to set up an administration for the acquisition of Maori land and not one to help them control and retain it.[7] He notes, further, that Henry Tacy Kemp did not set aside 'ample reserves' though officially instructed to do so.[8] Again, in connection with Commissioner Spain's investigation of pre-1840 land sales he quotes the Tribunal to the effect that Te Atiawa were capable of making their own decisions about their land rights but were not allowed to do so.[9] He also notes that the imperial Parliament provided for native districts which were never implemented.[10] Such occurrences — and of governments not doing what someone (itself on occasion) said they should have done — are endemic in the nineteenth century and beyond. But these voices of dissent and protest made little if any impact upon policy. Historians may certainly lament the persistence and impact of such illiberal policies. They may, I would say more profitably, go on to ask why it was the case that the dissenting voices, whether Maori or Pakeha, were consistently ineffectual. I am, as is evident, inclined to find a short answer in the nature of colonization: dissent and protest, while certainly admirable for their idealism, express values, actions and policies which never prevail when a country is being colonized. This brute fact is the rock upon which the 'might have beens' founder, including the anachronistic picture painted by the Tribunal of early colonial 'possibilities'.

I do not, as at times McAloon comes close to suggesting, believe that this is a way of justifying or excusing the colonizing past. But I do believe that this way of looking at the past provides the basis for a better explanation than an alternative which is content to blame a body of officials for wilfully disregarding the better options they knew, so it is held, to be both available and practicable. Perhaps they did know about them and rejected them, but there is mystery in that. The dissenting views were, at that time, political ideas lacking political weight. Explanations need to take into account much more than the wickedness, if that is what it was, of individual men. It is better to look at our past with a clear appreciation of what it was like, rather than with a sense of regret that it was not something quite different. In addition to these central matters, there are a few points of detail I would also like to comment upon.

First, treaty principles are the result not of 'judicial activism' but of 'legislative innovation'.[11] I used the phrase 'legislative reticence' to characterize the process and I think that is correct. The legislature did not set out the principles but gave

the Tribunal exclusive authority to do so and the Tribunal has done just that. Perhaps all that matters is that Parliament said that there were principles and the Tribunal has said what they are.

Second, 'As Oliver reads the Tribunal, tino rangatiratanga "obliged the Crown . . ."'.[12] If, indeed, Article II may validly be interpreted as conferring 'sole authority over land transactions' upon the tribes, Peter Adams's view that, leading up to the Treaty, the imperial government was pursuing two incompatible policies, protection of Maori and promotion of settlement, and the second objective was not one to which Maori attention was drawn, becomes even more cogent.[13] If that is a correct interpretation of the article, one needs to go on and ask a question or two about the likelihood, or otherwise, of its implementation by any conceivable contemporary administration.

Third, 'The Tribunal noted that active protection was implicit in . . . Normanby's instructions'.[14] I know that the Tribunal argues that 'protection' implies 'active protection' but I cannot see the logic of that extension of the meaning of Normanby's words. He, surely, meant that wrong-doers among the colonists were to be stopped from harming Maori, not that officials were to promote their economic well-being.

Fourth, 'Oliver devoted considerable attention to the Muriwhenua land report, arguing that the Tribunal essentially ignored substantial Crown evidence'.[15] In his footnote to this sentence McAloon refers to p.25 of *Histories, Power and Loss*. I cannot find any reference there to the Tribunal's dismissal of Crown evidence unfavourable to the tuku whenua argument (nor at p.170 of *Looking for the Phoenix,* to which he also refers). I do not say anywhere that the Tribunal '*simply* dismissed' Crown evidence; in a review of the Muriwhenua report I did say that it dismissed (but not 'simply') such evidence.[16]

Fifth, 'When it came to Crown officials assuming in Old Land Claims enquiries that any land not granted to claimants should be alienated to the Crown'.[17] In case it should be thought that I was seeking to defend the Crown in its decisions on these claims, I note that in my evidence before the Muriwhenua Land Tribunal I argued that the Crown assumption of the Old Land Claims surplus was mistaken, simply because its return would have been sound policy and would have met known Maori expectations, whatever the strict legal position.

Sixth, 'Oliver suggests that the Tribunal is fond of "elevating . . . the oral over the archival record"'.[18] I did not 'suggest' that the Tribunal was 'fond' of doing so, but that, in the report under consideration, it did so. The evidence for this conclusion is more fully set out in the *New Zealand Books* review of the Muriwhenua report noted above. And, to refer to the sentence concluding this paragraph, in the Muriwhenua report the Tribunal does not use oral evidence simply to 'elucidate matters of custom' but to form a judgement on such an 'historical matter' as Muriwhenua land transactions up to 1865.

Seventh, 'Oliver thinks that the Tribunal asserts certainty where there is less than certainty' and does so to enhance its political effectiveness.[19] The quotation which McAloon gives is from a passage in which it is suggested that within the court-like procedures it employs, the Tribunal is obliged to arrive at over-definite conclusions. I cited some eminent authorities (Richard Boast and

Andrew Sharp) for the view that legal procedures made such an impact on the way in which the Tribunal did history. Of course, it is also the case that firm conclusions are politically useful.

Eighth, '[H]is observation that "a firm conclusion" is "non-academic"'.[20] The full passage is: 'its belief that it *must* arrive at a firm conclusion is the most obviously non-academic characteristic of the Tribunal's history' (italics added).[21] This way of putting it says a good deal less than McAloon's summary indicates. I do know that historians often arrive at firm conclusions and have on occasion done so myself.

Ninth, 'Oliver seems to have a problem. . . .' and the two following sentences.[22] McAloon refers to my essay in *Histories, Power and Loss* where I summarized, I believe fairly, a passage from the Muriwhenua report and I fail to find anything there which could be construed as a 'tone' implying 'absurdity' in the Tribunal's analysis. I cannot find anything on this page to justify the assertion that I assumed tribal politics to be static and to defy change. I was summarizing a statement made in the report to the effect 'that change in such basic values as self-identification with ancestral land could not (and in fact did not) occur as a result of colonization'. That, indeed, is at the heart of the tuku whenua argument; if McAloon thinks that it is an improper way to describe tribal values he should transfer his disapproval from me to the Tribunal (and to the Muriwhenua claimants).

Tenth, 'The Tribunal's real point is that officials to 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.'[23] It will be clear that I could not agree more. Here, perhaps, it is necessary to say that asserting the extreme implausibility that officials would consider alternatives does not oblige me to approve of their opinions and actions. I am not, to go forward a few pages — 'Oliver is essentially arguing that colonization was . . . perhaps justified by its inevitability'[24] — concerned with either justifying or condemning colonization but with understanding it.

Finally, Eric Hobsbawm is cited on the value of 'partisan intellectuals'.[25] In the same book, Hobsbawm writes: 'the public responsibility of the historian . . . rests, first and foremost, on the fact . . . that historians as an occupation are the primary producers of the raw material that is turned into propaganda and mythology'.[26]

W.H. OLIVER

Wellington

NOTES

1 Jim McAloon, 'By Which Standards: History and the Waitangi Tribunal', *New Zealand Journal of History* (NZJH), 40, 2 (2006), pp.199–202.
2 ibid., p.230.
3 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.
4 ibid., p.9. Emphasis added.
5 ibid., pp.10, 20.
6 McAloon, p.208.
7 ibid., p.197.
8 ibid., p.198.
9 ibid., p.200.
10 ibid., p.213, n.128.
11 ibid., pp.195–6.
12 ibid., p.196.
13 Peter Adams, *Fatal Necessity: British Intervention in New Zealand 1830–1847,* Auckland, 1977.
14 ibid.
15 ibid.
16 'Is bias one-sided', *New Zealand Books,* 7, 2 (1997), pp.17–19.
17 McAloon, p.199.
18 ibid., p. 202.
19 ibid.
20 ibid., p.203.
21 Oliver, p.21.
22 McAloon, p.205.
23 ibid.
24 ibid., p. 208.
25 ibid., p.209.
26 Eric Hobsbawm, *On History,* New York, 1997, p.275.